



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 4, 2007

Mr. Rashaad V. Gambrell
Assistant City Attorney
City of Houston
P.O. Box 1562
Houston, Texas 77251-1562

OR2007-03714

Dear Mr. Gambrell:

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# 275075.

The City of Houston (the "city") received a request for for information

related to the formation of activities of the Texas Clean Air Cities Coalition [the "coalition"], or the [city]'s interest in or consideration of any proposals to build coal-fired power plants in Texas or the environmental permitting process for any such proposals.

You state that some responsive information will be made available to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.103 and 552.111 of the Government Code. We have considered the claimed exceptions and reviewed the submitted representative sample of information.¹

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records 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.

Section 552.103 of the Government Code 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.

...

(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 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 received the request for information, and (2) the information at issue is related to that litigation. *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 552.103(a).

You inform us that the city is a member of the coalition, which you state is a non-profit unincorporated association of local governmental entities. You also state that the coalition is a party to a contested administrative proceeding conducted by the State Office of Administrative Hearings for the Texas Commission on Environmental Quality concerning a request by TXU for a permit to build coal-fired powerplants. You indicate that the case was pending when the city received this request for information. We note that a contested case under the Texas Administrative Procedure Act, chapter 2001 of the Government Code, constitutes "litigation" for purposes of section 552.103(a). See Open Records Decision No. 588 (1991). Having considered your arguments, we conclude that the city was a party to pending litigation, as a member of the coalition, when the city received this request for information. See *Cox v. Thee Evergreen Church*, 836 S.W.2d 167, 169 (Tex. 1992) ("Historically, unincorporated associations were not considered separate legal entities and had no existence apart from their individual members."); *Libhart v. Copeland*, 949 S.W.2d 783, 792 (Tex. App. – Waco 1992, no pet. h.) (same); see also Bus. Org. Code § 252.007(b). We also conclude that the submitted information is related to the litigation for purposes of section 552.103. See Open Records Decision Nos. 551 at 5 (1990) (attorney general will determine whether governmental body has reasonably established that

information at issue is related to litigation), 511 at 2 (1988) (information “relates” to litigation under section 552.103 if its release would impair governmental body's litigation interests). Therefore, the city may withhold the submitted information under section 552.103 of the Government Code.

In reaching this conclusion, we assume that the opposing party in the pending litigation has not seen or had access to any of the information in question. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information that is related to litigation through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). If the opposing party has seen or had access to information that is related to pending litigation, through discovery or otherwise, then there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). We also note that 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). As section 552.103 is dispositive, we do not address your section 552.111 claim.

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, 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 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 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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/eb

Ref: ID# 275075

Enc. Submitted documents

c: Mr. Patrick W. Lee
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(w/o enclosures)