



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 23, 2017

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

OR2017-11182

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# 658857 (PIR No. 17-31316).

The Texas Commission on Environmental Quality (the "commission") received a request for information pertaining to complaints and investigations related to a specified city during a specified time period.¹ You state the commission has released some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.108, 552.110, 552.111, 552.117, 552.136, 552.137, and 552.139 of the Government Code and privileged under rule 503 of the Texas Rules of Evidence. You also state release of this information may implicate the proprietary interests of Ingevity Corporation ("Ingevity"). Accordingly, you state, and provide documentation supporting, you notified Ingevity of the request for information and of its right to submit arguments to this office as to why the information at issue should not be released. *See Gov't*

¹ You state the commission sought and received a clarification of the information requested. *See Gov't Code* § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request); *see also* Open Records Decision No. 31 (1974) (when presented with broad requests for information rather than for specific records, governmental body may advise requestor of types of information available so that request may be properly narrowed).

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 Ingevity. We have reviewed the submitted representative samples of information and considered the submitted arguments.²

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 has the burden of providing relevant facts and documents to show 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 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, 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 from disclosure 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 litigation is reasonably anticipated, the governmental body must furnish "concrete evidence showing that the claim litigation may ensue is more than mere conjecture." *Id.* In the context of anticipated litigation in which the governmental body is the prospective plaintiff,

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 those records contain substantially different types of information than that submitted to this office.

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 section 552.103 and litigation is “reasonably likely to result”).

You argue Attachments F, H, I, J, J-1, K, and L are protected by section 552.103 of the Government Code. You state the commission regulates public water systems in the State of Texas. You state the information at issue relates to the commission’s pending investigation of a “backflow” incident involving the City of Corpus Christi’s drinking water. You inform us if the investigation concludes environmental violations occurred, the violations may be referred to the commission’s Enforcement Division to formally pursue enforcement action. Based on your representations and our review, we find the commission reasonably anticipated litigation when it received the instant request. Further, you inform us the information at issue is related to the subject matter of the anticipated litigation. Therefore, we conclude the commission may withhold Attachments F, H, I, J, J-1, K, and L under section 552.103 of the Government Code.³

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing parties in the 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).

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. You raise section 552.101 in conjunction with the common-law informer’s privilege, which Texas courts have long recognized. See *Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969). The informer’s privilege protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority. See Open Records Decision No. 208 at 1-2 (1978). The informer’s privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to “administrative officials having a duty of inspection or of law enforcement within their particular spheres.” Open Records Decision No. 279 at 1-2 (1981) (citing 8 John H. Wigmore, *Evidence in Trials at Common Law*, § 2374, at 767 (J. McNaughton Rev. Ed. 1961)). The report must be of a violation of a criminal or civil statute. See Open Records Decision Nos. 582 at 2 (1990), 515 at 4 (1988). However, witnesses who provide information in the course of an investigation but do not

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

make a report of the violation are not informants for the purposes of claiming the informer's privilege. The privilege excepts the informer's statement only to the extent necessary to protect that informer's identity. Open Records Decision No. 549 at 5 (1990). We note the informer's privilege does not apply where the informant's identity is known to the individual who is the subject of the complaint. *See* ORD 208 at 1-2.

You state the information you have marked reveals the identity of complainants who reported possible violations of the Texas Health & Safety Code and Texas Water Code to the commission. We understand the commission has the authority to enforce the provisions of relevant code provisions. You also state violations of the relevant code provisions carry civil penalties and are punishable by fines. Based on your representations and our review, we find the commission may withhold portions of the information you marked and the additional information we have marked under section 552.101 of the Government Code in conjunction with the common-law informer's privilege. Upon review, however, we find the remaining information at issue, which we have marked for release, does not identify individuals who made reports of violations of criminal or civil law to the commission for purposes of the informer's privilege. Accordingly, the commission may not withhold any portion of the remaining information at issue under section 552.101 of the Government Code on the basis of the common-law informer's privilege.

