



ATTORNEY GENERAL OF TEXAS  
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September 7, 2007

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OR2007-11676

Dear Mr. Seal and Mr. Martinez:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 288272.

The Texas Commission on Environmental Quality (the "commission") received two requests for various information related to the application of Oak Grove Management Company, L.L.C. ("Oak Grove") for an air permit, including information related to Governor Perry's Executive Order RP 49, certain information the commission received from elected officials, any rules, policy statements and interpretations adopted or used by the commission in the discharge of its duties concerning various matters, and various records concerning TXU Corp., Kohlberg Kravis Roberts & Co., or TPG Capital. You inform us that your offices have



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made available to the requestors portions of the requested information, including the complete State Office of Administrative Hearings records related to the Oak Grove permit application. The Office of the General Counsel (the "OGC") and the Office of Legal Services (the "OLS") submitted separate sets of responsive documents to this office. The OGC states that the information it submits is information from offices under the direction of the Commissioners. You both claim that portions of the requested information are excepted from disclosure under chapter 552 of the Government Code. The OGC raises sections 552.101, 552.103, 552.107, and 552.111, while the OLS raises sections 552.101, 552.103, 552.107, 552.110, 552.111 and 552.137, as exceptions to the required public disclosure of portions of the requested information. The OLS notified Oak Grove of these requests so that Oak Grove may object to the disclosure of its information, if it chooses to do so, and submit arguments why its information is excepted from required public disclosure. *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). We have considered the claimed exceptions and reviewed the information you each submitted to this office.<sup>1</sup>

Initially, we note that an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why requested information relating to that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, Oak Grove has not submitted any comments to this office explaining how release of the requested information would affect its proprietary interests. Thus, we have no basis for concluding that Oak Grove has a protected proprietary interest in any of the submitted information. *See, e.g.*, Gov't Code § 551.110(b) (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); Open Records Decision Nos. 639 at 4 (1996), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Consequently, none of the submitted information may be withheld based on Oak Grove's proprietary interests.

We next note that the OGC submitted documents in exhibit C-2 that are subject to section 552.022 of the Government Code. Section 552.022 states that information coming within one of eighteen listed categories is public information and not excepted from disclosure unless it is "expressly confidential under other law." Gov't Code § 552.022(a). One of the section 552.022 categories is "final opinions, including concurring and dissenting

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<sup>1</sup>To the extent that the information submitted is a representative sample of the information at issue, we assume that the information 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.

opinions, and orders issued in the adjudication of cases.” *See id.* § 552.022(a)(12). The documents subject to section 552.022(a)(12) must therefore be released under section 552.022 unless the information is expressly made confidential under other law. The OGC raises sections 552.103, 552.107, and 552.111 for these documents. However, these exceptions are discretionary exceptions under the Public Information Act and do not constitute “other law” for purposes of section 552.022. *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); Open Records Decision No. 630 at 4 (1994) (governmental body may waive section 552.107(1)); Open Records Decision Nos. 677 at 8 (2002) (section 552.111 is not “other law” for purposes of section 552.022). 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). The OGC asserts that the attorney work product privilege applies to this information. Thus, we will determine whether the section 552.022 information in exhibit C-2 is confidential as attorney work product under Rule 192.5 of the Texas Rules of Procedure. We will also now consider the OGC’s section 552.111 claim for the remaining information in exhibit C-2 and the information in exhibits C-1, C-3, C-4, and C-5 because the OGC’s section 552.111 claim for this information is also based on the assertion that the information is attorney work product created for the Oak Grove case.

The attorney work product privilege is found in Rule 192.5 of the Texas Rules of Civil Procedure. Information subject to section 552.022 is “expressly confidential” for purposes of that section under Rule 192.5 only to the extent the information implicates the core work product aspect of the privilege. Open Records Decision No. 677 at 9-10 (2002). Core work product is defined as the work product of an attorney or an attorney’s representative developed in anticipation of litigation or for trial that contains the attorney’s or the attorney’s representative’s mental impressions, opinions, conclusions, or legal theories. Tex. R. Civ. P. 192.5(a), (b)(1).

In order to withhold attorney work product from disclosure under Rule 192.5, a governmental body must demonstrate that the material was 1) created for trial or in anticipation of litigation and 2) consists of an attorney’s or the attorney’s representative’s mental impressions, opinions, conclusions, or legal theories. ORD 677 at 6-7. The first prong of the work product test, which requires a governmental body to show that the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate that 1) 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 2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. *See Nat’l Tank 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. The second prong of the work product test requires the governmental body to show

that the documents at issue contains the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. Tex. R. Civ. P. 192.5(b)(1). A document containing work product information that meets both prongs of the work product test is confidential under Rule 192.5 provided the information does not fall within the purview of the exceptions to the privilege enumerated in Rule 192.5(c). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14<sup>th</sup> Dist.] 1993, no writ).

Section 552.111, which 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,” encompasses the attorney work product privilege in Rule 192.5. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). Section 552.111 protects work product as defined in Rule 192.5(a) 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.

