



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 13, 2010

Ms. Kathleen C. Decker
Litigation Division
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

OR2010-18622

Dear Ms. Decker:

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# 402758 (TCEQ PIR No. 10.09.22.06).

The Texas Commission on Environmental Quality (the "commission") received a request for all previous, current, and future documentation or transactions pertaining to docket numbers 2010-0365-AIR-E and 2010-1519-AIR-E. You state you have released some responsive information to the requestor. You claim that 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, you argue the commission is not required to comply with the requestor's request for an additional five day notice of "when public comment is requested or available or complainant testimony is an option." You ask our office to determine whether the commission is required to give the requestor "special notice of opportunities to comment." We note that this question relates to the Texas Open Meetings Act. *Id.* § 551.001 *et seq.*

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.

This inquiry is thus outside the scope of this office's ruling process under the Act. Accordingly, we do not address the commission's open meetings question.

Next, we address your argument that the commission is not required to provide the requestor with any future documentation pertaining to docket numbers 2010-0365-AIR-E and 2010-1519-AIR-E on a continuous basis or provide the requestor with "periodic updates to the requested information." We agree that in responding to a request for information under the Act, a governmental body is not required to answer factual questions, conduct legal research, or disclose information that did not exist at the time the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex.Civ.App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 563 at 8 (1990), 555 at 1-2 (1990). Accordingly, the commission need not provide in response to the instant request for information any information pertaining to docket numbers 2010-0365-AIR-E and 2010-1519-AIR-E that is created after the date of the present request.

Next, we note a portion of the submitted information was created after the request was received. This information, which we have marked, is not responsive to the instant request for information. This ruling does not address the public availability of non-responsive information, and the commission is not required to release non-responsive information in response to this request.

The commission asserts the requested information is excepted from disclosure under section 552.103 of the Government Code, which 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 of the governmental body's receipt of the request, and (2) the information at issue is related to that litigation. *University of Tex. Law*

Sch. v. Texas 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). For purposes of section 552.103(a), this office considers a contested case under the Texas Administrative Procedure Act (the “APA”), chapter 2001 of the Government Code, to constitute “litigation.” See Open Records Decision No. 588 (1991).

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. See Open Records Decision No. 452 at 4 (1986). When the governmental body is the prospective plaintiff in litigation, the evidence of anticipated litigation must at least reflect that litigation involving a specific matter is “realistically contemplated.” See Open Records Decision No. 518 at 5 (1989); see also Attorney General Opinion MW-575 (1982) (investigatory file may be withheld if governmental body’s attorney determines that it should be withheld pursuant to Gov’t Code § 552.103 and that litigation is “reasonably likely to result”).

The commission states docket number 2010-0365-AIR-E has been referred to the commission’s Litigation Division and a petition has been filed. The commission further states that “although an agreed order is pending commissioner approval for this case, the case is not closed until the order is approved,” and that “the agreed order can also be withdrawn prior to approval.” Thus, we find that litigation was pending for docket number 2010-0365-AIR-E on the date the commission received the request for information. The commission further asserts that docket number 2010-1519-AIR-E was referred to the commission’s Enforcement Division in order to formally pursue an enforcement action and that due to the nature of the violations, the commission is considering a direct referral to the Office of the Attorney General for representation in a civil action related to docket number 2010-1519-AIR-E. Based on this representation and our review, we determine that litigation was reasonably anticipated for docket number 2010-1519-AIR-E on the date the commission received the request for information. Furthermore, we find that the information at issue pertains to the incidents that form the basis of the pending or anticipated litigation in both docket numbers 2010-1519-AIR-E and 2010-1519-AIR-E for purposes of section 552.103(a). Accordingly, the commission may withhold the requested information pursuant to section 552.103 of the Government Code.²

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

²As our ruling is dispositive, we do not address the division’s remaining arguments against disclosure of this information.

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, 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,



Vanessa Burgess
Assistant Attorney General
Open Records Division

VB/dls

Ref: ID# 402758

Enc. Submitted documents

c: Requestor
(w/o enclosures)