



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 7, 2008

Ms. Celeste Baker
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Texas Commission on Environmental Quality
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Mr. Robert Martinez
Director
Environmental Law Division
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

OR2008-00212

Dear Ms. Baker and Mr. Martinez:

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# 298755.

The Texas Commission on Environmental Quality (the "commission") received a request for information related to "the Penske-Texas Disposal Systems dispute that has been sent or received by [a named individual] or anyone in the Executive Director's office or any of the [commission's] commissioners." The requestor subsequently narrowed his request to include "documents since January 1, 2004." The commission's Office of the General Counsel (the "OGC") and its Environmental Law Division (the "division") have submitted separate briefs as well as separate documents that each seeks to withhold. The OGC and the division state that they will provide some of the requested information to the requestor. The OGC claims that the information it has submitted is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code, as well as rule 192.5 of the Texas Rules of Civil Procedure. The division claims that the information it has submitted is excepted from disclosure under sections 552.103, 552.107, and 552.111.

We have considered the submitted arguments and reviewed the submitted information, a portion of which consists of a representative sample.¹

Initially, we note that the some of the information the division has submitted is subject to section 552.022 of the Government Code. Section 552.022 provides in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(12) final opinions, including concurring and dissenting opinions, and orders issued in the adjudication of cases[.]

Gov't Code § 552.022(a)(12). One of the documents the division has submitted consists of a final order issued by the commission. The division may only withhold that information if it is confidential under other law. The division raises section 552.103 of the Government Code for the information at issue. Section 552.103 is a discretionary exception to disclosure that protects the governmental body's interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); *see also* Open Records Decision No. 665 at 2 n.5 (discretionary exceptions generally). As such, section 552.103 is not other law that makes information confidential for the purposes of section 552.022. Therefore, the division may not withhold the information that is subject to section 552.022 under section 552.103. As the division raises no other arguments for that information, it must be released.

Next, the OGC states that some of the information it has submitted is subject to a previous ruling from this office. In Open Records Letter No. 2004-10974 (2004), we concluded that the information at issue is excepted from disclosure under section 552.103 of the Government Code. The OGC states that the pertinent facts and circumstances have not changed since the issuance of that ruling.² Accordingly, the OGC may continue to rely on

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.

²The four criteria for this type of "previous determination" are 1) the records or information at issue are precisely the same records or information that were previously submitted to this office pursuant to section 552.301(e)(1)(D) of the Government Code; 2) the governmental body which received the request for the records or information is the same governmental body that previously requested and received a ruling from the attorney general; 3) the attorney general's prior ruling concluded that the precise records or information are or are not excepted from disclosure under the Act; and 4) the law, facts, and circumstances on which the prior attorney general ruling was based have not changed since the issuance of the ruling. *See* Open Records Decision No. 673 (2001).

our prior ruling with respect to that information. *See* Gov't Code § 552.301(f); Open Records Decision No. 673 (2001).

We now address the information that both the OGC and the division have submitted that is not subject to section 552.022 or the prior ruling. Section 552.103 of the Government Code provides in relevant part 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 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 that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documents sufficient to establish the applicability of this exception to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate that: (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. 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.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See* Open Records Decision No. 551 at 4 (1990).

The OGC and the division state that the remaining information is related to pending litigation to which the commission is a party. They inform us that nine lawsuits concerning an enforcement action have been filed and were pending in the Travis County District Court at the time the commission received the present request for information. Based on these representations and our review, we find that litigation was pending when the commission received the present request for information. Furthermore, we find that the remaining information is related to the pending litigation. Accordingly, we conclude that section 552.103 is generally applicable to the remaining information.³

³As our ruling is dispositive for the information submitted by the OGC, we need not address their remaining arguments against disclosure.

We note, however, that the opposing party in the anticipated litigation appears to have already seen or had access to some of the remaining information submitted by the division. 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* ORD 551 at 4-5. If the opposing party has seen or had access to information that is related to 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). Therefore, the 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). Further, the applicability of section 552.103(a) ends once the litigation has concluded or is no longer anticipated. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982). Accordingly, the OGC and the division may withhold the information we have marked under section 552.103 of the Government Code. The remaining information may not be withheld on this basis.

We note that the remaining information contains personal e-mail addresses that are excepted from disclosure under section 552.137 of the Government Code.⁴ Section 552.137 provides:

- (a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.
- (c) Subsection (a) does not apply to an e-mail address:
 - (1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;
 - (2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;
 - (3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a

⁴The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

governmental body in the course of negotiating the terms of a contract or potential contract; or

(4) provided to a governmental body on a letterhead, cover-sheet, printed document, or other document made available to the public.

(d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Gov't Code § 552.137. Section 552.137 requires a governmental body to withhold an e-mail address of a member of the public that is provided for the purpose of communicating electronically with the governmental body, unless the member of the public has affirmatively consented to its release or the e-mail address is specifically excluded under section 552.137(c). The personal e-mail addresses of government employees must be withheld unless the employees have consented to release. We note that some of the personal e-mail addresses may belong to individuals who have a contractual relationship with the commission and therefore are not protected under section 552.137. However, to the extent that these individuals do not have a contractual relationship with the commission, their e-mail addresses must be withheld under section 552.137 unless they have consented to release.

In summary, the OGC may continue to rely on our ruling in Open Records Letter No. 2004-10974. The OGC and the division may withhold the information we have marked under section 552.103 of the Government Code. The division must withhold personal e-mail addresses under section 552.137, unless the owners of the e-mail addresses have consented to release. As the division raises no other arguments against disclosure for the remaining information, it must be released.

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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).

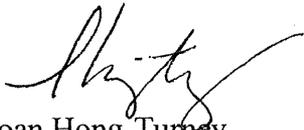
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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 challenge 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,



Loan Hong-Turney
Assistant Attorney General
Open Records Division

LH/eeg

Ref: ID# 298755

Enc. Submitted documents

c: Mr. Asher Price
Austin-American Statesman
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Austin, Texas 78704
(w/o enclosures)