



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 28, 2008

Ms. Sharon Alexander
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701-2483

OR2008-02731

Dear Ms. Alexander:

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# 303394.

The Texas Department of Transportation (the "department") received a request for any correspondence from 2003 to the present regarding any contracts between the department and Macquarie Group ("Macquarie"). You state you will withhold some of the requested information pursuant to our rulings in Open Records Letter Nos. 2007-10344 (2007), 2007 10184 (2007), 2006-05840 (2006), and 2005-10736 (2005). *See* Open Records Decision No. 673 (2001) (listing elements of first type of previous determination under Gov't Code § 552.301(a)). You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.104, 552.107, and 552.111 of the Government Code. You further indicate that release of a portion of the submitted information may implicate the proprietary interests of Macquarie. Accordingly, you state that you notified Macquarie of the department's receipt of the request for information and of the company's right to submit arguments to this office as to why the requested information should not be released to the requestor. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received comments from Macquarie. We have considered the submitted arguments and reviewed the submitted information, some of which is a representative sample.¹

¹ We 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.

Section 552.103 of the Government Code 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 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 that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date of its 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 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See Open Records Decision No. 551 at 4 (1990).*

Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *Open Records Decision No. 452 at 4 (1986)*. To demonstrate that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *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. *Open Records Decision No. 555 (1990)*; *see Open Records Decision No. 518 at 5 (1989)* (litigation must be "realistically contemplated").

You inform us, and have provided documentation reflecting, that prior to its receipt of the instant request for information, the department received a letter from an attorney containing a specific threat to sue the department on behalf of a potential opposing party regarding a SH 121 project. Therefore, based on your representation and the submitted documentation, we find that the department reasonably anticipated litigation on the date of its receipt of this request. We also find that some of the submitted information pertains to the SH 121 project, and is thus related to the anticipated litigation. We therefore conclude that the department

may withhold the information we have marked under section 552.103 of the Government Code.

In reaching this conclusion, we assume that the opposing party in the anticipated litigation has not seen or had access to any of the information in question. 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 anticipated 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). We further note that the applicability of section 552.103 ends once the related litigation concludes or is no longer reasonably anticipated. See Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Section 552.104 of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. The purpose of this section is to protect the governmental body's interests in competitive bidding and certain other competitive situations. See Open Records Decision No. 592 (1991). Furthermore, this section 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. Open Records Decision No. 541 at 4 (1990). Section 552.104 does not except information relating to competitive bidding situations once a contract has been awarded. Open Records Decision Nos. 306 (1982), 184 (1978). You inform us that some of the remaining information pertains to competitive bidding situations related to projects involving IH-635 and SH 161 in which contracts have not yet been awarded. You also assert that release of this information would undermine the department's interests in competitive bids. After considering your representations and reviewing the remaining documents, we conclude that the department may withhold the information related to IH-635 and SH 161, which we have marked, under section 552.104 of the Government Code.

You assert that the remaining information is excepted from disclosure under section 552.107 of the Government Code. Section 552.107(1) protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Third, the privilege applies only to communications between or among clients, client

representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *id.* 503(b)(1), meaning it was “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). Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

In this case, you assert that the remaining information consists of communications made for the purpose of facilitating the rendition of professional legal services. You state that the communications were between clients, client representatives, lawyers, and lawyer representatives identified by the department, and that the communications were to be kept confidential among the intended parties. Finally, you state that the department has not waived its privilege with respect to any of the communications at issue. Therefore, the department may withhold the remaining information, which we have marked, under section 552.107.

In summary, the department may withhold the information we have marked under sections 552.103, 552.104, and 552.107 of the Government Code. As our ruling is dispositive, we need not address the department’s and Macquarie’s remaining arguments 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 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).

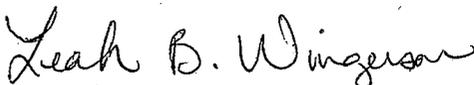
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records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



Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/mcf

Ref: ID# 303394

Enc. Submitted documents

c: Ms. Melissa del Bosque
Texas Observer Magazine
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(w/o enclosures)