



September 21, 2001

Mr. Douglas G. Caroom
Bickerstaff, Heath, Smiley, Pollan, Kever & McDaniel, L.L.P.
1700 Frost Bank Plaza
816 Congress Avenue
Austin, Texas 78701-2443

OR2001-4253

Dear Mr. Caroom:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 152247.

The Canadian River Municipal Water Authority ("CRWMA"), which you represent, received a request for: (1) takings impact assessments prepared in connection with CRWMA's Conjunctive Water Use Groundwater Supply Project, (2) information concerning the effect of the Conjunctive Water Use Groundwater Supply Project on the aquifer in a certain area, (3) communications, agreements, and other documents between CRWMA and the City of Amarillo relating to the effect of the Conjunctive Water Use Groundwater Supply Project on the aquifer in a certain area, and (4) information prepared by CRWMA or its consultants concerning certain applications for groundwater production permits filed with the Panhandle Groundwater Conservation District. You indicate that CRWMA has released some of the requested information. However, you claim some of the requested information is excepted from disclosure under sections 552.101, 552.103, 552.105, 552.107, 552.110, and 552.111 of the Government Code. We have also received comments from the requestor. *See Gov't Code § 552.304.* We have considered all of the submitted arguments and reviewed the submitted information.¹

Section 552.103 provides as follows:

¹You indicate that Exhibit C-1 is a representative sample of similar letters. We assume that the "representative sample" submitted to this office is truly representative of the letters 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.

(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.

CRWMA 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. *University of Tex. Law Sch. v. Texas 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). CRWMA must meet both prongs of this test for information to be excepted under 552.103(a).

This office has held that, for the purpose of section 552.103, "litigation" includes contested cases conducted in a quasi-judicial forum. See, e.g., Open Records Decision Nos. 474 (1987), 368 (1983), 336, 301 (1982). For instance, this office has held that cases conducted under the Texas Administrative Procedure Act, chapter 2001 of the Government Code, are "litigation" for purposes of section 552.103. See, e.g., Open Records Decision Nos. 588 (1991) (former State Board of Insurance proceeding), 301 (1982) (hearing before Public Utilities Commission). This office has focused on the following factors in determining whether an administrative proceeding is conducted in a quasi-judicial forum: 1) whether the dispute is, for all practical purposes, litigated in an administrative proceeding where a) discovery takes place, b) evidence is heard, c) factual questions are resolved, and d) a record is made; and 2) whether the proceeding is an adjudicative forum of first jurisdiction, i.e., whether judicial review of the proceeding in district court is an appellate review and not the forum for resolving a controversy on the basis of evidence. See Open Records Decision No. 588 (1991).

You indicate that CRWMA is currently involved in a contested case concerning a water permit application before the Panhandle Groundwater Conservation District (the "district").² Furthermore, you have submitted the district's rules governing such contested cases for

²The district submitted to this office information it obtained subsequent to the request for information in support of its argument that it is involved in pending litigation. However, in determining whether a governmental body has met its burden under section 552.103, this office cannot consider information about occurrences after the date of the request for information. See Gov't Code § 552.103(c).

our review. The rules specifically provide for discovery, the submission of evidence, and the creation of a record. Under the rules, the district's Board of Directors issues an order upon completion of the hearing. Finally, you indicate that the district's decision can be appealed pursuant to section 36.251 of the Water Code. Such a suit must be filed in "a court of competent jurisdiction in any county in which the district or any part of the district is located." Water Code § 36.251. Furthermore, the court's review of the district's decision is governed by the substantial evidence rule. *Id.* § 36.253. Based on this information, we find that CRWMA was involved in pending litigation at the time it received the request. Furthermore, we find that the submitted information in Exhibits C-1 through C-8 relates to the pending litigation. Therefore, CRWMA may withhold Exhibits C-1 through C-8 under section 552.103.

However, we note that once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, 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).

With respect to Exhibit C-9, we address your argument under section 552.107. Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. Open Records Decision No. 574 at 5 (1990). Section 552.107(1) does not except purely factual information from disclosure. *Id.* Section 552.107(1) does not except from disclosure factual recounting of events or the documentation of calls made, meetings attended, and memos sent. *Id.* at 5. You contend that Exhibit C-9 contains discussion between CRWMA's general manager, operating committee, and attorney. Based on your arguments and our review of Exhibit C-9, we conclude that the audiotape consists of client confidences and an attorney's legal advice and opinion. Consequently, CRWMA may withhold Exhibit C-9 under section 552.107(1).

In summary, CRWMA may withhold Exhibits C-1 through C-8 under section 552.103. CRWMA may withhold Exhibit C-9 under section 552.107(1).³

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.

³Based on this finding, we need not reach the remainder of your claimed exceptions.

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 appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, 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).

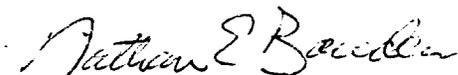
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, 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 appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public 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 General Services Commission 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,



Nathan E. Bowden
Assistant Attorney General
Open Records Division

NEB/sdk

Ref: ID# 152247

Enc: Submitted documents

c: Mr. Michael V. Powell
Locke, Liddell & Sapp, L.L.P.
2200 Ross Avenue, Suite 2200
Dallas, Texas 75201-6776
(w/o enclosures)