



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 5, 2013

Mr. Robert Martinez
Director
Environmental Law Division
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

OR2013-21129

Dear Mr. Martinez:

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# 507600 (TCEQ PIR No. 13634).

The Texas Commission on Environmental Quality (the "commission") received a request for the commission's complete file for a specified Industrial and Hazardous Waste Permit for Exide Technologies, Inc. ("Exide"). You state the commission has released some of the requested information. You claim some of the submitted 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 state you have marked portions of the submitted information that are not responsive to the instant request because they do not pertain to the specified permit. This

¹This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling 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 Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

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.

Next, we note some of the requested information may have been the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2013-10311 (2013). In Open Records Letter No. 2013-10311, we ruled the commission: (1) may withhold certain information under Texas Rule of Evidence 503; (2) may withhold certain information under sections 552.107(1) and 552.111 of the Government Code; (3) must withhold certain information under section 552.137 of the Government Code; and (4) must release the remaining responsive information. You now raise sections 552.103, 552.107, and 552.111 of the Government Code for some of the responsive information that may have been at issue in the previous ruling.

Section 552.007 of the Government Code provides if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential under law. *See* Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Accordingly, pursuant to section 552.007, the commission may not now withhold any previously released information unless its release is expressly prohibited by law or the information is confidential under law. Although you raise sections 552.103, 552.107, and 552.111 for some of the responsive information, these sections do not prohibit the release of information or make information confidential. *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 Nos. 677 at 10 (2002) (attorney work product privilege under section 552.111 may be waived), 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 470 at 7 (1987) (governmental body may waive statutory predecessor to section 552.111 deliberative process); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Thus, to the extent any portion of the responsive information was previously released in accordance with Open Records Letter No. 2013-10311, the commission may not now withhold such information under section 552.103, section 552.107, or section 552.111. As we have no indication the law, facts, and circumstances on which Open Records Letter No. 2013-10311 was based have changed, the commission must continue to rely on that ruling as a previous determination and withhold or release any identical responsive information in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). To the extent the responsive information

is not identical to information that was at issue in Open Records Letter No. 2013-10311, we will consider your arguments under sections 552.103, 552.107, and 552.111.

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.

...

(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).

You explain 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, before the date of the present request for information, the OAG 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 was involved in pending litigation when it received the present 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 remaining responsive information under section 552.103 of the Government Code.²

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

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. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

In summary, the commission must continue to rely on Open Records Letter No. 2013-10311 as a previous determination and withhold or release any identical responsive information in accordance with that ruling. The commission may withhold the remaining responsive information under section 552.103 of the Government Code.

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,



Lindsay E. Hale
Assistant Attorney General
Open Records Division

LEH/tch

Ref: ID# 507600

Enc. Submitted documents

c: Requestor
(w/o enclosures)