



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 19, 2013

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

OR2013-20204

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# 506223 (PIR No. 13-13507).

The Texas Commission on Environmental Quality (the "commission") received a request for information relating to work and activities involving a specified site, two specified Voluntary Cleanup Programs ("VCP"), and Exide Technologies ("Exide") for a specified time period. You state you have released some information responsive to the request. You claim the remaining 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.<sup>1</sup>

Section 552.103 of the Government Code provides in relevant part 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.

...

---

<sup>1</sup>We 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.

(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 claiming this exception bears the burden of providing relevant facts and documents to demonstrate the applicability of the exception. The test for meeting this burden is a showing that (1) litigation is 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). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

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). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* In the context of anticipated litigation in which the governmental body is the prospective plaintiff, the concrete evidence must at least reflect that litigation is “realistically contemplated.” *See* Open Records Decision No. 518 at 5 (1989); *see also* Attorney General Opinion MW-575 (1982) (finding that investigatory file may be withheld from disclosure if governmental body attorney determines that it should be withheld pursuant to section 552.103 and that litigation is “reasonably likely to result”).

You claim the submitted information is excepted from public disclosure under section 552.103 of the Government Code. You state the information concerns a site “believed to be” or “likely” contaminated with hazardous substances within the commission’s enforcement jurisdiction. You further state the commission continues to investigate the site at issue and an enforcement action is currently under development. You contend that, although Exide has agreed to voluntarily address the environmental issues through participation in the VCP, Exide could terminate its participation at any time. In that instance, you assert the commission could pursue enforcement litigation, state-funded remediation, and cost recovery litigation. You explain, if the commission were required to expend state funds to remediate the site, the commission would be required to pursue a cost recovery action against the responsible parties under section 361.197 of the Health and Safety Code. *See* Health and Safety Code § 361.197 (requiring the commission to file cost recovery actions in specified circumstances).

Additionally, you inform this office that Exide has filed for Chapter 11 bankruptcy protection. You state the commission has sought legal representation from the Office of the Attorney General (the “OAG”) in relation to Exide’s bankruptcy proceeding. You state, and provide documentation showing, the OAG has filed a Notice of Appearance and Request for

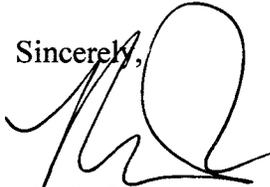
Service of Papers on behalf of the commission with the Delaware District of the United States Bankruptcy Court. Based on your representations and our review, we determine the commission reasonably anticipated and was involved in pending litigation when it received the request for information. Furthermore, you state, and we agree, the information at issue is related to the litigation. Accordingly, we find the commission may withhold the submitted information under section 552.103 of the Government Code.<sup>2</sup>

We note 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). Further, the applicability of section 552.103(a) ends once the litigation has concluded or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); *see also* 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.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](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,



Nneka Kanu  
Assistant Attorney General  
Open Records Division

NK/bhf

Ref: ID# 506223

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

---

<sup>2</sup>As our ruling is dispositive for this information, we need not address your remaining arguments against disclosure.