



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 17, 2004

Mr. W. Lane Lanford
Executive Director
Public Utility Commission of Texas
P.O. Box 13326
Austin, Texas 78711

OR2004-1147

Dear Mr. Lanford:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 196276.

The Public Utility Commission of Texas (the "commission") received a request for correspondence, memoranda, e-mails, or other records of communications regarding Cap Rock Energy Corporation or Cap Rock Electric Cooperative, Inc.¹ You inform us that the commission has released some of the information that is responsive to this request. You claim that other responsive information is excepted from disclosure under section 552.103 of the Government Code.² You also believe that this request for information implicates the interests of a private third party. You notified the private party of this request and of his right to submit arguments to this office as to why information relating to the private party should

¹You inform us that, since the receipt of this request for information, the commission has received clarification from the requestor that his request does not encompass certain specified types of information. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information); Open Records Decision No. 663 at 2-5 (1999) (addressing circumstances under which governmental body's communications with requestor to clarify or narrow request will toll ten-business-day deadline to request decision under Gov't Code § 552.301(b)).

²As you initially also raised sections 552.101, 552.106, 552.107, 552.110, and 552.111, but have submitted no arguments in support of any of these exceptions, we do not address the applicability of these sections to any of the submitted information. *See* Gov't Code § 552.301(e)(1)(A).

not be released.³ We have considered the exception you claim and have reviewed the information you submitted.

We first note that an interested third party is allowed ten business days from the date of the party's receipt of the governmental body's notice 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 decision, we have received no correspondence from the private party that the commission notified under section 552.305. Thus, the private party has not demonstrated that any of the information at issue is confidential or proprietary. See Gov't Code §§ 552.101, .110; Open Records Decision Nos. 552 at 5 (1990), 661 at 5-6 (1999).

Next, we address the commission's claim under section 552.103 of the Government Code. This exception 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). The governmental body has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) that the information at issue is related to that litigation. See *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.); see also Open Records Decision No. 551 at 4 (1990). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *Id.*

³See Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances).

You inform us that the submitted information relates to a petition filed in commission Docket No. 28813, styled *Petition to Inquire Into the Reasonableness of the Rates and Services of Cap Rock Energy Corporation*. You also state that this petition was filed prior to the commission's receipt of this request for information. You explain that the proceeding constitutes a contested case under the Administrative Procedure Act, chapter 2001 of the Government Code, and that the commission is a party to the case. See Open Records Decision No. 588 at 7 (1991) (contested case conducted under Administrative Procedure Act constitutes litigation for purposes of Gov't Code § 552.103). You inform us that the information submitted as Exhibits I, J, and K relates to the pending case. Based on your representations, the supporting documentation that you have submitted, and our review of the information at issue, we conclude that you have demonstrated that Exhibits I, J, and K are excepted from disclosure at this time under section 552.103.

In reaching this conclusion, we assume that the opposing party in the pending case has not seen or had access to any of the information that the commission seeks to withhold under section 552.103. The purpose of this exception is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to that litigation to obtain it through discovery procedures. See Open Records Decision No. 551 at 4-5 (1990). If the opposing party has seen or had access to information relating to pending litigation, through discovery or otherwise, then there is no interest in withholding that information from public disclosure under section 552.103. See Open Records Decision Nos. 349 (1982), 320 (1982). Furthermore, the applicability of section 552.103 ends once the related litigation concludes. See 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

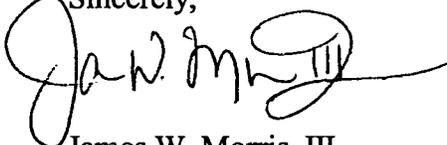
records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these 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).

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 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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,

A handwritten signature in black ink, appearing to read "James W. Morris, III". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 196276

Enc: Submitted documents

c: Mr. Ronald W. Lyon
Law Offices of Ronald W. Lyon, P.C.
115 South Travis Street
Sherman, Texas 75090
(w/o enclosures)