



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 26, 2019

Ms. Charmaine K. Backens
Director, Litigation Division
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

OR2019-17577

Dear Ms. Backens:

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# 772188 (PIR No. 19-46665).

The Texas Commission on Environmental Quality (the "commission") received a request for specified information pertaining to a named company. The commission states it has made some information available to the requestor. The commission states it will withhold certain information pursuant to Open Records Decision No. 684 (2009).¹ The commission claims the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions the commission has claimed and reviewed the submitted representative sample of information.²

Initially, we note the submitted information includes Agreed Orders that are publicly available on the commission's website. The Act does not permit selective disclosure of information to the public. *See* Gov't Code §§ 552.007(b), .021; Open Records Decision No. 463 at 1-2 (1987). Information that has been voluntarily released to a member of the public may not subsequently be withheld from another member of the public, unless public

¹Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain information without the necessity of requesting an attorney general decision.

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.

disclosure of the information is expressly prohibited by law or the information is confidential under law. See Gov't Code § 552.007(a); Open Records Decision Nos. 518 at 3 (1989), 490 at 2 (1988). Although you raise sections 552.103 and 552.111 of the Government Code for this information, these sections do not prohibit the release of information or make information confidential. See *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.); Open Records Decision Nos. 665 at 2 n.5, 663 at 5 (1999) (waiver of discretionary exceptions), 470 at 7 (1987) (deliberative process privilege under statutory predecessor to section 552.111 subject to waiver). Accordingly, the commission may not now withhold previously released information under section 552.103 or section 552.111 of the Government Code. However, we will consider the commission's arguments against disclosure of the information not previously released to members of the public.

Section 552.103 of the Government Code provides, in 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 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 (1) litigation was 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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). See ORD 551.

You state, and provide documentation showing, prior to the commission's receipt of the instant request for information, litigation styled *State of Texas v. Intercontinental Terminals Company, LLC*, Cause No. D-1-GN-19-001593, was filed and is currently pending in the 261st Judicial District Court of Travis County, Texas. You state the information at issue is related to the subject matter of the current litigation. Based upon your representations, the

submitted documentation, and our review of the information at issue, we find litigation was pending when the commission received the instant request, and we find the information at issue is related to the pending litigation for purposes of section 552.103. Accordingly, the commission may withhold the remaining information under section 552.103(a) of the Government Code.³

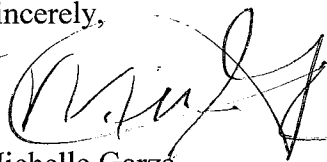
Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing parties in the pending 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 concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 at 3 (1982).

In summary, the commission must release the previously released Agreed Orders pursuant to section 552.007 of the Government Code. The commission may withhold the remaining information under section 552.103(a) of the Government Code.

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,



Michelle Garza
Assistant Attorney General
Open Records Division

MG/jxd

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

Ref: ID# 772188

Enc. Submitted documents

c: Requestor
(w/o enclosures)