



## Office of the Attorney General

State of Texas

September 17, 1996

DAN MORALES  
ATTORNEY GENERAL

Mr. Jonathan A. Gruver  
Haynes and Boone, L.L.P.  
901 Main Street, Suite 3100  
Dallas, Texas 75202-3789

OR96-1694

Dear Mr. Gruver:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 100601.

The City of Mesquite (the "city"), which you represent, received a request for seventeen categories of documents. You believe that some of the requested information is excepted from disclosure by sections 552.101, 552.103, 552.104, 552.107, and 552.111 of the Government Code. You have submitted to this office representative samples of the requested information that you believe is excepted from disclosure.<sup>1</sup>

The requestor seeks, among other things, all invoices that the city has received from Haynes and Boone, L.L.P. ("Haynes and Boone") and all documents created by Haynes and Boone, created by the city, or maintained by B.J. Smith that specifically reference Donald Smirl, Andrew R. Korn, Lane Rugeley, John MacLean, or Don Boulware. You contend that some documents referencing these individuals and portions of the invoices are excepted from disclosure under section 552.103 of the Government Code. Section 552.103(a) excepts from disclosure information:

(1) relating to litigation of a civil or criminal nature or settlement negotiations, 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; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

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<sup>1</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.

The city has the burden of providing relevant facts and documents to show that section 552.103(a) is applicable in a particular situation. In order to meet this burden, the city must show that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *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 (1990) at 4.

You state that Haynes and Boone has provided legal services to the city since 1990. The requested invoices, which date back to 1990, include detailed descriptions of the legal services that Haynes and Boone has provided to the city in connection with several litigation matters. You contend that all information in the invoices relating to both pending and closed litigation is excepted from disclosure under section 552.103(a).

First, we address the information in the invoices relating to closed litigation. Section 552.103(a) enables a governmental body to protect its position in litigation by forcing parties seeking information relating to the litigation to obtain it through discovery, if at all. Open Records Decision No. 551 (1990) at 3. The purpose of section 552.103(a) is to prevent the use of the Open Records Act as a method to avoid discovery rules. *Id.* at 4. Section 552.103(a) is not applicable to information relating to litigation once all parties to the litigation have inspected the information or once the litigation is concluded. *Id.* at 4. Thus, section 552.103(a) is not applicable to the information in the requested invoices that relates to closed litigation, and the city must release this information to the requestor.

Next, we consider whether the city may withhold from disclosure the information in the invoices that relates to pending litigation. You note that the requestor is an attorney who currently represents Donald L. Smirl, a former city employee, in his pending lawsuit against the city for "claims of wrongful discharge and violations of the Texas Whistleblower Act and the Texas Commission on Human Rights Act." This is the only pending lawsuit that you mention in your request for an open records decision. You have failed to indicate which portions of the invoices relate to this litigation. Therefore, we have marked the information in the invoices that, on its face, appears to relate to this pending litigation. The city may withhold only the marked portions of the invoices under section 552.103(a). It appears that all of the submitted documents referencing Donald Smirl, Andrew R. Korn, Lane Rugeley, John MacLean, or Don Boulware are also related to the pending litigation. Thus, the city may withhold all of these documents from disclosure pursuant to section 552.103(a).<sup>2</sup>

You also contend that the hourly billing rates listed on the invoices are excepted from disclosure under section 552.104 of the Government Code. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of

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<sup>2</sup>We note that once all parties to litigation have gained access to this information, through discovery or otherwise, section 552.103(a) is no longer applicable to the information. Open Records Decisions Nos. 551 (1990), 454 (1986). Furthermore, once the litigation has concluded, section 552.103(a) is no longer applicable to information relating to the litigation. Open Records Decision No. 350 (1982). Of course, the city has discretion to release information that is not otherwise confidential by law. Gov't Code § 552.007.

section 552.104 is to protect a governmental body's interests in competitive bidding situations. *See* Open Records Decision No. 592 (1991). You have not specifically alleged that the city is currently seeking bids for legal services. Moreover, section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. Open Records Decision No. 541 (1990) at 4. The information you have provided to us is not sufficient to meet this requirement. Under these circumstances, section 552.104 does not except from disclosure the hourly billing rates which appear on the invoices. Accordingly, the city must release this information to the requestor.

In your letter requesting an open records decision, you also invoked sections 552.101, 552.107, and 552.111 of the Government Code. However, you failed to submit to this office written comments explaining how these exceptions apply to the information at issue here. As you have not met your burden of establishing how sections 552.107 and 552.111 apply to the information, we have no basis upon which to pronounce the information protected under these sections. Open Records Decision Nos. 542 (1990), 532 (1989), 363 (1983). Although we will not generally raise exceptions on behalf of a governmental body, we will raise section 552.101 for a governmental body. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987). Thus, despite the fact that you did not submit written comments to us explaining why you believe section 552.101 is applicable to the information, we have considered whether any of the information not protected by sections 552.103 or 552.104 is excepted from disclosure under section 552.101. We conclude that the information not protected by sections 552.103 or 552.104 is also not protected from disclosure by section 552.101. Accordingly, the city must release to the requestor all of the information that is not excepted from disclosure under section 552.103 as previously discussed.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have any questions about this ruling, please contact our office.

Yours very truly,



Karen E. Hattaway  
Assistant Attorney General  
Open Records Division

KEH/ch

Ref: ID# 100601

Enclosures: Submitted documents

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(w/o enclosures)