



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 5, 2008

Mr. L. Joseph James
Staff Attorney - Administrative Law Section
Texas General Land Office
P.O. Box 12873
Austin, Texas 78711-2873

OR2008-01715

Dear Mr. James:

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# 301496.

The General Land Office (the "GLO") received a request for all e-mails sent by Land Commissioner Jerry Patterson. You argue that a portion of the information is not subject to the Act. You claim that the responsive information is excepted from disclosure under sections 552.103, 552.104, and 552.137 of the Government Code. We have considered your arguments and reviewed the submitted information.¹

Initially, the GLO asserts that the request for information was withdrawn by operation of law because the GLO sent the requestor a cost estimate pertaining to the request for information on November 14, 2007 and as of December 10, 2007 the GLO has not received a response from the requestor. *See* Gov't Code §§ 552.2615(a), 263(f). However, we have examined the cost estimate upon which your representation is based and note that, unlike all other correspondence that was sent to the requestor's Austin address, you sent the section 552.2615

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.

cost estimate to another address in Fort Worth. Therefore, because you did not properly address the 552.2615 estimate, we determine that it does not comply with the requirements of section 552.308(a) of the Act. *See id.* § 552.308(a) (notice is considered timely if properly addressed). Accordingly, we conclude that the requestor's public information request has not been withdrawn by operation of law, and we will address your arguments against disclosure of the submitted information under the Act.

Next, you claim that some of the submitted e-mails are not subject to the Act. The Act is only applicable to "public information." *See* Gov't Code § 552.021. Section 552.002(a) defines public information as "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it." Gov't Code § 552.002(a). Information that is collected, assembled, or maintained by a third party may be subject to disclosure under the Act if it is maintained for a governmental body, the governmental body owns or has a right of access to the information, and the information pertains to the transaction of official business. *See* Open Records Decision No. 462 (1987).

After reviewing the e-mails at issue, we agree that the e-mails you have marked as not subject to the Act do not constitute "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business" by or for the commission. *See* Gov't Code § 552.021; *see also* Open Records Decision No. 635 (1995) (statutory predecessor not applicable to personal information unrelated to official business and created or maintained by state employee involving *de minimis* use of state resources). Thus we conclude that the e-mails you have marked are not subject to the Act, and need not be released in response to this request.

Next, you argue that some of the submitted e-mails are excepted from disclosure under section 552.104 of the Government Code. Section 552.104 protects from required public disclosure "information which, if released, would give advantage to competitors or bidders." Gov't Code § 552.104. Section 552.104 is generally invoked to except information relating to competitive bidding situations involving specific commercial or contractual matters. Open Records Decision No. 463 (1987). This exception protects information from public disclosure if the governmental body demonstrates potential harm to its interests in a particular competitive situation. *See* Open Records Decision No. 463 (1987). We note that the e-mails you seek to withhold under section 552.104 consist of opinions and comments submitted to the GLO by members of the public who are not involved in the bidding process. Upon review, we conclude that you have failed to adequately demonstrate that the release of the public comments and opinions would harm the GLO's competitive interests with respect to the transfer of the property at issue. *See* Open Records Decision No. 592 at 8 (1991) (purpose of section 552.104 is to protect governmental body's interests in competitive bidding situation). Thus, we conclude that the GLO may not withhold the e-mails at issue under section 552.104 of the Government Code.

Next, you claim that a portion of the requested information is excepted from disclosure under section 552.103 of the Governmental 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.

Gov't Code § 552.103(a), (c). 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 was 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. *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 meet both prongs of this test for information to be excepted under section 552.103(a).

You state that the e-mails you have marked relate to pending litigation in the 239th Judicial District Court styled *Brannon et al. v. The State of Texas*, Cause number 15802*JG01 in which the GLO is a party. You also assert that the requested information directly relates to settlement negotiations and the opponents' claim against the GLO. Based upon your representations and our review of the documents, we conclude that section 552.103 of the Government Code is applicable to the e-mails you have marked and that you may withhold these e-mails under this exception.

We note, 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 parties in the 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. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Finally, you argue that the remaining information also contains e-mail addresses that are excepted from disclosure under section 552.137 of the Government Code, which 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* Gov't Code § 552.137 (b). You do not inform us that the owners of the e-mail addresses have affirmatively consented to release. Therefore, the GLO must withhold the e-mail addresses you have marked under section 552.137.

In summary, you may withhold the information you have marked under section 552.103 of the Government Code. You must withhold the e-mail addresses you have marked under section 552.137. The remaining responsive information must be released.

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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).

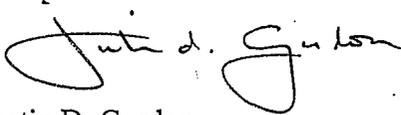
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records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



Justin D. Gordon
Assistant Attorney General
Open Records Division

JDG/jh

Ref: ID# 301496

Enc. Submitted documents

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(w/o enclosures)