



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

February 3, 2010

Mr. Kevin McCalla  
Ms. Katharine Marvin  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, Texas 78711-3087

OR2010-01679

Dear Mr. McCalla and Ms. Marvin:

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# 369392.

The Texas Commission on Environmental Quality (the "commission") received a request for a specified proposal, the award in response to the proposal, the scope of work, and the task assignment/work order. You state that the commission will make some of the requested information available to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.110 of the Government Code. You also provide documentation showing that the commission notified Shaw Environmental & Infrastructure, Inc. ("Shaw") of the request for information and of its right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received comments from Shaw. We have considered the submitted arguments and reviewed the submitted information.

Initially, you inform us that the submitted information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2005-09580 (2005). In that decision, we ruled that the information at issue was excepted from disclosure under section 552.104 of the Government Code. However, we understand that the contract award on which the previous ruling was based has since been executed. Thus, we find that

the circumstances have changed, and the commission may not continue to rely on Open Records Letter No. 2005-09580 as a previous determination. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). Accordingly, we will address your arguments against the disclosure of the submitted information.

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 section 552.103(a).

To establish litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See id.* Concrete evidence to support a claim litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. *See* Open Records Decision No. 555 (1990); *see also* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically

contemplated"). On the other hand, this office has determined if an individual publicly threatens to bring suit against a governmental body but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish litigation is reasonably anticipated. *See* Open Records Decision No. 361 (1983).

You state prior to the commission's receipt of the present request the requestor filed a notice of contract claim under chapter 2260 of the Government Code. You explain the commission reasonably anticipates litigation because chapter 2260 authorizes a contractor to request a hearing before the State Office of Administrative Hearings under the contested case provisions of the Government Code. We note such contested cases conducted under the Administrative Procedure Act, chapter 2001 of the Government Code, are considered litigation for purposes of section 552.103. *See* Open Records Decision No. 588 at 7 (1991). You inform us the claim arose from work performed on a specified work site by both the requestor and Shaw. You also indicate the information at issue relates to the anticipated litigation. Based on your arguments and our review of the submitted information, we find the commission reasonably anticipated litigation on the date it received the request for information. Furthermore, we find the submitted information is related to the anticipated litigation. The commission may withhold the submitted information under section 552.103 of the Government Code.<sup>1</sup>

We note once the information has been obtained by all parties to the pending litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information either obtained from or provided to the opposing parties in the pending litigation is not excepted from disclosure under section 552.103(a), and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

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](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

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<sup>1</sup>As our ruling is dispositive, we need not address the remaining arguments against disclosure.

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,



Tamara Wilcox  
Assistant Attorney General  
Open Records Division

TW/dls

Ref: ID# 369392

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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