



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

January 29, 2019

Ms. Lauren Downey
Assistant Attorney General
Public Information Coordinator
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

OR2019-02615

Dear Ms. Downey:

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# 748274 (PIR No. 18-50758).

The Office of the Attorney General (the "OAG") received a request for thirty-six categories of information, including specified information pertaining to (1) certain vehicles in the State of Texas (the "state") within a defined time period; (2) specified regulations and statutes, including records relating to enforcement, legislative history, and penalties; (3) the regulation of diesel emissions from mobile sources; (4) mobile-source emissions; (5) the automobile inspection program; (6) certain enforcement actions during a specified time period; (7) any communications between the OAG and certain entities during a defined time period; (8) the state's effort to mitigate certain ozone pollution; (9) the United States Environmental Protection Agency; and (10) a specified trust. The OAG states it does not maintain information responsive to several categories of the request.¹ The OAG states it will release some information with redactions allowed by law. The OAG claims the submitted information is excepted from disclosure under sections 552.103 and 552.107 of the

¹The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

Government Code. We have considered the claimed exceptions and reviewed the submitted representative sample of information.² We have also received and considered the requestor's comments. *See* Gov't Code § 552.304 (interested party may submit written comments regarding availability of requested information).

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

(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 claiming section 552.103 has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information, and (2) the information at issue is related to that litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, *writ ref'd n.r.e.*). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See* Open Records Decision No. 551 at 4 (1990).

The OAG informs us it is representing the state, as well as its client agency, the Texas Commission on Environmental Quality, in thirty-four related pending cases that were combined into one master file, *In re Volkswagen Clean Diesel Litigation: TCAA Enforcement Case*, Master File No. D-1-GN-16-000370. The OAG states the cases were pending in the 353rd Judicial District Court of Travis County, Texas, at the time it received the instant request. Upon review, we find litigation involving the OAG was pending when

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

it received the request for information. The OAG asserts, and we agree, the information it seeks to withhold relates to the litigation at issue. Therefore, we agree section 552.103(a) is applicable to the information at issue. Accordingly, the OAG may withhold the submitted information under section 552.103(a) of the Government Code.³

However, once the information has been obtained by all parties to the 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 litigation has concluded. Attorney General Opinion MW-575 at 2 (1982); 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.

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,



Cole Hutchison
Assistant Attorney General
Open Records Division

CH/eb

Ref: ID# 748274

Enc. Submitted documents

c: Requestor
(w/o enclosures)

³As our ruling is dispositive, we need not address the OAG's remaining argument against disclosure of the submitted information.