Tex. R. Civ. P. 192.5(a). A governmental body seeking to withhold information under the work product aspect of section 552.111 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.*; ORD 677 at 6-8. In order for this office to conclude that the information was made or developed in anticipation of litigation, a governmental body must make the *National Tank Company* demonstration discussed above that 1) 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 2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. *Nat'l Tank Co. v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). As we have already noted, 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; ORD 677 at 7. If a requestor seeks an attorney's entire litigation file, and a governmental body seeks to withhold the entire file and demonstrates that the file was created in anticipation of litigation, we will presume that the entire file is protected from disclosure as attorney work product. Open Records Decision No. 647 at 5 (1996) (citing *Nat'l Union Fire Ins. Co. v Valdez*, 863 S.W.2d 458, 461 (Tex. 1993)) (organization of attorney's litigation file necessarily reflects attorney's thought processes).

To be work product, information must be prepared “by or for a party or a party’s representatives.” Tex. R. Civ. P. 192.5(a)(1). The OGC explains that the Commissioners are the OGC’s clients and that all of Exhibit C reflects the OGC’s confidential attorney-client legal advice and analyses to the Commissioners with regard to the Commissioner’s consideration of the issues in the contested case involving the Oak Grove permit application. The OGC does not state that the Commissioners are parties to the pending contested hearing. We understand that the Commissioners are not parties in the contested case, because, as you say, the Commissioners are the ultimate decision-makers in the contested hearing. However, the Commission will be a party to a court action if a party in the contested case appeals the Commissioner’s order in district court. *See* Health & Safety Code § 382.032.

The OGC informs us that the Commissioners issued the order and permit to Oak Grove on June 21, 2007, and that the order and permit remain pending before the Commissioners until the Commissioner’s decision becomes final and appealable to the district court. The OGC states that “I reasonably anticipate that one or more parties in the Oak Grove case may appeal to the district court the issued order and permit on issues involving the executive Order, if not also on other issues in the case, if any Motions for Rehearing are filed and not granted.”

The OGC states that the information in exhibits C-1 through C-5 was developed or made in anticipation of or in light of the contested Oak Grove case that is pending before the Commission. The OGC states that exhibit C-1 contains a legal brief with supporting documentation on the issues in the Oak Grove contested case and which was distributed to all three Commissioners. Exhibit C-2, the OGC explains, includes materials related to one or more of the issues in the Oak Grove contested case which were distributed to one of the three Commissioners. The OGC states that both exhibit C-1 and exhibit C-2 contain written markings on pages, the release of which would reveal legal strategies, analyses, and the position of the OGC or the commissioners with regard to the Oak Grove case. The OGC also maintains that the markings on copies of documents in the public record of the Oak Grove case that are included in the exhibits at issue are confidential attorney work product. Exhibit C-3 includes two attorney-client communications about issues in the Oak Grove case. With regard to exhibit’s C-4 and C-5, the OGC states these exhibits are the entire litigation files of certain OGC attorneys developed by them in performance of their legal duties as Assistant General Counsels or General Counsel for the Commissioners that were created in anticipation of litigation. The OGC argues that the documents in these exhibits and the markings on them reflect the attorneys’ legal analyses, theories, and opinion on the issues in the case.

After review of the information and consideration of the arguments, we find that the OGC has shown that the information was created in anticipation of litigation. We further find that the information consists of attorney work product. Thus, we conclude that the section 552.022 documents in exhibits C-1 are confidential attorney work product the commission may withhold under Rule 192.5. We further conclude that the remaining information in exhibits C-1, as well as all of the information in exhibits C-2, C-3, C-4 and

C-5 are privileged attorney work product that the commission may withhold based on section 552.111.<sup>2</sup>

Exhibit C-6 consists of three OGC documents related to the contested case involving the Sandy Creek Energy Associates, L.P. application for a permit. The OGC informs us that when the commission received the request, the commission had pending before it two motions for rehearing. The Commission did not consider either motion for rehearing and so the motions were overruled by operation of law on July 2, 2007. The parties have thirty days during which to seek judicial review of the final commission order. The OGC states that it reasonably anticipates litigation to bring to the district court issues related to the involvement of Governor Perry's Executive Order RP 49 in the Sandy Creek TPDES case. The OGC explains that exhibit C-6 is the entire litigation file of an Assistant General Counsel developed in performance of her legal duties for the commission and argues that to release the information will reveal the mental impressions, conclusions, legal theories or analyses or recommendations of the OGC with regard to the litigation.

After review of the information and consideration of the arguments, we find that the OGC has shown that the information in exhibit C-6 was created in anticipation of litigation. We further find information in exhibits C-6 is privileged attorney work product. Consequently, the commission may withhold the information in exhibit C-6 under section 552.111.<sup>3</sup>

We turn now to the OLS information and arguments. We begin with OLS's claim that section 552.103 applies to certain information in exhibits D-1, D-2, and D-3 to the OLS's submission for the Hammond request and to certain information in exhibits E-1, E-2, E-3, E-4, and E-5, of the OLS's submissions for the Muelke request. 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

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<sup>2</sup>In light of our conclusion on the OGC's attorney work product privilege claim, we need not address any other arguments relating to the OGC Oak Grove records.

