



October 7, 2002

Ms. Amy L. Sims  
Assistant City Attorney  
City of Lubbock  
P.O. Box 2000  
Lubbock, Texas 79457-2000

OR2002-5652

Dear Ms. Sims:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 169034.

The City of Lubbock (the "city") received two written requests for records pertaining to the city's land application site. You indicate that some responsive information will be released to the requestors. You contend, however, that the remaining information coming within the scope of the request is excepted from required public disclosure pursuant to sections 552.101, 552.103, 552.107, and 552.111 of the Government Code.

We note at the outset that some of the submitted records that you contend constitute work product under section 552.111 consist of completed reports subject to section 552.022 of the Government Code. Section 552.022 provides in pertinent part:

(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 under this chapter unless they are expressly confidential under 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). The city must release the completed reports unless these documents are expressly made confidential under other law.<sup>1</sup> You contend that the submitted reports are excepted from disclosure pursuant to section 552.111 of the Government Code.

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<sup>1</sup> We note that you have not raised section 552.108 for these reports. See Gov't Code § 552.022(a)(1).

However, section 552.111 is a discretionary exception under the Public Information Act and does not constitute “other law” for purposes of section 552.022. *See* Open Records Decision No. 663 (1999) (governmental body may waive section 552.111).<sup>2</sup> Accordingly, we do not address your section 552.111 claims with respect to the completed reports.

However, you contend that the completed reports constitute consulting expert reports that may be withheld from disclosure under the consulting expert privilege, which is found in Rule 192.3(e) of the Texas Rules of Civil Procedure. Recently, the Texas Supreme Court held that “[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are ‘other law’ within the meaning of section 552.022.” *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). A party to litigation is not required to disclose the identity, mental impressions, and opinions of consulting experts. *See* Tex. R. Civ. P. 192.3(e).

Rule 192.3(e) provides that the “identity, mental impressions, and opinions of a consulting expert whose mental impressions and opinions have not been reviewed by a testifying expert are not discoverable.” You indicate that the city hired the outside consultants as a result of the city’s intent to amend its existing land use permit with the former Texas Natural Resources Conservation Commission, now the Texas Commission on Environmental Quality (the “TCEQ”), as well as a “Notice of Violation” that the city received from the TCEQ with regard to the city’s operations at the land site and the subsequent anticipated administrative hearings. You further state that the city does not anticipate calling these experts as witnesses at this time. We agree that the completed reports reveal the identity, mental impressions, and opinions of a consulting expert. Accordingly, the city may withhold the submitted reports under rule 192.3(e) of the Texas Rules of Civil Procedure. *See In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001).

We now address whether the remaining submitted documents are excepted from public disclosure under the exceptions you raised. You contend that the remaining submitted documents are excepted from required public disclosure pursuant to section 552.103 of the Government Code. To secure the protection of section 552.103, a governmental body must demonstrate that the requested information relates to pending or reasonably anticipated litigation to which the governmental body is a party. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.--Austin 1997, no pet.); *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. 588 (1991). Additionally, the governmental body must demonstrate that the litigation was pending or reasonably anticipated as of the day it received the records request. Gov’t Code § 552.103(c). The mere chance of litigation will not trigger

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<sup>2</sup> Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body’s position in litigation and does not itself make information confidential), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions, therefore, do not constitute “other law” that makes information confidential.

section 552.103(a). Open Records Decision No. 452 at 4 (1986). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.*

As noted above, the city is currently involved in administrative hearings before the TCEQ over matters that relate to the land site. You explain:

The City is in the process of amending its permit for the site at issue with the [TCEQ]. . . . Furthermore, the City received a notice of violation . . . from the [TCEQ] about the operations at the site. . . . Both of these procedures are adversarial in nature and are governed by the procedures in the Administrative Procedure Act.

This office has determined that a contested case under the Administrative Procedure Act, Government Code chapter 2001, constitutes “litigation” for purposes of section 552.103. *See* Open Records Decision Nos. 588 (1991) (former State Board of Insurance proceeding), 301 (1982) (hearing before Public Utilities Commission). Accordingly, we conclude that you have demonstrated that litigation is currently pending for purposes of section 552.103(a). Furthermore, after reviewing the remaining information, we conclude that the information “relates” to the administrative hearings for purposes of section 552.103. Accordingly, we conclude that the city may withhold this information under section 552.103 of the Government Code.

In reaching this conclusion, we assume that the city has not provided any of these records to the TCEQ. 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.<sup>3</sup> Open Records Decision Nos. 349 (1982), 320 (1982). Consequently, to the extent the submitted documents have previously been provided to the TCEQ, they must now be released to the requestors.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days.

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<sup>3</sup>We also note that the applicability of section 552.103(a) ends once the litigation has concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

*Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

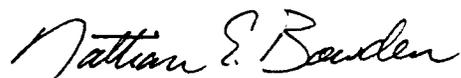
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Nathan E. Bowden  
Assistant Attorney General  
Open Records Division

NEB/RWP/sdk

Ref: ID# 169034

Enc: Submitted documents

c: Ms. Stephanie Nichols-Young  
125 East Coronado  
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(w/o enclosures)