



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 30, 2008

Ms. Nicole B. Webster  
Assistant City Attorney  
City of Waco  
P.O. Box 2570  
Waco, Texas 76702-2570

OR2008-07405

Dear Ms. Webster:

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# 311448.

The City of Waco (the "city") received six requests from four requestors for several categories of information regarding the Fort Fisher Complex, the Fort Fisher grave relocation project, and correspondence between the city and American Archaeology Group. You state that you have released some information to the requestors and that you have previously released information in response to a prior request for information from one of the requestors. *See* Gov't Code § 552.232 (prescribing procedures for response to repetitious or redundant request for information). You also state that you have no information responsive to portions of the requests.<sup>1</sup> You claim that some of the submitted information is exempted from disclosure under sections 552.103 and 552.107 of the Government Code.<sup>2</sup>

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<sup>1</sup>The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *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), 563 at 8 (1990), 555 at 1-2 (1990).

<sup>2</sup>We understand that Exhibit 5 was submitted for informational purposes only.

You also indicate that release of some of the submitted information may implicate the proprietary interests of three third parties. Accordingly, you have notified the interested third parties, Geo-Marine, Inc. ("GMI"), PBS&J, and Prewitt & Associates, Inc. ("PAI"), of these requests and of each company's right to submit arguments to this office as to why the requested information should not be released. *See id.* § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Act in certain circumstances). We have received correspondence from GMI and PAI. We have considered the submitted arguments and reviewed the submitted representative sample of information.<sup>3</sup>

Initially, we note that Exhibit 4 contains information that is subject to section 552.022 of the Government Code. Section 552.022(a)(5) provides that, "all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate[,]" are not excepted from required disclosure unless they are made expressly confidential by law. Gov't Code § 552.022(a)(5). You claim that this information is excepted from disclosure under section 552.103 of the Government Code. However, section 552.103 is a discretionary exception under the Act and does not constitute "other law" for 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. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived). Accordingly, the city may not withhold the estimates in Exhibit 4, which we have marked, under section 552.103. As you raise no further exceptions against the disclosure of this information, it must be released to the requestors.

We now address your section 552.103 claim for the remaining information in Exhibit 4 that is not subject to section 552.022, as well as for the information in Exhibit 6. 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.

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<sup>3</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.

(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). The 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, 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). The governmental body must meet both prongs of this test for information to be excepted under section 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). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *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”). 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. Open Records Decision No. 361 (1983).

You assert that the city reasonably anticipates litigation relating to the subject of the present requests. You state, and provide documentation showing, that prior to the date you received these requests for information, the city received two letters from attorneys containing specific threats to sue the city on behalf of one of the requestors. Therefore, based on your representations, our review of the remaining information at issue, and the totality of the circumstances, we conclude that the city reasonably anticipated litigation on the date that it received the requests for information. We also find that the remaining information at issue relates to the anticipated litigation. Accordingly, we conclude that section 552.103 is generally applicable to the remainder of Exhibit 4 and Exhibit 6.

We note, however, that the opposing party in the anticipated litigation has seen 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* Open Records Decision No. 551 at 4-5 (1990). 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, to the extent that the opposing party in the anticipated litigation has seen or had access to the information at issue, such information is not excepted from disclosure under section 552.103. With the exception of such information, the city may withhold the remainder of Exhibit 4 and Exhibit 6 under section 552.103 of the Government Code.<sup>4</sup> We 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).

We note that some of the information that may not be withheld under section 552.103 is encompassed by the city's claim under section 552.107 of the Government Code. Section 552.107 of the Government Code protects information that comes 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. *See* 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. *See* 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. *See In re Texas 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 capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element.

Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *See* TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). 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

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<sup>4</sup>As our ruling is dispositive for this information, we need not address your remaining argument against disclosure.

at the time the information was communicated. *See 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 instance, the city seeks to withhold some of the information in Exhibit 6 that the opposing party in the anticipated litigation has seen under section 552.107(1). Upon review, we find that the information at issue is not a communication of legal advice or opinion, or a confidential client communication. Thus, this information is not within the attorney-client privilege. Accordingly, the city may not withhold this information based on section 552.107 of the Government Code and must release this information, which we have marked, to the requestors.

