



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 26, 2007

Ms. Brenda N. McDonald
Deputy City Attorney
City of Irving
825 West Irving Boulevard
Irving, Texas 75060

OR2007-15401

Dear Ms. McDonald:

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# 295264.

The City of Irving (the "city") received a request for several categories of information regarding a specified development project. You claim that the requested information is excepted from disclosure under sections 552.103, 552.104, 552.107, 552.111, and 552.131 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, we note that some of the submitted information, which have marked, is not responsive to the instant request because it was created after the date of this request. The city need not release nonresponsive information in response to this request and this ruling will not address that information.

¹We 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.

Next, we address your assertion that some of the requested information is not subject to the Act. Specifically, you indicate that “to the extent that the [r]equest is for ‘discussions’ or ‘relationships’ the [c]ity requests affirmation from [our office] that these are not the types of materials intended for disclosure under” the Act. We note that the Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986). Likewise, a governmental body is not required to produce the responsive information in the format requested, a list, or create new information to respond to the request for information. *AT&T Consultants, Inc. v. Sharp*, 904 S.W.2d 668, 676 (Tex. 1995); *Fish v. Dallas Indep. Sch. Dist.*, 31 S.W.3d 678, 681 (Tex. App.—Eastland, pet. denied); Attorney General Opinion H-90 (1973); Open Records Decision Nos. 452 at 2-3, 342 at 3 (1982), 87 (1975). However, a governmental body must make a good-faith effort to relate a request to information that is within the governmental body’s possession or control. See Open Records Decision No. 561 at 8-9 (1990). Thus, to the extent this requested information exists in any format, it may only be withheld if an exception to disclosure is applicable. Accordingly, we will consider your arguments against the disclosure of the submitted information.

We note that portions of the submitted information are subject to section 552.022 of the Government Code. Section 552.022 provides that:

(a) the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

Gov’t Code § 552.022(a)(1). Exhibit D consists of a completed audit and a completed report, which are subject to section 552.022(a)(1). Although you raise sections 552.103, 552.107, and 552.131 of the Government Code for this information, these exceptions are all discretionary exceptions that protect a governmental body’s interests and may be waived; as such, they are not other law that makes information confidential for the purposes of section 552.022. See *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (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 552.107); see also Open Records Decision No. 522 (1989) (discretionary exceptions in general). Therefore, none of the information subject to section 552.022 may be withheld under these exceptions.

However, the Texas Supreme Court has held that the Texas Rules of Evidence are “other law” within the meaning of section 552.022. See *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). The attorney-client privilege also is found at Texas Rule of

Evidence 503. Accordingly, we will consider your assertion of this privilege under rule 503 with respect to the information in Exhibit D. Additionally, because section 552.022 does not apply to information excepted from disclosure under section 552.104 of the Government Code, we will also address your argument for withholding the completed audit and report in Exhibit D, along with the remaining information at issue, under section 552.104. *See* Gov't Code § 552.104(b).

Texas Rule of Evidence 503 encompasses the attorney-client privilege. Rule 503(b)(1) provides as follows:

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). 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).

Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show 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. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Pittsburgh*

Corning Corp. v. Caldwell, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You state that Exhibit D consists of confidential communications between city employees and the city's attorneys that were made in connection with the rendition of professional legal services to the city. You also state that the communications were intended to be confidential. Upon review, we determine some of the information at issue, Exhibit D-1, which we have marked, consists of confidential attorney-client communications and may be withheld under rule 503. However, we conclude you have not established that the remaining information at issue consists of privileged attorney-client communications, and the city may not withhold any of the remaining information at issue under rule 503.

Next, we address your claim under section 552.103 of the Government Code for the remaining information not subject to section 552.022. Section 552.103 provides in 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 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), (c). A governmental body that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documents sufficient to establish that this exception is applicable in a particular situation. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date of the governmental body's receipt of the request for information, and (2) the information at issue is related to the pending or anticipated litigation. *See 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). A governmental body must establish both elements of this test in order for information to be excepted under section 552.103.

To demonstrate that litigation is reasonably anticipated, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *See* Open Records Decision No. 452 at 4. Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See id.* 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. *See* Open Records Decision No. 555; *see also* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that, if an individual publicly threatens to bring suit against a governmental body but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. *See* Open Records Decision No. 361 (1983).

You assert that the city reasonably anticipates litigation regarding the specified development project. You inform us, and provide documentation showing, that prior to the receipt of the present request, the city received a letter from the requestor's attorney alleging that the city breached the terms of its agreement with the requestor regarding the development project. The letter also states that the requestor expended millions of dollars in reliance on the agreement. Based on your representations, our review of the remaining submitted information, and the totality of the circumstances, we agree that the city reasonably anticipated litigation on the date it received the present request for information. Furthermore, we find that the information at issue is related to the anticipated litigation. Accordingly, we conclude that section 552.103 is generally applicable to the remaining submitted information.

