



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 22, 2010

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

OR2010-16064

Dear 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# 399556 (PIR No. 10.08.20.09).

The Texas Commission on Environmental Quality (the "TCEQ") received a request for (1) all information prepared for or by the Commissioners or Executive Director of the TCEQ regarding the United States Environmental Protection Agency's (the "EPA") Endangerment and Cause or Contribute Finding for Greenhouse Gases, 74 Fed. Reg. 66,496 (Dec. 15, 2009), any information discussing national climate change legislation or Congressional efforts to limit the EPA's ability to regulate greenhouse gases under the Clean Air Act, and written records of meetings with individuals or entities requesting gubernatorial action on the EPA's Endangerment Finding; (2) all information related to any interactions between the Commissioners or Executive Director of the TCEQ and representatives of the Coalition for Responsible Regulation, Quintana Minerals Corporation, FMC Corporation, Great Northern Properties, or Natural Resource Partners; (3) all information related to the State of Texas' petition for reconsideration of the EPA's Endangerment Finding; and (4) all information related to the State of Texas' petition for review of the EPA's greenhouse gas endangerment finding under the Clean Air Act. You state the TCEQ has made available some information to the requestor. You claim the requested information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code. We have

considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, we note a page in attachment E is a court-filed document. Section 552.022(a)(17) of the Government Code provides for required public disclosure of “information that is also contained in a public court record,” unless the information is expressly confidential under other law. Gov’t Code § 552.022(a)(17). The document in attachment E is subject to section 552.022(a)(17). Although you seek to withhold that document under sections 552.103, 552.107, and 552.111 of the Government Code, these sections are discretionary exceptions to disclosure that protect a governmental body’s interests and may be waived. *See id.* § 552.007; *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 Gov’t Code § 552.103); Open Records Decision Nos. 677 at 8 (2002) (attorney work product privilege under section 552.111 may be waived), 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, sections 552.103, 552.107, and 552.111 are not other laws that make information expressly confidential for the purposes of section 552.022(a)(17). Therefore, the court document in attachment E, which we have marked, may not be withheld under sections 552.103, 552.107, and 552.111. However, the Texas Supreme Court has held the Texas Rules of Evidence and the Texas Rules of Civil Procedure are “other law” within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Accordingly, we will consider the applicability of the attorney-client privilege under Texas Rule of Evidence 503 and the work product privilege under Texas Rules of Civil Procedure 192.5. We will also address your arguments for the remainder of the submitted information not subject to section 552.022 of the Government Code.

Rule 503 of the Texas Rules of Evidence encompasses the attorney-client privilege and provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

- (A) between the client or a representative of the client and the client’s lawyer or a representative of the lawyer;
- (B) between the lawyer and the lawyer’s representative;

¹We assume the “representative sample” of information 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 those records contain substantially different types of information than those submitted to this office.

(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5). Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show the communication is confidential by explaining it was not intended to be disclosed to third persons and it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You state the submitted court-filed document was communicated between attorneys and employees of the TCEQ for the purposes of facilitating the rendition of professional legal services to the TCEQ. You indicate this communication was made in confidence and has maintained its confidentiality. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the court-filed document in attachment E. Accordingly, the TCEQ may withhold the court-filed document we have marked in attachment E under Texas Rule of Evidence 503.² We will now address your arguments for the remainder of the submitted information.

Section 552.103 of the Government Code provides:

(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

²Because Texas Rule of Evidence 503 is dispositive, we need not address your remaining argument against disclosure of this information.

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). A governmental body that raises section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information at issue. To meet this burden, the governmental body must demonstrate (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).*

You state the submitted information relates to a challenge of the EPA's endangerment findings. The State of Texas, on behalf of the TCEQ, filed a petition for review of the findings in the United States Court of Appeals for the D.C. Circuit on February 16, 2010 and subsequently filed a motion to stay on September 15, 2010. Based on your representations and our review, we find you have demonstrated litigation was pending when the TCEQ received this request for information. Further, you state all of the documents responsive to the request were prepared in response to either the proposed endangerment finding or the final endangerment finding. Therefore, we find the remainder of the submitted information consists of documents relating to the pending litigation. Thus, we conclude the TCEQ may withhold the remainder of the submitted information under section 552.103 of the Government Code.³

We note, however, once the information at issue has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to the information. *See Open Records Decision Nos. 349 (1982), 320 (1982).* Thus, any information at issue that has either been obtained from or provided to all opposing parties in the 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

³Because section 552.103 of the Government Code is dispositive, we need not address your remaining arguments against disclosure of the remainder of the submitted information.

concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

In summary, the TCEQ may withhold the court-filed document in attachment E, which we have marked, under Texas Rule of Evidence 503. The remainder of the submitted information may be withheld under section 552.103 of the Government Code.

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,



Sean Nottingham
Assistant Attorney General
Open Records Division

SN/tp

Ref: ID# 399556

Enc. Submitted documents

c: Requestor
(w/o enclosures)