ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 25, 2009

Mr. David M. Swope
Assistant County Attorney
Harris County
1019 Congress, 15th Floor
Houston, Texas 77002

OR2009-13577

Dear Mr. Swope:

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# 356479 (County Attorney File No. 09GEN1106).

Harris County's Public Health and Environmental Services Department (the "HCPHES") received a request for sampling and analysis results and related investigation reports for activities performed by HCPHES at or near a specified address. You claim the submitted information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Most of the submitted documents are subject to section 552.022(a)(1) of the Government Code, which provides:

> the following categories of information are public information and not excepted from required disclosure under [the Act] unless they are expressly confidential under other law:
>
> > (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). With the exception of the violation notice letter, the submitted documents consist of completed investigations made by HCPHES. Thus, HCPHES may only withhold this information if it is excepted from disclosure under section 552.108 or expressly

confidential under "other law." Although you assert this information is excepted under section 552.103 of the Government Code, this section is a discretionary exception to public disclosure that protects a 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); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived). As such, section 552.103 is not "other law" that makes information confidential for purposes of section 552.022. Therefore, the submitted completed investigations may not be withheld under section 552.103 of the Government Code.

We now address your arguments under section 552.103 of the Government Code for the remaining violation notice letter. Section 552.103 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 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 purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). A 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 was pending or reasonably anticipated on the date that the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Thomas v. Cornyn*, 71 S.W.3d 473, 487 (Tex. App.—Austin 2002, no pet.); *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.*); ORD 551 at 4. A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You inform this office, and provide documentation showing, that prior to receiving this request Harris County filed suit against three businesses. The submitted documentation reflects that this lawsuit alleges statutory violations that arose from the requested sampling

and analysis results and related investigation reports. Accordingly, based on your representations and our review, we agree litigation was pending as of the date the request was received. We also find that the violation notice letter relates to this pending litigation.

However, if the opposing parties to litigation have already seen or had access to information relating to the litigation through discovery or otherwise, then there is no interest in withholding such information from the public under section 552.103. *See* Open Records Decision Nos. 349 at 2 (1982), 320 at 1 (1982). In this instance, the violation notice letter is addressed to the requestor, who the submitted documents identify as a representative of Integrated MCC Solutions, LLC and Genssler Environmental Holdings, LLC. Both of these companies are defendants in the pending litigation. The letter also reflects it was sent to U.S. Oil Recovery, LP, the remaining defendant in the pending litigation. Accordingly, we conclude that the violation notice letter has been seen by all opposing parties in the pending litigation, and HCPHES may not withhold it under section 552.103 of the Government Code. *See id.* As you raise no other exceptions to disclosure, the submitted information must be released in its entirety.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

Bob Davis
Assistant Attorney General
Open Records Division

RSD/cc

Ref: ID# 356479

Enc. Submitted documents

cc: Requestor
(w/o enclosures)