



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 24, 2008

Ms. Catherine Brown Fryer
Bickerstaff, Heath, Delgado, & Acosta, LLP
816 Congress Avenue, Suite 1700
Austin, Texas 78701

OR2008-10032

Dear Ms. Fryer:

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# 316659.

The La Joya Water Supply Corporation (the "corporation") received a request for eight categories of information pertaining to the corporation's interactions with six named certified public accountants (the "CPAs"). You state that a majority of the requested information will be released to the requestor. You claim that a portion of the requested information is not subject to the Act. You claim that the submitted invoice and agreements are excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code.¹ We have considered your arguments and have reviewed the submitted information.

Initially, we note that you have not submitted any information responsive to the request for working papers of the named third party CPAs. You argue that these records are not public information as defined by section 552.002 of the Government Code. Section 552.002 of the Government Code 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." *See* Gov't Code § 552.002(a). Thus, information that is collected, assembled, or maintained by a third party may be subject to disclosure under the Act if a governmental body owns or has a right of access to the information and it relates to the transaction of official business. *See* Open Records Decision Nos. 462 (1987), 445 (1986); *cf.* Open Records Decision No. 499 (1988).

¹Although you raise section 552.101 of the Government Code in conjunction with sections 552.103, 552.107, and 552.111 of the Government Code, this office has concluded that section 552.101 does not encompass other exceptions found in the Act. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990).

In Open Records Decision No. 445 (1986), this office addressed whether notes and information acquired by an outside consultant in preparation of a report were “public information” for purposes of the Act. In that open records decision, the consultant contracted with the governmental body to provide a comprehensive written report to the governmental body. *Id.* However, the contract did not provide the governmental body access to notes and information acquired by the consultant in preparation of the report. *Id.* Furthermore, the governmental body indicated that it did not possess the information and did not know the contents of the information. *Id.* This office held that the notes and information acquired by the consultant in preparation of the report were not “public information” for purposes of the Act, and thus not required to be disclosed. *Id.*

In this case, you acknowledge that the working papers of the of the third party CPAs were created on behalf of the corporation. You state that they were used to conduct audits and create reports for the corporation, and you inform this office that the final audits and reports have been provided to both the corporation and the requestor. You argue that the working papers are not subject to the Act because they are not owned or maintained by the corporation. You have also provided the corporation’s contracts with the outside CPAs showing that the corporation does not have a right of access to the internal working papers of these third parties. We find that because the corporation neither maintains nor has a right of access to the working papers of the third party CPAs, this information is not “public information” under the Act, and the corporation is not required to produce these records in response to the request for information. Gov’t Code § 552.002; *see* ORD 445.

We now turn to your arguments regarding the submitted information. 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 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. Corryn*, 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 [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).

You state that prior to the receipt of this request, the corporation was involved in a lawsuit pending in the 206th Judicial District Court, Hidalgo County, Texas. Accordingly, we conclude that litigation was pending when the corporation received the request. You explain that the submitted invoice and engagement letters pertain to expert reports that will be used as evidence by the corporation as defendant in this pending litigation. Based on this representation, we find that the submitted information is related to the pending litigation. Therefore, we find that the corporation may withhold the submitted information under section 552.103 of the Government Code.

We note, however, that once the submitted information has been obtained by all parties to the pending litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to the information. *See Open Records Decision Nos. 349 (1982), 320 (1982)*. We also note that 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).

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). If the governmental body does not file suit over 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,



Reg Hargrove
Assistant Attorney General
Open Records Division

RJH/eeg

Ref: ID# 316659

Enc. Submitted documents

c: Mr. J. Gary Frisby, President
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(w/o enclosures)