



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 26, 2012

Ms. Rebecca Brewer
Abernathy, Roeder, Boyd, & Joplin, P.C.
P.O. Box 1210
McKinney, Texas 75070-1210

OR2012-01310

Dear Ms. Brewer:

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# 443406 (Frisco Request No. 2011-0858).

The City of Frisco (the "city"), which you represent, received a request for Exide Technologies's ("Exide") application for renewal of its hazardous waste permit. You claim the requested 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.

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 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 that (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).*

To establish that litigation is reasonably anticipated for the purposes of section 552.103, a governmental body must provide this office with “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” *See Open Records Decision No. 452 at 4 (1986).* In the context of anticipated litigation in which the governmental body is the prospective plaintiff, the concrete evidence must at least reflect litigation is “realistically contemplated.” *See Open Records Decision No. 518 at 5 (1989); see also Attorney General Opinion MW-575 (1982)* (finding investigatory file may be withheld if governmental body attorney determines it should be withheld pursuant to Gov't Code § 552.103 and that litigation is “reasonably likely to result”). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See ORD 452 at 4.*

You explain the city is involved in a dispute with Exide concerning Exide's emissions from its battery recycling plant. You state, and have provided documentation demonstrating, the Texas Commission on Environmental Quality, in cooperation with the city, is in the process of entering into an agreed order requiring Exide to control emissions from its operations. You inform us the order will incorporate federal regulations which would authorize a private lawsuit to enforce Exide's compliance. You state the city may file suit to ensure Exide's compliance. Based on your representations and documentation, our review of the submitted information, and the totality of the circumstances, we find the city reasonably anticipated on the date of its receipt of this request for information.

However, we note 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 ORD 551 at 4-5.* If the opposing party has seen or had access to information relating to pending or anticipated litigation, through discovery or otherwise, then there is no interest in withholding such information from public disclosure under section 552.103. *See Open Records Decision Nos. 349 (1982), 320 (1982).* In this instance, the opposing party provided the information at issue to the city. Thus, the opposing party has seen or had access to the submitted information, and the city may not withhold it under section 552.103. As you raise no other exceptions, the submitted information must be released.

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,

A handwritten signature in cursive script that reads "Jennifer Luttrall".

Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/dls

Ref: ID# 443406

Enc. Submitted documents

c: Requestor
(w/o enclosures)