



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 28, 2004

Ms. Molly Cagle
Vinson & Elkins, L.L.P.
2801 Via Fortuna, Suite 100
Austin, Texas 78746

OR2004-4419

Dear Ms. Cagle:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 202617.

The Guadalupe-Blanco River Authority ("GBRA"), which you represent, received a request for fifteen categories of information relating to the Lower Guadalupe Water Supply Project ("the Project"), a joint project sponsored by GBRA, the San Antonio River Authority, and the San Antonio Water System.¹ You state that GBRA will make some responsive information available to the requestor for inspection. You claim, however, that the remainder of the information at issue is excepted from disclosure under sections 552.103, 552.104, 552.107, 552.110, 552.111, 552.137, and 552.139 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.² We have also considered arguments submitted by interested third parties whom GBRA has notified of the request pursuant to section 552.305 of the Government Code. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Public Information Act in certain circumstances).

¹ We note that the requestor made similar requests to the San Antonio River Authority and the San Antonio Water System.

² 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.

We begin by addressing the information submitted as Exhibit G. You advise that Exhibit G contains confidential usernames and passwords provided to GBRA by a consultant working on the Project, and you contend that this information is excepted from disclosure under section 552.139 of the Government Code. You state that the usernames and passwords at issue are tools for the maintenance, manipulation, or protection of public property. In Open Records Decision No. 581 (1990), this office determined that certain computer information, such as source codes, documentation information, and other computer programming, that has no significance other than its use as a tool for the maintenance, manipulation, or protection of public property is not the kind of information made public under section 552.021 of the Government Code. Based on the reasoning in Open Records Decision No. 581 and our review of the information in Exhibit G, we determine that the usernames and passwords we have marked in Exhibit G do not constitute public information under section 552.002 of the Government Code. Accordingly, this information is not subject to the Public Information Act and need not be released. Based on this finding, we do not reach your claim under section 552.139 for this information.

Next, we note that a portion of the remaining information at issue is subject to section 552.022 of the Government Code. As you acknowledge, the attorney fee bill information submitted as Exhibits C6 and C7 is subject to section 552.022(a)(16). Section 552.022(a)(16) provides that information in a bill for attorney's fees that is not protected under the attorney-client privilege is not excepted from required disclosure unless it is expressly confidential under other law. Gov't Code § 552.022(a)(16). While your claim under section 552.103 of the Government Code encompasses this information, we note that section 552.103 is a discretionary exception that protects the governmental body's interests and is not other law that makes information expressly confidential for purposes of section 552.022(a). See *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); see also Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Accordingly, the completed report and attorney fee bills at issue may not be withheld under section 552.103.³ As you seek to withhold portions of the fee bills pursuant to Rule 503 of the Texas Rules of Evidence, however, we address your claim under the attorney-client privilege on that basis. See *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001) (Texas Rules of Evidence are "other law" within the meaning of section 552.022 of the Government Code).

Rule 503(b)(1) of the Texas Rules of Evidence provides:

³ Section 552.107(1) of the Government Code, which incorporates the attorney-client privilege into the Public Information Act, is also a discretionary exception. See Open Records Decision Nos. 676 (2002), 665 (2000). Because you claim the privilege on the basis of Rule 503 for this information, we do not further address your claim under section 552.107 for the submitted attorney fee bill information.

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

- (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
- (B) between the lawyer and the lawyer's representative;
- (C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
- (D) between representatives of the client or between the client and a representative of the client; or
- (E) among lawyers and their representatives representing the same client.

Tex. R. Evid. 503(b)(1); *see id.* 503(a)(2), (a)(4) (defining "representative of the client," "representative of the lawyer.") A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5).

A governmental body seeking to withhold information from public disclosure pursuant to the attorney-client privilege must: (1) demonstrate that the document at issue is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) demonstrate that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Open Records Decision No. 676 (2002).

You have highlighted the portions of the submitted attorney fee bills that you seek to withhold pursuant to the attorney-client privilege. Upon review of your arguments and the information at issue, we find you have established that the information you have highlighted in Exhibits C6 and C7 is protected by the attorney-client privilege. Thus, we determine that GBRA may withhold this information pursuant to Rule 503 of the Texas Rules of Evidence.

