



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

October 29, 2015

Ms. Kasey Feldman-Thomason
General Law Attorney
Public Utility Commission of Texas
P.O. Box 13326
Austin, Texas 78711

OR2015-22715

Dear Ms. Feldman-Thomason:

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# 585173 (PUC ID# 2015-07-042).

The Public Utility Commission of Texas (the "commission") received a request for certain e-mail communications related to a specified federal rule.¹ You state you have released some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.111, and 552.137 of the Government Code.² Additionally, you state release of some of the submitted information

¹We note the commission sought and received clarification of the information requested. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *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).

²Although you also raise section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5, this office has concluded section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Further, we note the proper exceptions to raise when asserting the attorney-client privilege and the attorney work product privilege in this instance are sections 552.107 and 552.111 of the Government Code, respectively. *See* Open Records Decision Nos. 676 at 1-2 (2002), 677 (2002).

may implicate the proprietary interests of several third parties.³ Accordingly, you state you notified the third parties of the request for information and of their rights to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d), .304 (interested party may submit comments stating why information should or should not be released); *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 TCEQ. We have considered the submitted arguments and reviewed the submitted representative sample of information.

Section 552.103 of the Government Code provides, in relevant part, the following:

(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 claiming section 552.103 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 is pending or reasonably anticipated on the date the governmental body received the request, 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, orig. proceeding); *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).

³The notified third parties are: Electric Reliability Council of Texas; Texas Commission on Environmental Quality ("TCEQ"); Tetra Tech, Frontier Associates; CPS Energy; Midcontinent Independent System Operator, Inc.; Energy Future Holdings; Jackson Walker, LLP; and The University of Texas' Bureau of Economic Geology's Center for Energy Economics.

To establish litigation is reasonably anticipated, a governmental body must provide this office “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” 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 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”). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. See ORD 452 at 4.

You inform us the United States Environmental Protection Agency (the “EPA”) issued a proposed rule relating to emissions guidelines. In response to the proposed rule, you inform us the commission submitted one hundred thirteen pages of comments to the EPA “strongly denouncing the proposed rule.” You state the commission anticipated a substantial chance of litigation at the time the initial request was received because “the proposed rule was so problematic for [the commission] and the State of Texas.” You further inform us the final rule was released before the date of the clarified request and that, “although modified from the proposed rule, [the final rule] is still problematic for the [commission] and the State of Texas,” and that the commission considered there to be a substantial chance of litigation at the time of the clarified request. Based on your representations and our review, we find the commission reasonably anticipated litigation when it received the clarified request for information, and the information at issue relates to the anticipated litigation. Therefore, we conclude the commission may withhold the submitted information under section 552.103 of the Government Code.⁴

We note, however, once information has been obtained by all parties to the anticipated 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 anticipated 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 when the litigation has concluded. See Attorney General Opinion MW-575 at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

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.

⁴As our ruling is dispositive, we do not address the remaining arguments against disclosure of this information.

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,



Joseph Behnke
Assistant Attorney General
Open Records Division

JB/som

Ref: ID# 585173

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Bill Magness
ERCOT
7620 Metro Center Drive
Austin, Texas 78744
(w/o enclosures)

Ms. Chad Allen
MISO
3850 North Causeway Boulevard
Two Lakeway, Suite 1040
Metairie, Louisiana 70002
(w/o enclosures)

Mr. Michael J. Nasi
Jackson Walker, LLP
Partner, Environmental
& Legislative Practice Group
100 Congress Avenue, Suite 1100
Austin, Texas 78701
(w/o enclosures)

Mr. Robert Martinez
Director
Environmental Law Division
Texas Commission on
Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087
(w/o enclosures)

Mr. Lark Lee
Tetra Tech
c/o Kasey Feldman-Thomason
General Law Attorney
Public Utility Commission of Texas
P.O. Box 13326
Austin, Texas 78711
(w/o enclosures)

Mr. Keenan Ogelman
CPS Energy
c/o Kasey Feldman-Thomason
General Law Attorney
Public Utility Commission of Texas
P.O. Box 13326
Austin, Texas 78711
(w/o enclosures)

Ms. Vicki Oswalt
Energy Future Holdings
c/o Kasey Feldman-Thomason
General Law Attorney
Public Utility Commission of Texas
P.O. Box 13326
Austin, Texas 78711
(w/o enclosures)

Mr. Jay Zarnikau
Frontier Associates
c/o Kasey Feldman-Thomason
General Law Attorney
Public Utility Commission of Texas
P.O. Box 13326
Austin, Texas 78711
(w/o enclosures)

Ms. Michelle Foss
Chief Energy Economist
& Program Manager
c/o Kasey Feldman-Thomason
General Law Attorney
Public Utility Commission of Texas
P.O. Box 13326
Austin, Texas 78711
(w/o enclosures)