



November 7, 2001

Mr. Ramon Dasch  
Acting Division Director  
Texas Natural Resource Conservation Commission  
P. O. Box 13087  
Austin, Texas 78711-3087

OR2001-5159

Dear Mr. Dasch:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 154524.

The Texas Natural Resource Conservation Commission (the "commission") received a request in May of 2001 for documents relating to the Guadalupe Blanco River Authority ("GBRA") amendment to a specified Certificate of Adjudication. On August 23, 2001, the commission received a request for all documents since June 23, 2001 concerning the GBRA amendment. You claim that some of the requested information is excepted under sections 552.103, 552.107, and 552.111 of the Government Code. We have considered your asserted exceptions and reviewed the submitted information.

You state that you requested a decision from this office for information responsive to the May 2001 request. In Open Records Letter No. 2001-3664 (2001), we concluded that the commission could withhold information responsive to the May 2001 request under sections 552.103, 552.107, and 552.111 of the Government Code. You explain that after Open Records Letter No. 2001-3664 (2001) was issued, you discovered more information that is responsive to the May 2001 request. You state that you will release the majority of this information, but ask to withhold three e-mails under section 552.107 of the Government Code.

Pursuant to section 552.301(b) of the Government Code, a governmental body must ask this office for a decision not later than the tenth business day after the date of receiving the written request. Further, a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence

showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. Gov't Code § 552.301(e)(1)(A)-(D). As you concede, you have failed to request a decision within the ten business days or submit a copy of the specific information requested within the fifteen business days as required by section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). Section 552.107(1) is a discretionary exception and does not provide a compelling reason to overcome the presumption of openness. *See* Open Records Decision No. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)). Therefore, you may not withhold the e-mails responsive to the May 2001 request under section 552.107(1) of the Government Code. Consequently, you must release these e-mails.

With regard to the e-mails that are responsive to the August 23, 2001 request, you timely claim section 552.103 of the Government Code. Section 552.103(a) 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.

A governmental body has the burden of providing relevant facts and documents to show the applicability of an exception in a particular situation. The test for establishing that section 552.103(a) applies is a two-prong 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 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 588 (1991). Further, litigation must be pending or reasonably anticipated on the date the requestor applies to the public information officer for access. Gov't Code § 552.103(c).

You explain that the requestor's law firm has filed a motion for rehearing concerning the permit and filed a petition against the commission requesting declaratory and injunctive relief on August 20, 2001 in Cause No. GN-102688 in the 200th District Court, Travis

County. You state that the basis of the lawsuit is the issuance of GBRA's permit. Based on your representations and our review of the submitted information, we conclude that you have demonstrated the existence of pending litigation and that the submitted e-mails relate to the litigation. Therefore, you may withhold the e-mails responsive to the August 23, 2001 request under section 552.103 of the Government Code.<sup>1</sup>

We note that if the opposing party in the litigation has seen or had access to any of the information in these records, there is no section 552.103(a) interest in withholding that information from the requestor. Open Records Decision Nos. 349 (1982), 320 (1982). We note that the applicability of section 552.103(a) ends once the litigation concludes. 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 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).

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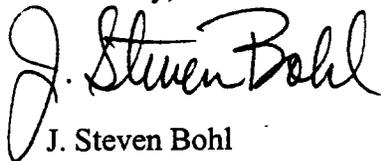
<sup>1</sup>Having found the information excepted under section 552.103, we need not address the applicability of sections 552.107 and 552.111.

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,



J. Steven Bohl  
Assistant Attorney General  
Open Records Division

JSB/sdk

Ref: ID# 154524

Enc: Submitted documents

c: Mr. Bill Aleshire  
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(w/o enclosures)