



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

November 3, 2017

Ms. Diane Morris
Deputy General Counsel
Office of the Governor
P. O. Box 12428
Austin, Texas 78711

OR2017-25266

Dear Ms. Morris:

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# 686628 (OOG ID# 17-335).

The Office of the Governor (the "governor's office") received a request for communications between governor's office staff and officials and employees of the Texas Commission on Environmental Quality (the "commission"), the U.S. Environmental Protection Agency, or the Federal Emergency Management Agency during a specified time period and concerning certain topics. Although the governor's office takes no position as to whether the submitted information is excepted under the Act, the governor's office states release of this information may implicate the interests of the commission. Accordingly, the governor's office states, and provides documentation showing, it notified the commission of the request for information and of its right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.304 (permitting interested third party to submit to attorney general reasons why requested information should or should not be released). We have received comments from the commission. We have considered the submitted arguments and reviewed 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).

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, 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").

The commission asserts the submitted information relates to anticipated litigation and is protected by section 552.103 of the Government Code. We note the governor's office is not a party to the anticipated litigation and, therefore, does not have a litigation interest in the matter for purposes of section 552.103. *See* Gov't Code § 552.103(a); Open Records Decision No. 575 at 2 (1990) (statutory predecessor to section 552.103 only applies when governmental body is party to litigation). In such a situation, we require an affirmative representation from the governmental body with the litigation interest that it wants the information at issue withheld from disclosure under section 552.103. The commission affirms it objects to release of the information at issue as it relates to the commission's

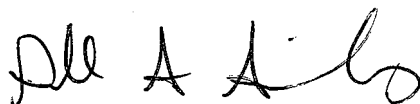
pending investigation into alleged environmental violations occurring at the facility specified in the request. We understand the commission anticipates referring the matter to the commission's Enforcement Division to formally pursue enforcement action. Based on the commission's representations and our review, we find the commission reasonably anticipated litigation when it received the instant request. Further, the commission informs us, and we agree, the information at issue is related to the subject matter of the anticipated litigation. Therefore, we conclude the governor's office may withhold the submitted information under section 552.103 of the Government Code on behalf of the commission.¹

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).

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,



Gerald A. Arismendez
Assistant Attorney General
Open Records Division

GAA/tdw

¹As our ruling is dispositive, we need not address the commission's remaining arguments against disclosure of the submitted information.

Ref: ID# 686628

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Third Party
(w/o enclosures)