



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

March 7, 2008

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

OR2008-03148

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# 304114.

The Texas Department of Transportation (the "department") received two separate requests from the same requestor for: (1) documents pertaining to projects in the "Dallas and Fort Worth districts that could be delayed as a result of the department's cash flow problems" and documents sent to and by a named individual between November 1, 2007 and December 13, 2007; and (2) all documents concerning legislation sponsored by Senator Kay Bailey Hutchinson in the most recent session of Congress and all documents sent or received by department staff or commissioners to a member of the Texas Congressional delegation between July 1, 2007 and the date of the request for information. You state that you have released information responsive to the second request. You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.103, 552.104, 552.107, 552.111, 552.117, and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>1</sup>

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<sup>1</sup>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.

Initially, we note that some of the information in Exhibit C was created after the department received this request for information, and thus is not responsive to the request. The Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983). This decision does not address the public availability of the non-responsive information, which we have marked, and that information need not be released.

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 a governmental body’s interests in competitive situations, typically in the context of competitive bidding. See Open Records Decision No. 592 (1991). A governmental body seeking to withhold information from disclosure pursuant to section 552.104 must demonstrate 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). Section 552.104 generally does not except bidding information after competitive bidding has concluded and a contract has been executed. *Id.* at 5.

In this instance, you inform us that the information in Exhibits B and C was created or collected in connection with a specific competitive procurement, and that the contract arising from that process has not yet been awarded. Based on your representations and our review of the information in Exhibits B and C, we find that the department has demonstrated that releasing the information at issue would harm the interests of the department in a particular competitive situation. We therefore conclude that the department may withhold the responsive information in Exhibits B and C in its entirety at this time pursuant to section 552.104 of the Government Code.<sup>2</sup> However, we note that the department may no longer withhold the information under section 552.104 once a contract has been executed and is in effect.

Next, you assert that the information in Exhibit D is excepted from disclosure by section 552.111 of the Government Code. The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. See *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615 (1993), this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined that

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<sup>2</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* Open Records Decision No. 615 at 5. This office has also concluded that a preliminary draft of a document that is intended for public release in its final form necessarily represents the drafter's advice, opinion, and recommendation with regard to the form and content of the final document, so as to be excepted from disclosure under section 552.111. *See* Open Records Decision No. 559 at 2 (1990) (applying statutory predecessor). Section 552.111 protects factual information in the draft that also will be included in the final version of the document. *See id.* at 2-3. Thus, section 552.111 encompasses the entire contents, including comments, underlining, deletions, and proofreading marks, of a preliminary draft of a policymaking document that will be released to the public in its final form. *See id.* at 2.

You assert that Exhibit D contains draft documents and intraagency communications of internal pre-decisional deliberations pertaining to department policy. Based on your representations and our review, we find that you have established that section 552.111 is applicable to some of the information at issue in Exhibit D. Therefore, the information in Exhibit D, which we have marked, may be withheld under section 552.111 of the Government Code. However, we find the remaining information in Exhibit D is mainly factual, and the department has failed to demonstrate how it constitutes internal communications consisting of advice, opinion, or recommendation that reflect the policymaking processes of the department. Accordingly, no portion of the remaining information may be withheld on this basis.

We note that the remaining information in Exhibit D includes e-mail addresses that are subject to section 552.137 of the Government Code.<sup>3</sup> Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). The e-mail addresses in the remaining information are not a type specifically excluded by section 552.137(c). As such, these e-mail addresses, which we have marked, must be withheld under section 552.137 unless the owners of the addresses have affirmatively consented to their release. *See id.* § 552.137(b).

You claim that the information in Exhibit E is excepted from disclosure under section 552.103 of the Government Code. 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

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

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 is pending or reasonably anticipated on the date the governmental body receives the request for information, and (2) the information at issue is related to that litigation. *See Thomas v. Cornyn*, 71 S.W.3d 473, 487 (Tex.App.-Austin 2002, no pet.); *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 [1<sup>st</sup> Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). ORD 551 at 4.

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To establish 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." 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").

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 governmental body on behalf of a potential opposing party.

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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).

Therefore, based on your representations 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 the information at issue is related to the anticipated litigation. We therefore conclude that the department may withhold the information in Exhibit E at this time under section 552.103 of the Government Code.<sup>5</sup>

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* Open Records Decision No. 551 at 4-5 (1990). 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).

In summary, the information in Exhibits B and C may be withheld under section 552.104 of the Government Code. The information which we have marked in Exhibit D may be withheld under section 552.111 of the Government Code. The department may withhold the information in Exhibit E pursuant to section 552.103 of the Government Code. The department must withhold the e-mail addresses we have marked pursuant to section 552.137 unless the owners of the addresses have affirmatively consented to their release. The remaining 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).

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<sup>5</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

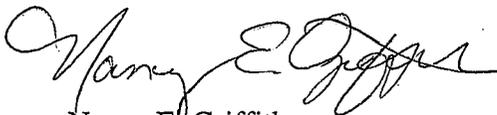
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records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



Nancy E. Griffiths  
Assistant Attorney General  
Open Records Division

NEG/jb

Ref: ID# 304114

Enc. Submitted documents

c: Mr. Michael A. Lindenberger  
The Dallas Morning News  
508 Young Street  
Dallas, Texas 75202  
(w/o enclosures)