We note, however, that the opposing party in the anticipated litigation appears to have already seen or had access to some of the information at issue. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information that is related to litigation through discovery procedures. *See* ORD 551 at 4-5. If the opposing party has seen or had access to information that is related to litigation, through discovery or otherwise, then there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Therefore, the 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). Further, the applicability of section 552.103(a) ends once the litigation has concluded or is no longer anticipated. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982). Accordingly, the city may withhold the information we have marked under section 552.103 of the Government Code.² The remaining information is not subject to section 552.103 and may not be withheld on this basis.

²As our ruling for this information is dispositive, we do not address your remaining arguments against disclosure for this information.

You assert that portions of the remaining information are excepted from disclosure under section 552.104 of the Government Code. Section 552.104 excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104(a). The purpose of section 552.104 is to protect a governmental body’s interests in competitive bidding situations. *See* Open Records Decision No. 592 (1991). Moreover, section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. *See* Open Records Decision No. 541 at 4 (1990). Generally, section 552.104 does not except information relating to competitive bidding situations once a bid has been awarded and a contract has been executed. Open Records Decision Nos. 306 (1982), 184 (1978).

You assert that the some of the remaining information is excepted from disclosure under section 552.104 because this information “relate[s] to the financial structuring of the project, the proposed site plans, and the negotiations regarding the proposed [p]roject.” You also state that releasing this information “would offer bidders an advantage in developing proposals to the [c]ity.” Upon review, however, we find that you have not established that the city has a competitive interest that would be harmed by release of the information at issue. Accordingly, we conclude that you have not demonstrated that public release of the information at issue would cause specific harm to the city’s interests in a particular competitive bidding situation. Therefore, the city may not withhold any of the information at issue from public disclosure under section 552.104 of the Government Code.

Section 552.131 of the Government Code provides in part:

(a) Information is excepted from [required public disclosure] if the information relates to economic development negotiations involving a governmental body and a business prospect that the governmental body seeks to have locate, stay, or expand in or near the territory of the governmental body and the information relates to:

- (1) a trade secret of the business prospect; or
- (2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained.

Gov’t Code § 552.131(a). Section 552.131(a) excepts from disclosure only “trade secret[s] of [a] business prospect” and “commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained.” *Id.* Thus, the scope of section 552.131(a) is co-extensive with that of section 552.110 of the Government Code. *See id.* § 552.110(a).

You state that some of the remaining information is excepted from disclosure under section 552.131. You contend that the information at issue involves “financial work” regarding the proposed project, and that disclosure of this information would cause substantial competitive harm to the city in negotiating with new developers. You have not demonstrated, however, that any of the information at issue constitutes a trade secret under section 552.110(a). *See id.* § 552.110(a); Open Records Decision No. 552 at 5 (1990) (attorney general will accept private person’s claim under Gov’t Code § 552.110(a) if person establishes *prima facie* case for trade secret exception and no one submits argument that rebuts claim as matter of law). Likewise, you have not shown that any of the submitted information consists of commercial or financial information whose disclosure would cause substantial competitive harm. *See Gov’t Code* § 552.110(b); Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm). We therefore conclude that the city may not withhold any of the information at issue under section 552.131(a).

Lastly, we note that the remaining submitted information contains e-mail addresses that are excepted from disclosure under section 552.137 of the Government Code. Section 552.137 requires a governmental body to 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 the owners of the email addresses have affirmatively consented to release. We note that the requestor has a right of access to his own e-mail address. *Id.* § 552.023 (person or person’s authorized representative has special right of access to information relating to person and protected from public disclosure by laws intended to protect that person’s privacy interest). The city must withhold the e-mail addresses we have marked under section 552.137, unless the owners have affirmatively consented to release.³

In summary, the city may withhold the information we have marked pursuant to section 552.103 of the Government Code. The city may also withhold Exhibit D-1 pursuant to Texas Rule of Evidence 503. The city must withhold the information we have marked pursuant to section 552.137 of the Government Code. 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

³The Office of the Attorney General will raise a mandatory exception, like section 552.137 of the Government Code, on behalf of a governmental body, but ordinarily will not raise other exceptions. *See Open Records Decision Nos.* 481 (1987), 480 (1987), 470 (1987).

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).

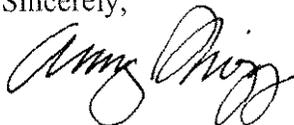
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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,



Amy L.S. Shipp
Assistant Attorney General
Open Records Division

ALS/mcf

Ref: ID# 295264

Enc. Submitted documents

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