<sup>3</sup>In light of our conclusion on the OGC's attorney work product privilege claim, we need not address any other arguments relating to the records in Exhibit C-6.

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), (c). 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). 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.<sup>4</sup> Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be “realistically contemplated”).

The OLS states that the commission was a party to the hearing in the Oak Grove case. *See* 30 T.A.C. 80.108(c) (concerning executive director’s party status in permit hearings). The OLS explains that the commission rendered its decision to issue the permit on June 10, 2007. The OLS argues that litigation is reasonably anticipated. After consideration of the arguments and in light of the totality of the circumstances, we conclude that the OLS has shown that the information relates to reasonably anticipated litigation.

However, when 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 parties in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. The parties in the litigation have apparently obtained or provided the email addresses in exhibit E-1 as well as

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<sup>4</sup>In 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).

information in exhibit E-5.<sup>5</sup> Thus, section 552.103 does not apply to the information obtained from and provided to opposing parties in these exhibits. For the remaining information, we find that the Commission may withhold the information based on section 552.103.<sup>6</sup>

The OLS raises section 552.101 for the information in exhibit E-5. Section 552.101 excepts from required public disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. Section 552.101 excepts from disclosure information made confidential by statute. The OLS brings its section 552.101 claim in conjunction with section 382.041(a) of the Health and Safety Code. Section 382.041(a) provides:

(a) Except as provided by Subsection (b), a member, employee, or agent of the commission may not disclose information submitted to the commission relating to secret processes or methods of manufacture or production that is identified as confidential when submitted.

Health & Safety Code § 382.041(a). This office has concluded that section 382.041 protects information that is submitted to the commission if a *prima facie* case is established that the information constitutes a trade secret under the definition set forth in the Restatement of Torts, and if the submitting party identified the information as being confidential upon its submission to the commission. *See* Open Records Decision No. 652 (1997). The OLS states that when TXU submitted the documents, TXU had marked them as confidential. However, we have received no arguments from TXU that any of its information constitutes a trade secret. Therefore, the commission may not withhold any of TXU's information under section 552.101 in conjunction with section 382.041.

We note that exhibit E-5 includes documents that may fall under an Agreed Protective Order entered in the Oak Grove case. The OLS has not asserted that any documents are protected from required disclosure based on an Agreed Protective Order. However, section 552.107(2) of the Government Code excepts from required public disclosure information if "a court by order has prohibited disclosure of the information." Gov't Code § 552.107(2). This office has found that an administrative forum operating pursuant to the Administrative Procedure Act functions as a court. *See* Open Records Decision No. 588 (1990) at 3 (citing *State v. Thomas*, 766 S.W.2d 217 (Tex. 1989)). Thus, if the commission determines that the

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<sup>5</sup>The OLS explains that the information in exhibit E-1 consists of discovery requests. The OLS also explains that the documents in exhibit E-5 were submitted into evidence at the hearing and all parties have had access to the documents in exhibit E-5.

<sup>6</sup>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 light of our conclusion under section 552.103, we need not address any other arguments relating to the information in exhibits E-2, E-3, and E-4.

protective order prohibits it from releasing any of the information in exhibit E-5, the commission must withhold the information pursuant to section 552.107(2).

Section 552.137 protects some of the email addresses in exhibits E-1 and E-5.<sup>7</sup> Section 552.137 makes certain e-mail addresses confidential. Section 552.137 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 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, cover sheet, 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.

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<sup>7</sup>The OLS did not raise section 552.137 within the statutory ten-business-day deadline for the email addresses in exhibit E-1 and did not raise section 552.137 for the email addresses in exhibit E-5. See Gov't Code § 552.301(a), (b). However, because section 552.137 is a compelling reason to withhold the email addresses, we will determine whether the exception applies to the submitted information. See *id.* § 552.302; see also Open Records Decision Nos. 481 (1987) (attorney general will raise mandatory exceptions on behalf of governmental body).

Gov't Code § 552.137. 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. You state that the “addresses [in exhibit E-1] were not provided to the commission for any contractual reasons, nor were the addresses on a letterhead, cover sheet, printed document or other document specifically made available to the public.” We therefore conclude that the commissioner must withhold the e-mail addresses of members of the public under section 552.137. We have marked the documents accordingly.

In summary, the commission may withhold the section 552.022 documents in exhibits D-1 as privileged core attorney work product under Rule 192.5 and the remaining information the OGC submitted under section 552.111 as privileged attorney work product. The commission may withhold the marked email addresses in exhibit E-1 and E-5 under section 552.137. The commission may withhold the information in exhibits E-2, E-3, and E-4 under section 552.103. The commission must release the remaining information in exhibit E-5, unless the commission determines that the protective order prohibits it from releasing any of the information.

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,



Kay Hastings  
Assistant Attorney General  
Open Records Division

KH/eb

Ref: ID# 288272

Enc: Submitted documents

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