



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 25, 2020

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

OR2020-06034

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# 813519 (PIR No. 20-50679)

The Texas Commission on Environmental Quality (the "commission") received a request for documents detailing e-mail communications between commission employees and any other person regarding a specified business or entity for a specified period of time.¹ You claim the submitted information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted representative sample of information.³ We have also received and considered comments from the requestor. *See* Gov't Code § 552.304

¹We 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.

²Although the commission raises Texas Rule of Evidence 503, we note the proper exception to raise when asserting the attorney-client privilege for information not subject to section 552.022 of the Government Code is section 552.107 of the Government Code. *See* Open Records Decision Nos. 676 at 1-2 (2002).

³We 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.

(interested party may submit comments stating why information should or should not be released).

Initially, we address the requestor's assertion the submitted information must be released because the information the commission has submitted as responsive to the instant request was also responsive to a previous request made by the requestor on September 3, 2019, for which the commission did not seek a ruling from this office. The submitted documentation reflects the commission responded to the previous request for information by releasing the information the commission deemed to be responsive to the requestor. We note a governmental body must make a good-faith effort to relate a request to information held by the governmental body. *See* Open Records Decision No. 561 at 8 (1990). We further note this office is unable to resolve disputes of fact in the open records ruling process. *See* Open Records Decision Nos. 592 at 2 (1991), 552 at 4 (1990), 435 at 4 (1986). Accordingly, where an issue cannot be resolved as a matter of law, we must rely upon the facts alleged to us by the governmental body requesting our opinion, or upon those facts that are discernible from the documents submitted for our inspection. *See* ORD 552 at 4. Therefore, based on the commission's representations and the information provided to this office, we conclude the commission made a good-faith effort and released all information maintained by the commission that was responsive to the previous request. Thus, we will consider the commission's arguments against disclosure of the submitted information.

Next, we address the requestor's claim the commission failed to comply with section 552.301 of the Government Code in requesting a ruling from this office. Section 552.301 of the Government Code describes the procedural obligations placed on a governmental body that receives a written request for information it wishes to withhold. Pursuant to section 552.301(b), the governmental body must ask for the attorney general's decision and state the exceptions that apply within ten business days after receiving the request. *See* Gov't Code § 552.301(a), (b). In this instance, you state the commission received the request for information on November 5, 2019. We note the commission was closed on November 11, 2019, in observance of Veteran's Day. You state that on November 20, 2019, the commission provided the requestor with a cost estimate and a request for a deposit for payment of these charges. *See id.* §§ 552.2615(a), .263(a). You further state the commission received a deposit for payment of the anticipated costs on November 26, 2019. *See id.* § 552.263(e) (if governmental body requires deposit or bond for anticipated costs pursuant to section 552.263, request for information is considered to have been received on date that the governmental body receives deposit or bond). You state the commission operated on a skeleton crew on November 27, 2019, and was closed on November 28, 2016, and November 29, 2019. This office does not count the date the request was received or holidays, including skeleton crew days observed by a governmental body, for the purpose of calculating a governmental body's deadlines under the Act. Accordingly, the commission's ten- and fifteen-business-day deadlines were December 13, 2019, and December 20, 2019, respectively. The information containing the information required by section 552.301(b) was submitted via interagency mail on December 13, and the information containing the information required by section 552.301(e) was submitted via inter-agency mail on December 20. *See id.* § 552.308(a)(1) (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Therefore, we find the commission complied with

the procedural requirements of section 552.301 of the Government Code in requesting this decision.

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). A governmental body has the burden of providing relevant facts and documents to show section 552.103(a) is applicable in a particular situation. The test for meeting this burden is a showing that (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. *See 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. We note contested cases conducted under the Administrative Procedure Act (the "APA"), chapter 2001 of the Government Code, are considered litigation for purposes of section 552.103. *See* Open Records Decision No. 588 at 7 (1991). We further note a contested case before the State Office of Administrative Hearings ("SOAH") is considered litigation for the purposes of the APA. *See id.*

You state the submitted information pertains to a contested administrative case before SOAH involving an amended permit application submitted by the entity named in the request that was pending when the commission received the request. You explain on June 6, 2019, SOAH granted the entity's request to stay the proceeding pending an appeal on a related matter before the Federal Emergency Management Agency. You further state the information at issue is related to the litigation. Based on these representations and our review, we find the information at issue is related to litigation that was pending on the date the commission received the request for information. Therefore, the commission may withhold the submitted information under section 552.103 of the Government Code.⁴

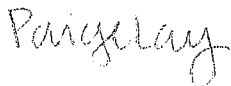
⁴As our ruling is dispositive, we need not address your remaining arguments against disclosure.

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. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to all parties to the pending or anticipated litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. *See* Attorney General Opinion MW-575 (1982); *see also* 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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,



Paige Lay
Assistant Attorney General
Open Records Division

PL/rm

Ref: ID# 813519

Enc. Submitted documents

c: Requestor
(w/o enclosures)