Section 552.108(a)(1) of the Government Code excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]" Gov't Code § 552.108(a)(1). A governmental body claiming section 552.108(a)(1) must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). In this instance, you state attachments ECU-2 and ECU-3 relate to an ongoing criminal investigation by the commission's Environmental Crimes Unit, and release of the information would interfere with the investigation of the alleged criminal conduct. This office has previously determined that the Environmental Crimes Unit of the commission is a law enforcement agency for purposes of section 552.108. Based on your representation and our review, we find release of attachments ECU-2 and ECU-3 would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests that are present in active cases), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Thus, the commission may withhold Attachments ECU-2 and ECU-3 under section 552.108(a)(1) of the Government Code.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee or official of a governmental body who requests this information be kept confidential under section 552.024 of the Government

Code. *See* Gov't Code § 552.117(a)(1). Section 552.117(a)(1) also applies to the personal cellular telephone number of a current or former official or employee of a governmental body, provided the cellular telephone service is not paid by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former employee or official who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee or official who did not timely request under section 552.024 the information be kept confidential. Therefore, to the extent the employees whose information is at issue timely requested confidentiality under section 552.024 of the Government Code, the commission must withhold the information you marked and the additional information we have marked under section 552.117(a)(1) of the Government Code; however, the commission may only withhold the marked cellular telephone numbers if the cellular telephone service is not paid for by a governmental body. Conversely, to the extent the employees whose information is at issue did not timely request confidentiality under section 552.024, the commission may not withhold the marked information under section 552.117(a)(1).

Section 552.136(b) of the Government Code provides, "[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136(b); *see id.* § 552.136(a) (defining "access device"). Upon review, we agree the commission must withhold the conference call telephone numbers and access codes you have marked under section 552.136 of the Government Code.

Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). We note section 552.137(c) provides section 552.137(a) does not apply to an e-mail address provided to a governmental body by a person who has or seeks a contractual relationship with the governmental body or by the contractor's agent, an institutional e-mail address, an Internet website address, the general e-mail address of a business, or an e-mail address a governmental entity maintains for one of its officials or employees. *Id.* § 552.137(c). Upon review, we find some of the e-mail addresses you have marked do not consist of a personal e-mail address for purposes of section 552.137 or are subject to subsection (c). Thus, these e-mail addresses may not be withheld under section 552.137. However, we find the remaining e-mail addresses, which we have marked, are not a type specifically excluded by section 552.137(c). Accordingly, the commission

must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure.

Section 552.139(a) of the Government Code provides:

(a) Information is excepted from [required public disclosure] if it is information that relates to computer network security, to restricted information under Section 2059.055 [of the Government Code], or to the design, operation, or defense of a computer network.

Gov't Code § 552.139(a). You explain the information you have marked relates to a secure, non-public site, as well as the security information used to access the site. Based on your representations, we find the information you have marked is related to computer network security and the design, operation, or defense of a computer network. Thus, the commission must withhold the information you have marked under section 552.139(a).

In summary, the commission may withhold Attachments F, H, I, J, J-1, K, and L under section 552.103 of the Government Code. With the exception of the information we have marked for release, the commission may withhold the information you have marked and the additional information we have marked under section 552.101 of the Government Code in conjunction with the common-law informer's privilege. The commission may withhold Attachments ECU-2 and ECU-3 under section 552.108(a)(1) of the Government Code. To the extent the employees whose information is at issue timely requested confidentiality under section 552.024 of the Government Code, the commission must withhold the information you marked and the additional information we have marked under section 552.117(a)(1) of the Government Code; however, the commission may only withhold the marked cellular telephone numbers if the cellular telephone service is not paid for by a governmental body. The commission must withhold the conference call telephone numbers and access codes you have marked under section 552.136 of the Government Code. The commission must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure. The commission must withhold the information you have marked under section 552.139(a). The commission must release the remaining information.

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,

A handwritten signature in black ink, appearing to read 'KH', is positioned above the typed name.

Kieran Hillis
Assistant Attorney General
Open Records Division

KH/sb

Ref: ID# 658857

Enc. Submitted documents

c: Requestor
(w/o enclosures)

1 Third Party
(w/o enclosures)