



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 30, 2011

Mr. Chris Schuchart
Attorney at Law
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P.O. Box 1569
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OR2011-14183

Dear Mr. Schuchart:

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# 431527.

The City of La Coste (the "city"), which you represent, received a request for four categories of information for a specified time period: (1) any water quality sampling and reports created or produced by the city or "any entity contracted by the city" regarding three specified locations; (2) any complaints or written correspondence to the city or "any entity contracted by the city" regarding the three specified locations; (3) information regarding the water quality of a specified location; (4) and water quality sampling results for a specified address. You claim that some of the requested information is not subject to the Act. You claim that the remaining requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered your arguments and reviewed the submitted representative sample of information. We have also received and considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit written comments regarding why information should or should not be released).

Initially, we note you have not submitted any information pertaining to sampling and reports created or produced by an entity with which the city contracts, or correspondence to an entity with which the city contracts. You argue this requested information is not subject to the Act. The Act is applicable only to "public information." *See id.* §§ 552.002, .021. Section 552.002(a) defines "public information" as:

[I]nformation that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

(1) by a governmental body; or

(2) for a governmental body and the governmental body owns the information or has a right of access to it.

Id. § 552.002(a). Thus, virtually all of the information in a governmental body's physical possession constitutes public information and, thus, is subject to the Act. *Id.* § 552.002(a)(1); *see* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). The Act does not require a governmental body to release information if the governmental body that receives the request has neither possession of the information nor a right of access to it. *See* Open Records Decision Nos. 534 at 203 (1989), 518 (1989), 445 at 2 (1986). However, the Act is applicable to information that a governmental body does not physically possess if the information is collected, assembled, or maintained for a governmental body, and the governmental body owns the information or has a right of access to it. Gov't Code § 552.002(a)(2); *see also* Open Records Decision No. 462 at 4 (1987) (Act applies to information collected or maintained by a consultant if the information relates to a governmental body's official duties or business, the consultant acts as agent of the governmental body in collecting the information, and the governmental body has or is entitled to access to the information).

The requestor submits comments to our office and argues this requested information is subject to the Act because the third party contractor "operates the facility [at the location in question] on behalf of the [c]ity[.]" You contend that, because categories one and two of the request for information, in part, seek information that was created or produced by a third party, the city does not possess this information. You generally state the third party contractors "are not agents, representatives, or consultants" for the city, and did not "collect[], assemble[], or maintain[] information for, on behalf of or under the direction of the [c]ity." Furthermore, you state the city does not have control over these contractors' "methods and details of work." We note this office has said that whether a party to a contract with a governmental body is an independent contractor and/or agent is not dispositive of whether information held by the party is subject to the Act. *See* ORD 462 at 4-5. Accordingly, we find you have failed to demonstrate how the requested information created by a third party operating the facility at issue on behalf of the city is not subject to the Act. Because this information is subject to the Act, it must be released unless it falls within the scope of an exception to disclosure. *See* Gov't Code §§ 552.301, .302. However, you do not submit information responsive to these portions of categories one and two of the request. Furthermore, we note the submitted representative sample of information is not representative of the information sought in either of these portions of the request. As such, to the extent this information exists, it must be released. *See id.*

We also note you have not submitted any written correspondence to the city requested in category two of the request. Although you state you submitted a representative sample of

information, we find the submitted information is not representative of the information sought in this portion of the request. Please be advised this letter ruling applies to the types of information you have submitted for our review. Therefore, this opinion does not reach, and therefore does not authorize, the withholding of any other requested information to the extent that the other information is substantially different than that submitted to this office. *See id.* § 552.302 (where request for attorney general decision does not comply with requirements of section 552.301, information at issue is presumed to be public). Accordingly, because you have not submitted information responsive to this portion of the request for our review, we assume you have released it. *See id.* §§ 552.301(e)(1)(D), .302. If the city has not released this information, the city must do so at this time. *See id.*; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to the requested information, it must release the information as soon as possible).

We next note some of the submitted information is subject to section 552.022 of the Government Code, which provides in pertinent part:

(a) [T]he following categories of information are public information and not excepted from required disclosure under this chapter 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). The information at issue contains a completed Discharge Monitoring Report that falls within the purview of section 552.022(a)(1). The city may only withhold the information subject to section 552.022(a)(1) if it is excepted from disclosure under section 552.108 of the Government Code or is expressly made confidential under other law. *See id.* Although you raise section 552.103 of the Government Code, this section is discretionary in nature and thus may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 439, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.103 does not constitute other law that makes information expressly confidential for the purposes of section 552.022. Therefore, the city may not withhold the submitted report, which we have marked, under section 552.103. As you raise no further exceptions against the disclosure of this information, it must be released. We will consider your argument under section 552.103 for the remaining information not subject to section 552.022.

You claim that the remaining information at issue is protected under section 552.103 of the Government Code. Section 552.103 of the Government Code provides in part:

(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). A governmental body that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation 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 the governmental body received the request for information, and (2) the information at issue is related to the pending or anticipated litigation. *See University 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 from disclosure under section 552.103(a). *See* ORD 551 at 4.

You state, and provide supporting documentation representing, the requestor's client is the plaintiff in a pending lawsuit styled *Kunze v. Texas Commission on Environmental Quality*. The lawsuit was filed against the Texas Commission on Environmental Quality ("TCEQ") seeking judicial review of TCEQ's grant of the renewal of the city's Texas Pollutant Discharge Elimination System Permit for the wastewater treatment facility at issue. You further state, and provide supporting documentation representing, the city intervened in this lawsuit on December 3, 2010. Thus, we agree the city was a party to this pending litigation on the date the city received the present request for information.

The requestor contends the requested information cannot be withheld under section 552.103 because it is not directly related to the pending litigation. *See* Open Records Decision No. 429 at 3 (1983) (stating statutory predecessor to section 552.103 applies to only information clearly relevant to pending litigation). The requestor argues the requested information is not information pertaining to the specific act at issue in the pending litigation and, thus, is not related to the litigation. However, the Third Court of Appeals stated that, for purposes of section 552.103, the phrase "related to" is construed according to its common usage and is therefore broadly defined to include information "'pertaining to,' 'associated with,' or 'connected with'" contemplated litigation. *University of Tex. Law Sch.*, 958 S.W.2d at 483. The court further opined that, "[i]nformation can be *related to* litigation without being *relevant* to the substantive issues in the litigation." *Id.* The information at issue pertains to the water quality at specified locations in a creek and at the wastewater treatment plant at issue in the pending litigation. As such, we find the information at issue

is related to the pending litigation, and the city may withhold the submitted information that is not subject to section 552.022 under section 552.103 of the Government Code.

We note that 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. Open Records Decision No. 349 at 2 (1982). We also note that the applicability of section 552.103(a) ends when the litigation is concluded. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982). In summary, with the exception of the submitted Discharge Monitoring Report subject to section 552.022(a)(1) of the Government Code, the city may withhold the submitted information under section 552.103 of the Government Code. The city must release the remaining information.

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,



Misty Haberer Barham
Assistant Attorney General
Open Records Division

MHB/akg

Ref: ID# 431527

Enc. Submitted documents

c: Requestor
(w/o enclosures)