



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

June 28, 2017

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

OR2017-14480

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# 664200 (PIR# 17-32871).

The Texas Commission on Environmental Quality (the "commission") received a request for information, including communications, pertaining to specified regulations of the United States Environmental Protection Agency (the "EPA") during a specified time period. You state the commission will withhold certain information under section 552.136(c) of the Government Code and pursuant to Open Records Decision No. 684 (2009).<sup>1</sup> You also state the commission will release some information. You claim 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 information. We have also considered comments submitted by a lawyer for the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

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<sup>1</sup>Section 552.136(c) of the Government Code permits a governmental body to withhold the information described in section 552.136(b) without the necessity of seeking a decision from this office. *See* Gov't Code § 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). *See id.* § 552.136(d), (e). Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general opinion.

Initially, we must address the requestor's claim the commission failed to comply with the procedural requirements a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. *See id.* § 552.301. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. *See id.* § 552.301(b). Additionally, pursuant to section 552.301(e), a governmental body must submit to this office within fifteen business days of receiving an open records request (1) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See id.* § 552.301(e). In this instance, you state the commission received the request for information on April 7, 2017. You inform us the commission operated on a skeleton crew on April 14, 2017, and April 21, 2017. This office does not count holidays, including skeleton crew days observed by a governmental body, as business days for the purposes of calculating a governmental body's deadlines under the Act. Accordingly, the commission's ten- and fifteen-business-day deadlines were April 25, 2017, and May 2, 2017, respectively. The commission's initial request for a decision to this office was timely submitted and shows it was copied to the requestor. *See id.* § 552.308(a) (prescribing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Further, the information required by section 552.301(e) was also timely submitted and shows it was copied to the requestor. *See id.* Consequently, we find the commission complied with the requirements of section 552.301 in requesting this decision from our office. Accordingly, we will address the commission's arguments against disclosure of the submitted information.

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.

*Id.* § 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).

You state four different lawsuits filed by the commission against the EPA were pending in federal circuit courts of appeals when the commission received the request for information.<sup>2</sup> Therefore, we agree litigation was pending when the commission received the instant request. You state the pending litigation relates to the regulations at issue in the request. Thus, we also find you have established the submitted information is related to the pending litigation for purposes of section 552.103(a). Accordingly, the commission may withhold the submitted information under section 552.103(a) of the Government Code.<sup>3</sup>

However, once the information has been obtained by all parties to the pending litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). We also note the applicability of section 552.103(a) ends when the litigation has concluded. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2. Thus, information that has either been obtained from or provided to all parties to the pending litigation is not excepted from disclosure under section 552.103(a) and must be disclosed.

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

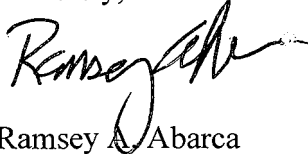
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<sup>2</sup>You state the litigation at issue is styled: *State of Texas v. EPA*, Case No. 16-60118 in the 5th Circuit Court of Appeals; *State of Texas v. United States Environmental Protection Agency*, Case No. 17-1021, in the D.C. Circuit Court of Appeals; *State of Texas v. EPA*, Case No. 16-60670 in the 5th Circuit Court of Appeals; and *State of Texas v. EPA*, Case No. 16-1428 in the D.C. Circuit Court of Appeals.

<sup>3</sup>As our ruling for this information is dispositive, we need not address your remaining arguments against its disclosure.

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 "Ramsey Abarca". The signature is fluid and cursive, with a long horizontal stroke at the end.

Ramsey Abarca  
Assistant Attorney General  
Open Records Division

RAA/bw

Ref: ID# 664200

Enc. Submitted documents

c: Requestor  
(w/o enclosures)