



November 13, 2002

Mr. W. Thomas Godard
Assistant General Counsel
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756-3199

OR2002-6474

Dear Mr. Godard:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 171381.

The Texas Department of Health (the "department") received a request for all files dealing with Gulf Nuclear, including inspection records, radioactivity monitoring records, and communications with Gulf Nuclear. You indicate that the department will release some of the requested information. You claim that the remainder of the requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Although you raise section 552.101 as a possible exception to the disclosure of information, you do not contend, nor is it apparent, that any of the submitted information is confidential by law. *See* Open Records Decision Nos. 663 (1999) (sections 552.103 and 552.111 may be waived), 630 at 4 (1994) (section 552.107(1) may be waived), 381 (1983). Therefore, we conclude that none of the submitted information is excepted from disclosure under section 552.101 of the Government Code.

Next we address the fact that some of the submitted information has been previously released to the public. While you acknowledge that some of the submitted information was previously released to the Houston Chronicle by the department's open records coordinator, you state that this release was erroneous because the open records coordinator did not have the authority to waive your claimed exceptions. Section 552.007 of the Government Code provides as follows:

(a) [The Public Information Act] does not prohibit a governmental body or its officer for public information from voluntarily making part or all of its information available to the public, unless the disclosure is expressly prohibited by law or the information is confidential under law.

(b) Public information made available under Subsection (a) must be made available to any person.

Therefore, if a governmental body or its public information officer releases information to the public, the governmental body must release the information to future requestors as well unless the governmental body is required to withhold the information by law. Sections 552.103, 552.107(1), and 552.111 are discretionary exceptions that grant a governmental body the discretion to either withhold or release information. *See Open Records Decision Nos. 663 (1999), 630 at 4 (1994)*. These provisions do not require that a governmental body withhold information. Because the department is not required to withhold the information at issue from the public and the department's public information officer has already released the information to the public, we find that the department must release the portion of the submitted information that has been previously released to the public.

With respect to the remainder of the submitted information, we address your claimed exceptions. First, you appear to contend that a portion of the information is excepted from disclosure under section 552.107(2) of the Government Code. Section 552.107(2) excepts from required public disclosure information if "a court by order has prohibited disclosure of the information." You have provided to this office an order entered by the United States Bankruptcy Court for the Southern District of Texas, Houston Division, in *In re The GNI Group, Inc., et al.*, Cause No. 00-38458-H2-7. The order, dated November 20, 2001, provides that "the report styled 'Site Specific Decommissioning Cost Estimate Report' prepared by U.S. Ecology shall be filed under seal by the Clerk of the Bankruptcy Court with the exception of the cover letter and the four-page subsection labeled 'Cost Section - Summation . . .'" Although you do not provide any arguments with respect to section 552.107(2), we understand that you are prohibited from disclosing the Site Specific Decommissioning Cost Estimate Report pursuant to the court order. Therefore, the department must withhold the Site Specific Decommissioning Cost Estimate Report, with the exception of the cover letter and the four page cost section, under section 552.107(2).

Next, you contend that some of the submitted information is excepted from disclosure under section 552.107(1). Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. In instances where an attorney represents a governmental entity, the attorney-client privilege protects only an attorney's legal advice and the client's confidences made to the attorney. *See Open Records Decision No. 574 (1990)*. Accordingly, these two classes of information are the only information contained in the records at issue that may be withheld pursuant to the attorney-client privilege. You contend that some of the submitted information consists of the advice, opinion, and recommendations

of the department's attorneys as well as some privileged communications from Radiation Control Division personnel to department attorneys. Based on your arguments and our review of the submitted information, we agree that the department may withhold the information you have marked under section 552.107(1), with the exception of the information that has already been provided to the public.

Finally, you contend that some of the submitted information is excepted from disclosure under section 552.103 of the Government Code. Section 552.103 provides as follows:

(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.

The department has the burden of providing relevant facts and documents to show that 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 at the time the department received the request for information, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (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. 551 at 4 (1990). The department must meet both prongs of this test for information to be excepted under 552.103(a).

We understand that the department has filed pleadings in a bankruptcy case in which the department is seeking "to collect money for the clean up of the Gulf Nuclear facilities." Based on this information and our review of the submitted documents, we find that the department may withhold the information you have marked under section 552.103 of the Government Code, except for the information that has already been provided to the public, because the information relates to pending litigation involving the department.

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).

In summary, the department must release the portions of the submitted information that it has previously released to the public. The department must withhold the submitted Site Specific Decommissioning Cost Estimate Report, with the exception of the cover letter and the four page cost section, under section 552.107(2) of the Government Code. The department may withhold the remainder of the submitted information under sections 552.103 and 552.107 of the Government Code.

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. *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).

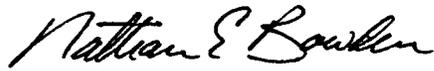
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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); *Tex. Dep't of Pub. 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/sdk

Ref: ID# 171381

Enc: Submitted documents

c: Mr. Kenneth T. Ward
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(w/o enclosures)