We now turn to the remaining information at issue, which you assert may be subject to third-party claims. We note that an interested third party is allowed ten business days from the date of its receipt of the governmental body's notice under section 552.305 to submit its reasons, if any, as to why information relating to that party should not be released. *See Gov't Code* § 552.305(d)(2)(B). As of the date of this letter, this office has not received comments from PBS&J explaining how the release of the submitted information would affect the company's proprietary interests. Thus, we have no basis to conclude that the release of any portion of the submitted information would implicate the proprietary interests of PBS&J, and the city may not withhold any portion of the submitted information on that basis. *See, e.g., Open Records Decision Nos. 661 at 5-6 (1999)* (stating that business enterprise that claims exception for commercial or financial information under section 552.110(b) must show by specific factual evidence that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret).

GMI asserts that portions of its information are excepted from disclosure under sections 552.101, 552.104, and 552.110 of the Government Code. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Gov't Code* § 552.101. This exception encompasses information that is considered to be confidential under other constitutional, statutory, or decisional law. *See Open Records Decision Nos. 600 at 4 (1992)* (constitutional privacy), 478 at 2 (1987) (statutory confidentiality), 611 at 1 (1992) (common-law privacy). GMI has not directed our attention to any law under which any of its submitted information is considered to be confidential for purposes of section 552.101. Therefore, the city may not withhold any of the submitted information pertaining to GMI under section 552.101 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. Section 552.104 is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions which are intended to protect the interests of third parties. *See* Open Records Decision Nos. 592 (1991) (statutory predecessor to section 552.104 designed to protect interests of a governmental body in a competitive situation, and not interests of private parties submitting information to the government), 522 (1989) (discretionary exceptions in general). As the city did not submit any arguments in support of withholding any information pursuant to section 552.104, the city may not withhold any of GMI's information pursuant to section 552.104 of the Government Code. *See* ORD 592 (governmental body may waive section 552.104 ).

Section 552.110 of the Government Code protects: (1) trade secrets and (2) commercial or financial information, the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.110(a), (b). Section 552.110(a) protects the property interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See id.* § 552.110(a). A "trade secret":

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business in that it is not simply information as to single or ephemeral events in the conduct of the business, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees . . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining whether information qualifies as a trade secret:

- (1) the extent to which the information is known outside of [the company's] business;
- (2) the extent to which it is known by employees and others involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and to [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing this information; and
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* ORD 232. This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for exemption is made, and no argument is submitted that rebuts the claim as a matter of law. ORD 552. However, we cannot conclude that section 552.110(a) is applicable unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. Open Records Decision No. 402 (1983).

Section 552.110(b) protects “[c]ommercial 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 § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *Id.* § 552.110(b); *see* ORD 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

GMI contends that section 552.110(a) is applicable to portions of its information. Upon review of GMI’s arguments and the information at issue, we conclude that GMI failed to make a *prima facie* case that any of its submitted information constitutes a trade secret. Thus, none of the submitted information may be withheld under section 552.110(a).

Both GMI and PAI claim that some of their information is excepted from disclosure under section 552.110(b). Upon review, we find that both GMI and PAI have demonstrated that release of portions of their information would cause those companies substantial competitive harm. Accordingly, the city must withhold the information we have marked under

section 552.110(b). We note that GMI and PAI have published the identities of their customers on their websites. Thus, GMI and PAI have failed to demonstrate that release of this information would cause substantial competitive injury. Additionally, we find that GMI and PAI have made only conclusory allegations and have provided no specific factual or evidentiary showing to support their allegations that release of the remaining information at issue would cause their companies substantial competitive injury. See Gov't Code § 552.110(b); *see also, e.g.*, Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts is too speculative), 319 at 3 (1982) (information relating to organization and personnel, market studies, and qualifications not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Thus, no portion of the remaining information pertaining to these companies may be withheld under section 552.110(b).

Finally, we also note that a portion of the submitted information is protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are protected by copyright. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of materials protected by copyright, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. See Open Records Decision No. 550 (1990).

In summary, the city must release the information we have marked pursuant to section 552.022 of the Government Code. Except for information obtained from or provided to the opposing party in the anticipated litigation, the city may withhold the remaining information in Exhibit 4 and Exhibit 6 pursuant to section 552.103 of the Government Code. The city must withhold the information we have marked pursuant to section 552.110 of the Government Code. The remaining information must be released, but any copyrighted information may only be released in accordance with copyright law.

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).

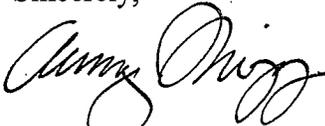
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records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



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

ALS/jb

Ref: ID# 311448

Enc. Submitted documents

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