



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 21, 1995

Ms. Melissa M. Ricard
Senior Staff Attorney
Office of General Counsel
Texas A&M University System
State Headquarters Bldg.
301 Tarrow, 6th Floor
College Station, Texas 77843-1230

OR95-403

Dear Ms. Ricard:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 26249.

The Texas A&M University System ("A&M") has received a request for "[a]ll documents and correspondence in the offices of [two university officials] concerning construction of a power co-generation facility." We received a letter from you dated May 5, 1994, attaching a number of documents that you asserted were excepted from required public disclosure under sections 552.101, 552.103, 552.104, and 552.107 of the act. Subsequently, we received a letter brief from you dated May 19, 1994, with exhibits. Your May 19, 1994, letter brief asserts that documents in exhibit 3 are "representative samples" of information excepted from required public disclosure under sections 552.101, 552.103, and 552.107 of the act. You also appear to assert that all of the requested information is excepted from required public disclosure under section 552.104.

A&M received a second request for information relating to this matter on June 22, 1994, from the same requestor. By a letter dated July 5, 1994, you submitted additional responsive documents to this office and asked us to consider the second request with the first request, stating "[a]ll the documents listed are either attached to this letter or were included in our earlier request."

You assert that the requested information may be excepted from disclosure under section 552.103 of the act. That provision excepts from required public disclosure information relating to litigation "to which the state or political subdivision . . . is or may be a party." Gov't Code § 552.103(a)(1). For section 552.103 to apply, the information must relate to litigation to which A&M is or may be a party. Section 552.103 requires concrete evidence that litigation is realistically contemplated; it must be more than mere conjecture. Open Records Decision Nos. 518 (1989) at 5; 328 (1982). Thus, to secure the protection of this exception, a governmental body must demonstrate that requested information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding. Open Records Decision No. 551 (1990); *see also* Open Records Decision No. 588 (1991) (contested case under statutory predecessor to Administrative Procedure Act is litigation for purposes of former section 3(a)(3) exception).

You have submitted a letter, dated June 17, 1994, to the general counsel of A&M from an attorney representing Tenneco Power requesting A&M to preserve certain records "[i]n light of probable litigation." Based on this letter, we conclude that litigation may be reasonably anticipated. It is apparent from the requested records that they relate to such litigation. Therefore, with one exception, we conclude that the requested information may be withheld under section 552.103.¹

Section 552.103 does not except information from required public disclosure if the party opposing the governmental body in the litigation has had access to the information. *See* Open Records Decision No. 597 (1991) at 4. Therefore, A&M may not withhold information to which Tenneco Power has had access. It appears that Tenneco Power has had access to at least the following documents:

Letter from E. Dean Gage, Interim President, A&M, to Mr. M. S. Feinberg, Tenneco Power Generation, dated April 19, 1994;

Letter from Richard Lindsay, Vice Chancellor for Finance and Operations, A&M, to Mr. M. S. Feinberg, Tenneco Power Generation, dated April 25, 1994;

Letter from Melissa M. Ricard, Senior Staff Attorney, A&M, to Mr. William D. Rapp, Tenneco Power Generation, dated March 9, 1994;

¹It is not clear whether you have submitted to this office all documents responsive to the first request or merely "representative samples." Please note that we are unable to address whether section 552.103 applies to documents that have not been submitted to us.

Memorandum from Melissa M. Ricard, Senior Staff Attorney, A&M, to James B. Bond, Vice Chancellor and General Counsel, A&M, dated June 8, 1993 (released to Tenneco Power Generation);

Legal and Financial Summaries prepared by Tenneco Power Generation (in part responding to above legal memorandum);

Proposed Structure for the Tax-Exempt Financing of an Electric Generating Facility to Sell Energy Services to Texas A&M University prepared by Tenneco Power Generation;

Letter from M. S. Feinberg, Tenneco Power Generation, to Mr. Joseph P. Sugg, Director of Physical Plant, A&M, dated February 18, 1994;

Tenneco Power Generation responses to A&M Physical Plant Department question nos. 51, 54, and 61;

Letter from Joseph P. Sugg, A&M, to Mr. Mitch Feinberg, Tenneco Power Generation, dated January 11, 1994;

Development Agreement between A&M and Tenneco Power Generation, dated September 1993; and

Letter from Ray M. Bowen, A&M, to Mr. M. S. Feinberg, Tenneco Power Generation Company, dated June 17, 1994.

These records may not be withheld, nor may A&M except under section 552.103 any other responsive record which has been previously released to Tenneco Power.

We note that none of these records are excepted from required public disclosure under the attorney client privilege, for which you cite sections 552.101 and 552.107(1) of the act, given that the privilege is waived by the disclosure of any privileged record to a third party. *See* Open Records Decision No. 589 (1991). In addition, you have not demonstrated that section 552.104 is applicable. Section 552.104 is designed to protect the interests of a governmental body in competitive bidding situations. Open Records Decision No. 592 (1991) at 8. You state that A&M and Tenneco Power "continue to negotiate toward a final resolution. Should key elements of the negotiations be disclosed at this time, the process could be seriously compromised." It is apparent from a letter and press release you submitted to this office, however, that A&M has broken off all negotiations with Tenneco Power. Moreover, because A&M was negotiating only with Tenneco Power, and there were no other "competitors or bidders," section 552.104 would have been inapplicable even if the negotiations were ongoing.

If you have questions about this ruling, please contact our office.

Yours very truly,



Loretta R. DeHay
Assistant Attorney General
Open Government Section

LRD/MRC/rho

Ref.: ID# 26249

Enclosures: Submitted documents

cc: Mr. Ty Clevenger
601 Fir Road
Gladewater, Texas 75647
(w/o enclosures)