



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 23, 2013

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

OR2013-12661

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# 493967 (TCEQ PIR No. 13-12071).

The Texas Commission on Environmental Quality (the "commission") received a request for correspondence and documents pertaining to the San Jacinto River Waste Pits (the "Waste Pits"), all documents pertaining to a specified lawsuit, all aerial photographs of the Waste Pits, and documents regarding requests for information pertaining to the Waste Pits.¹ You state the commission will release some of the requested information. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code. You also state release of some of the submitted information may implicate the proprietary interests of a third party. Accordingly, you state, and provide documentation showing, you notified ALS Environmental of the request for information and of its right to submit arguments to this office as to why the submitted

¹We note the commission received clarification regarding this request. See Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information); see *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

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 ALS Environmental. We have considered the submitted arguments and reviewed the submitted representative sample of information.²

Initially, we note that in correspondence to our office, ALS Environmental states it does not object to release of any of its information. Accordingly, the commission may not withhold any of the submitted information on the basis of any proprietary interest ALS Environmental may have in it.

Next, we note some of the submitted information consists of a completed report made by or for commission, which is subject to section 552.022(a)(1) of the Government Code. Pursuant to section 552.022(a)(1), completed investigations, reports, and evaluations are expressly public unless they are either excepted under section 552.108 of the Government Code or confidential under the Act or other law. Gov't Code § 552.022(a)(1). Although you raise section 552.103 of the Government Code, section 552.103 is a discretionary exception to disclosure and does not make information confidential under the Act. *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 section 552.103); Open Records Decision Nos. 665 at 2 n.5 (discretionary exceptions generally), 663 (1999) (governmental body may waive section 552.103). As such, section 552.103 does not make information confidential for the purposes of section 552.022. Therefore, the commission may not withhold the completed report under section 552.103 of the Government Code. As you raise no further exceptions for the completed report, which we have marked, it must be released.

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.

...

²We assume 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.

(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 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 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 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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You assert the remaining information is related to pending litigation to which the commission is a party. You state, and submit documentation demonstrating, a lawsuit styled *Harris County, Texas and the State of Texas, acting by and through the Texas Commission on Environmental Quality v. International Paper, McGinnes Industrial Maintenance Corp., Waste Management, Inc., and Waste Management of Texas, Inc.*, Cause No. 2011-76724, was pending in the 295th Judicial District Court, Harris County, Texas on the date the commission received the request for information. You further state the remaining information is related to the pending litigation because it pertains to the underlying claims in the lawsuit. Upon review of your arguments and the information at issue, we find the remaining information relates to litigation that was pending when the commission received this request for information. Accordingly, the commission may withhold the remaining information under section 552.103 of the Government Code.³

We note once 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 that has either been obtained from or provided to the opposing party in the pending litigation is not excepted from disclosure under section 552.103(a), and it 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).

In summary, the commission must release the completed report we have marked under section 552.022(a)(1) of the Government Code. The commission may withhold the remaining information under section 552.103 of the Government Code.

³As our ruling on this information is dispositive, we need not address your remaining arguments against disclosure.

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/som

Ref: ID# 493967

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Ms. Rebecca Pierrot
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(w/o enclosures)