



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 15, 2006

Ms. Ingrid K. Hansen
General Counsel
Texas Building and Procurement Commission
P.O. Box 13047
Austin, Texas 78711

OR2006-06349

Dear Ms. Hansen:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 251852.

The Texas Building and Procurement Commission (the "commission") received a request for the following information related to a specified requisition and purchase order:

1. All notes, documents, letters, emails, memoranda, reports, investigative reports, etc. that discuss or reference or refer to Sigma Engineering or Sigma Equipment Corp. of White Plains, New York[;]
2. All notes, documents, letters, emails, memoranda, reports, investigative reports, etc. that discuss or reference or refer to TDCJ Requisition No. 696-3-50164-V, its attachments, or to the formulation of said purchase order;
3. All notes, documents, letters, emails, memoranda, reports, investigative reports, etc. that discuss or reference or refer to State Purchase Order No. 3-001454, its attachments, or to the formulation of said purchase order;

4. All notes, documents, letters, emails, memoranda, reports, investigative reports, etc. that discuss the purchase or construction of a soap bar manufacturing system for any entity that comprises the State of Texas; and
5. All notes, documents, letters, emails, memoranda, reports, investigative reports, etc. that identify individuals or entities within the State of Texas familiar with or interested in soap bar manufacturing systems.

You state that the commission has released some of the requested information to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.103, 552.107 and 552.11 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.103 of the Government Code provides:

(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. 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. *Univ. of Tex. Law Sch. v. Tex. 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 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). Whether litigation is reasonably

anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986). In Open Records Decision No. 638 (1996), this office stated that a governmental body has met its burden of showing that litigation is reasonably anticipated when it received a notice of claim letter and the governmental body represents that the notice of claim letter is in compliance with the requirements of the Texas Tort Claims Act ("TTCA"), Civ. Prac. & Rem. Code, ch. 101, or an applicable municipal ordinance.

You state that the commission has received a notice of claim from the requestor's client, which you state is in compliance with statutory notice requirements of a pending breach of contract claim. You state, and the documents reflect, that the notice of claim was submitted to the commission prior to the present request for information. Therefore, we conclude that the commission reasonably anticipated litigation on the date it received the request for information. We also find that the information in Attachments B-1 through B-14 relates to the anticipated litigation for purposes of section 552.103. Accordingly, the commission may withhold the information in Attachments B-1 through B-14 under 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. Furthermore, the applicability of section 552.103(a) ends once litigation has been concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Next, we address your claim that the information in Attachments B-15 and B-16 is excepted from public disclosure under section 552.111 of the Government Code. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency" and encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines work product as (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or (2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents. *See* TEX. R. CIV. P. 192.5. A governmental body seeking to withhold information under this exception bears the burden of demonstrating that the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. *Id.*; Open Records Decision No. 677 at 6-8. In order for this office to conclude that the information was made or developed in anticipation of litigation, we must be satisfied that a) a reasonable person would have concluded from the totality of the circumstances surrounding the

investigation that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation. *Nat'l Tank Co. v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204; Open Records Decision No. 677 at 7. Upon review of your arguments and the information at issue, we agree that the information in Attachments B-15 and B-16 may be withheld under section 552.111 of the Government Code.

In summary, to the extent the information has not been obtained from or provided to the opposing party in the anticipated litigation, the commission may withhold the information in Attachments B-1 through B-14 under section 552.103 of the Government Code. The commission may withhold the information in Attachments B-15 and B-16 under section 552.111 of the Government Code. As our ruling is dispositive, we need not address your remaining argument against disclosure.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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. 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,



Shelli Egger
Assistant Attorney General
Open Records Division

SE/sdk

Ref: ID# 251852

Enc. Submitted documents

c: Mr. Jack M. Wilhelm
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(w/o enclosures)