



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

September 25, 2015

Ms. Hadassah Schloss  
Director of Open Government  
Texas General Land Office  
P.O. Box 12873  
Austin, Texas 78711-2873

OR2015-20183

Dear Ms. Schloss:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 580781.

The Texas General Land Office (the "GLO") received a request for all documents relating to a specified request for proposal and contract.<sup>1</sup> You state the GLO will release some information. You claim the submitted information is excepted from disclosure under sections 552.103, 552.105, 552.110, and 552.111 of the Government Code. You also state release of some of the information may implicate the proprietary interests of WFN, Inc. ("WFN"). Accordingly, you state, and provide documentation showing, you notified WFN of the request for information and of its right to submit arguments to this office as to why the information at issue should not be released. *See Gov't Code § 552.305(d); see also Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances).* We have considered the submitted arguments

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<sup>1</sup>We note the governmental body sought and received clarification of the information requested. *See Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request).*

and reviewed the submitted information, portions of which consist of representative samples.<sup>2</sup>

An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from WFN explaining why the submitted information should not be released. Therefore, we have no basis to conclude WFN has protected proprietary interests in the submitted information. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, the GLO may not withhold any portion of the submitted information on the basis of any proprietary interest WFN may have in the information.

Next, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides, in relevant part, as follows:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). A portion of the submitted information is a completed investigation that is subject to section 552.022(a)(1). You seek to withhold the information at issue under sections 552.103, 552.105, and 552.111 of the Government Code. However, sections 552.103, 552.105, and 552.111 are discretionary in nature and do not make information confidential under the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does

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<sup>2</sup>We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

not itself make information confidential); *see also* Open Records Decision Nos. 677 at 8 (2002) (attorney work product privilege under section 552.111 may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 564 (1990) (statutory predecessor to section 552.105 subject to waiver). Thus, the GLO may not withhold the information at issue under section 552.103, section 552.105, or section 552.111. As you raise no further exceptions to disclosure of this information, the completed investigation, which we have marked, must be released. However, we will address the applicability of sections 552.103, 552.105, and 552.111 to the remaining information, which is not subject to section 552.022.

Section 552.103 of the Government Code provides, in pertinent part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date of the receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a).

You inform us, and provide documentation showing, at the time the GLO received the present request for information, the GLO was a party to a pending appeal styled *McCardell v. U.S. Department of Housing and Urban Development, et al.*, No. 14-40955, in the United States Court of Appeals for the Fifth Circuit. You explain the remaining information is directly related to this litigation. Based on your representations and our review, we find the GLO was a party to pending litigation at the time it received the present request for

information. Further, we find the remaining information relates to the pending litigation. Thus, the GLO may withhold the remaining information under section 552.103 of the Government Code.<sup>3</sup>

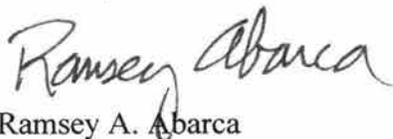
We note the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* ORD 551 at 4-5. Thus, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Further, the applicability of section 552.103(a) ends when the litigation has concluded. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

In summary, the GLO must release the completed investigation we have marked pursuant to section 552.022(a)(1) of the Government Code. The remaining submitted information may be withheld under section 552.103 of the Government Code.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Ramsey A. Abarca  
Assistant Attorney General  
Open Records Division

RAA/dls

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<sup>3</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure.

Ref: ID# 580781

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Mr. Nick Autorina  
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(w/o enclosures)