



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 27, 2004

Mr. Paul Sarahan
Director, Litigation Division
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

OR2004-6296

Dear Mr. Sarahan:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 205847.

The Texas Commission on Environmental Quality (the "commission") received a request for all documents regarding Gulf Metals Industries, Inc. ("GMI"), TXD980623722. You claim that the submitted information is excepted from disclosure under sections 552.103, 552.107, 552.111, and 552.137 of the Government Code. You state that the submitted information may contain proprietary information that is protected from disclosure under section 552.110 of the Government Code. You also state that you have submitted this request for a decision in order to give GMI and Cooper Industries, Inc. ("Cooper"), the opportunity to submit arguments against release of any proprietary information. *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 Public Information Act in certain circumstances). GMI and Cooper submitted to this office a claim that certain portions of the submitted information should be withheld under section 552.103. We have considered the exceptions you claim and the submitted third party arguments, and we have reviewed the submitted information.

We first address the commission's claim that Tabs 1, 2, 3, 4, 5, 6, and 8 are protected under section 552.103 of the Government Code, which 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 commission 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, 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 commission must meet both prongs of this test for information to be excepted under 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). The commission is involved in the supervision of GMI and Cooper in the clean-up of a contaminated site. The commission argues that litigation is anticipated because the commission is required to file litigation against all parties responsible for such contamination under section 361.197 of the Health and Safety Code if the commission performs or takes over investigations and remediation at a contaminated site. The commission argues that it will file suit against up to seventy non-cooperative parties to the investigation and clean-up at issue in order to recover costs pursuant to section 361.197. Furthermore, the commission argues that litigation was anticipated on the date the request for information was received. Finally, the commission asserts the information at issue relates to the anticipated litigation with non-cooperative parties. Accordingly, we find that section 552.103(a) is applicable to Tabs 1, 2, 3, 4, 5, 6, and 8.

Generally, however, once information has been obtained by all parties to the anticipated litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information and such information must be disclosed. Open Records Decision Nos. 349 (1982), 320 (1982). Here, you acknowledge that GMI and Cooper have seen some of the information at issue; however, not all parties to the anticipated litigation have had

access to the information. Therefore, the commission may withhold Tabs 1, 2, 3, 4, 5, 6, and 8 under section 552.103(a). We note that the applicability of section 552.103(a) ends once the litigation concludes. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).¹

We next address Tab 9 which you indicate may contain proprietary information of GMI and Cooper. GMI and Cooper have not submitted to this office any reasons explaining why the information in Tab 9 should be excepted from disclosure. We thus have no basis to conclude that the information in Tab 9 constitutes proprietary information. *See* Gov't Code § 552.110; Open Records Decision Nos. 639 at 4 (1996) (to prevent disclosure of commercial or financial information, party 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), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Accordingly, we conclude that Tab 9 may not be withheld from disclosure based on GMI's or Cooper's proprietary interests.

Finally, we address the commission's claim that certain e-mail addresses are excepted from disclosure under section 552.137 of the Government Code, which provides:

(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.

(c) Subsection (a) does not apply to an e-mail address:

(1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;

(2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or

¹Because we reach this conclusion under section 552.103(a), we need not address the arguments of GMI and Cooper against the disclosure of this information.

information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract; or

(4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.

(d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Under section 552.137, a governmental body must withhold the e-mail address of a member of the general public, unless the individual to whom the e-mail address belongs has affirmatively consented to its public disclosure. *See id.* § 552.137(b). You do not inform us that a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. The commission must, therefore, withhold the e-mail addresses we have marked in Tabs 7 and 9 under section 552.137.

In summary, you may withhold the information in Tabs 1, 2, 3, 4, ,5, 6, and 8 under section 552.103. You must withhold the e-mail addresses we have marked in Tabs 7 and 9 under section 552.137. The remaining information must be released to the requestor.

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,



W. David Floyd
Assistant Attorney General
Open Records Division

WDF/sdk

Ref: ID# 205847

Enc. Submitted documents

c: Ms. Marsha Woodard
Litigation Assistant
Union Pacific Railroad Company
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(w/o enclosures)