



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

April 18, 1997

Mr. Carl J. Shahady
Agency Attorney
Texas Municipal Power Agency
P.O. Box 7000
Bryan, Texas 77805

OR97-0879

Dear Mr. Shahady:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 105806.

The Texas Municipal Power Agency (the "agency") received a request for the following categories of information related to the agency and its member cities:

- TMPA, Bryan, Denton, Garland and Greenville generation data (MWH, Fuel, O&M costs) for the year ending September 1996;
- TMPA, Bryan, Denton, Garland and Greenville power purchases from other utilities for the year ending September 1996;
- TMPA, Bryan, Denton, Garland and Greenville power sales (MWH & Dollars) to Bryan, Denton, Garland and Greenville retail customers, Brazos Electric, College Station, A&M, Bowie, Bridgeport, Farmersville, Grandbury, and other wholesale customers for year ending September 1996. Plus additional energy transactions to balance accounts;
- The Points of delivery and Wheeling path of all wholesale sales for the year ending September 1996; [and]
- Other information to establish the true nature of the TMPA/Member City/ERCOT/TMPP system operation and determine and identify the lawful jurisdiction of Federal, State and Municipal regulatory authorities.

You assert that the requested information is excepted from disclosure under section 552.103. You have provided this office with a representative sample of the information that is at issue.¹

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state is or may be a party. A governmental body has the burden of providing relevant facts and documents to show that 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, and (2) the information at issue is related to that litigation. *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 (1990) at 4. A governmental body must meet both prongs of this test for information to be excepted under 552.103(a). For purposes of section 552.103(a), this office considers a contested case under the Texas Administrative Procedure Act ("APA"), Government Code chapter 2001, to constitute "litigation." Open Records Decision No. 588 (1991) at 7 (construing statutory predecessor to the APA).

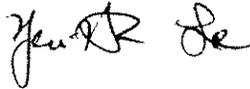
You advise us that the City of Garland, a member city of the agency, is involved in a contested case under the APA that is currently pending before the Public Utility Commission ("PUC") and the State Office of Administrative Hearings ("SOAH"). *Complaint of Les Cook Service Electric Company Against the City of Garland*, SOAH Docket No. 473-97-0330, PUC Docket No. 16028. Furthermore, you contend that litigation against the agency is reasonably anticipated as a result of the requestor's statement that he "plan[s] to broaden the [pending] case to include TMPA when given the opportunity." We therefore conclude that you have established that litigation is pending or reasonably anticipated. Additionally, we conclude that the documents you submitted are related to pending or reasonably anticipated litigation. Thus, you may withhold the requested information under section 552.103.

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 party in the anticipated 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).

¹In reaching our conclusion here, we assume that 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.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read "Yen-Ha Le". The signature is cursive and somewhat stylized, with the first name "Yen" and last name "Le" clearly visible.

Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/rho

Ref.: ID# 105806

Enclosures: Submitted documents

cc: Mr. Les Cook
Les Cook Service Electric Company
3631-C Cavalier
Garland, Texas 75042
(w/o enclosures)

