



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

September 17, 1996

Ms. Elizabeth C. Lara
Assistant, Legal and Compliance
MC 110-1A
Texas Department Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR96-1710

Dear Ms. Lara:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 100649.

The Texas Department of Insurance (the "department") received a request for information concerning Foremost County Mutual Insurance Company ("Foremost"). Specifically, the requestor asked for the following:

- (1) Any complaints concerning this company from 1990 to the present. I would like copies of the complaints.
- (2) Any information, documentation, memoranda or notes concerning rates.
- (3) Any information, documentation, memoranda, or notes concerning disciplinary action contemplated or initiated.
- (4) Any orders entered concerning this company.
- (5) Any public information (including financial statements) concerning the solvency of this company, during the time period 1990 to the present.
- (6) If TDI maintains clippings concerning this company, copies of the clippings.

You state that the department will release some of the information to the requestor. You claim, however, that the remaining information is excepted from required public disclosure by sections 552.103, 552.107, and 552.111 of the Government Code. You also state that Foremost may have

a proprietary interest in some of the information. Therefore, pursuant to section 552.305, you ask whether the department must release this information. We have considered the exceptions you claim and have reviewed the documents you seek to withhold.

Since the property and privacy rights of a third party are implicated by the release of some of the requested information here, this office notified Foremost of this request. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Open Records Act in certain circumstances). Foremost responded by claiming that certain requested documents are excepted from disclosure by sections 552.101 and 552.110 of the Government Code.¹

Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets, and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. Foremost, in its brief to our office, argues that both components of section 552.110 protect five categories of information. In Open Records Decision No. 639 (1996), this office announced that it would follow the federal courts' interpretation of exemption 4 to the federal Freedom of Information Act when applying the second prong of section 552.110 for commercial and financial information. In *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), the court concluded that for information to be excepted under exemption 4 to the Freedom of Information Act, disclosure of the requested information must be likely either to (1) impair the Government's ability to obtain necessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. *Id.* at 770. A business enterprise cannot succeed in a *National Parks* claim by a mere conclusory assertion of a possibility of commercial harm. Open Records Decision No. 639 (1996) at 4. To prove substantial competitive harm, the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure. *Id.* After reviewing Foremost's arguments and the submitted materials, we find that Foremost has met its burden under the commercial and financial information prong of section 552.110. We have marked the five categories of information that the department must withhold under section 552.110.²

¹Foremost also claims that request number 2 is "vague and ambiguous;" thus, the department cannot identify the specific documents responsive to the request. We note that a governmental body must make a good faith effort to relate a request to information which it holds. Open Records Decision No. 561 (1990). When a governmental body is presented with a broad request for information rather than for specific records, it may advise the requestor of the types of information available so that he may narrow his request. Open Records Decision Nos. 563 (1990), 561 (1990). Finally, whether the submitted information falls within the scope of the request is a question of fact. We presume that the department submitted to our office the responsive information. Fact issues are not resolvable in the open records process; therefore, we must rely on the representation of the governmental body requesting our decision. *See* Open Records Decision Nos. 554 (1990), 552 (1990).

²We note that the department raised section 552.305 for a letter dated June 17, 1994 with attachments. Foremost has made no argument against disclosure of this information; thus, it appears that they have no objection to its release.

We now turn to the department's arguments against disclosure. To show that section 552.103(a) is applicable, the department must demonstrate 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. Contested cases conducted under the Administrative Procedure Act, chapter 2001 of the Government Code, are considered litigation under section 552.103. Open Records Decision No. 588 (1991) at 7. Section 552.103 requires concrete evidence that litigation may ensue. To demonstrate that litigation is reasonably anticipated, the department must furnish evidence that litigation is realistically contemplated and is more than mere conjecture. Open Records Decision No. 518 (1989) at 5. Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 (1986) at 4.

In this instance, you state that there is an ongoing investigation of Foremost for alleged violations of state insurance laws. You also explain that the investigation will culminate in an administrative contested case against the insurer. We conclude that litigation is reasonably anticipated. We additionally find that the documents marked by the department as protected by section 552.103 are related to the reasonably anticipated litigation for the purposes of section 552.103(a). The documents may, therefore, be withheld pursuant to section 552.103.

Generally, however, 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). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

You next assert that some of the documents, which you have marked, are excepted from disclosure by section 552.107. Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. Open Records Decision No. 574 (1990). at 5. When communications from attorney to client do not reveal the client's communications to the attorney, section 552.107 protects them only to the extent that such communications reveal the attorney's legal opinion or advice. *Id.* at 3. In addition, basically factual communications from attorney to client, or between attorneys representing the client, are not protected. *Id.* We find that some of the requested information reveals

(Footnote continued)

Having concluded that the five categories of information are protected under the "commercial and financial information" prong of section 552.110, we do not address Foremost's contention that the information is excepted from disclosure under the trade secret prong of section 552.110 and under section 552.101 as information deemed confidential by article 1.24D of the Insurance Code.

the attorney's legal opinion or advice to a client and, therefore, may be withheld under section 552.107. We have marked the information that may be withheld. The two letters from Sarah F. Mika to the department, however, do not appear to be information that reflects either confidential communications from a client to the attorney or the attorney's legal advice or opinions. We do not believe that these documents are protected by section 552.107, and they must be released.

You finally claim that section 552.111 protects various documents within the submitted material. Section 552.111 excepts "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. An agency's policymaking functions, however, do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 (1993) at 5-6. In addition, section 552.111 does not except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Id.* at 4-5. While some of the documents pertain to the policy functions of the department, some of the information contained in these documents is purely factual. We have marked those portions of the documents that may be withheld from required public disclosure under section 552.111. The remaining information must be released.

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 questions about this ruling, please contact our office.

Yours very truly,



Don Ballard
Assistant Attorney General
Open Records Division

JDB/ch

Ref: ID# 100649

Enclosures: Submitted documents

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