We next address your claim under section 552.103 of the Government Code for Exhibits A, B, D, and the remaining information in Exhibits C and E. 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 governmental body 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 is pending or reasonably anticipated on the date the governmental body 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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.⁴ Open Records Decision No. 555 (1990); see Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated").

In this instance, you argue that GBRA reasonably anticipates litigation relating to the development and implementation of the Project. You advise that the Project envisions a substantial amount of water to be delivered annually to the San Antonio region at costs in excess of \$700 million, and you indicate that the GBRA, the San Antonio River Authority,

⁴In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, see Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, see Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, see Open Records Decision No. 288 (1981).

and the San Antonio Water System are in competition with other parties seeking to appropriate water from sources to be utilized in the Project. You state that persons with interests in properties to be affected by construction of Project infrastructure have threatened litigation to alter or stop the Project. You have also provided this office with an affidavit of Mr. W. E. West, Jr., General Manager of GBRA, recounting a meeting with representatives of the interested parties at which these representatives indicated their intent to oppose the Project in state and federal courts, as well as in the administrative permitting process.⁵ Based on your representations and our review of the information you have submitted, we find that GBRA has established by concrete evidence that GBRA reasonably anticipated litigation related to the Project at the time GBRA received the present request for information. Furthermore, we find that the information at issue is related to the anticipated litigation. We therefore determine that Exhibits A, B, D, and the remaining information in Exhibits C and E are generally excepted from disclosure under section 552.103 of the Government Code.⁶

We note, however, that 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 all opposing parties 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 or is no longer anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Finally, you seek to withhold e-mail addresses of members of the public contained in Exhibit F pursuant to section 552.137 of the Government Code. Section 552.137 provides in pertinent part:

(a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release[.]

⁵ See Open Records Decision No. 588 (1991) (contested case proceedings conducted under Administrative Procedures Act, chapter 2001 of the Government Code, considered litigation for purposes of section 552.103).

⁶ As we are able to make this determination, we need not reach your other claimed exceptions to disclosure for this information.

Gov't Code § 552.137(a), (b). Based on your representations and our review, we find that the e-mail addresses we have marked in Exhibit F are subject to section 552.137(a). You state that the individuals at issue have not consented to the release of the e-mail addresses. Accordingly, GBRA must withhold the e-mail addresses we have marked pursuant to section 552.137 of the Government Code.

In summary, the usernames and passwords contained in Exhibit G are not public information subject to the Public Information Act and need not be disclosed. The marked e-mail addresses in Exhibit F must be withheld pursuant to section 552.137 of the Government Code. GBRA may withhold the information you have highlighted in Exhibits C6 and C7 pursuant to Rule 503 of the Texas Rules of Evidence as information protected by the attorney-client privilege. GBRA may withhold the remaining submitted information at this time pursuant to section 552.103 of the Government Code. Based on this finding, we do not reach the arguments submitted by interested third parties, or the remaining exceptions to disclosure raised by GBRA.

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); *Texas 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,



David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 202617

Enc: Submitted documents

c: Mr. James B. Blackburn, Jr.
Blackburn Carter, P.C.
2900 Wesleyan, Suite 400
Houston, Texas 77027
(w/o enclosures)

Mr. Donald Kuhlmann
Environmental Manager
Invista
P.O. Box 2626
Victoria, Texas 77902-2626
(w/o enclosures)

Mr. Samuel K. Vaugh, P.E.
HDR Engineering, Inc.
2211 South IH-35, Suite 300
Austin, Texas 78741-3842
(w/o enclosures)

Dr. R. Douglas Slack
Department of Wildlife and Fisheries Sciences
Texas A&M University
311B Nagle Hall
College Station, Texas 77843-2258
(w/o enclosures)

Mr. Lee Wilson
Lee Wilson & Associates
105 Cienega Street
Santa Fe, New Mexico 87501
(w/o enclosures)

Mr. Krish Raju
BP Chemicals
P.O. Box 659
Port Lavaca, Texas 77979
(w/o enclosures)

Mr. Roger L. Thomas
Academy of Natural Sciences
1900 Ben Franklin Parkway
Philadelphia, Pennsylvania 19103
(w/o enclosures)

Ms. Kathleen Hunt
Union Carbide
P.O. Box 186
Port Lavaca, Texas 77979
(w/o enclosures)