



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 30, 2004

Mr. Duncan C. Norton
General Counsel
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

Mr. Paul Sarahan
Director, Litigation Division
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

OR2004-10974

Dear Mr. Norton and Mr. Sarahan:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 214951.

The Texas Commission on Environmental Quality (the "commission") received a request for information relating to Penske Truck Leasing, Inc. ("Penske"), Zenith Electronics Corporation ("Zenith"), Texas Disposal Systems, Inc. ("TDSL"), and TDSL's waste disposal facility in Creedmoor, Texas, including (1) correspondence between the commission and representatives of Penske, Zenith, and TDSL since May 1, 2004; (2) completed forms 0152 filed by representatives of Penske or Zenith; and (3) internal commission documents and correspondence written, generated, or sent since May 1, 2004. You inform us that the commission will release some of the requested information. You claim that other responsive 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 you claim and have

reviewed the information you submitted.¹ We also have considered the arguments that we received from the requestor. See Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

We first note that some of the submitted information does not fall within the time interval specified by the requestor and thus does not appear to be responsive to this request. This ruling does not address the public availability of any submitted information that is not responsive to the request, and the commission need not release such non-responsive information.

Next, we address section 552.103, as it is the most inclusive exception you claim. This section provides in 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.

Gov't Code § 552.103(a), (c). A governmental body that raises section 552.103 has the burden of providing relevant facts and documents sufficient to establish the applicability of this exception to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate that: (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 the pending or anticipated litigation. See *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *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).

¹This letter ruling assumes that the submitted representative samples of information are truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the commission to withhold any information that is substantially different from the submitted information. See Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

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 establish that litigation is reasonably anticipated, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *Id.* When the governmental body is the prospective plaintiff in the anticipated litigation, the concrete evidence must at least reflect that litigation is "realistically contemplated." *See* Open Records Decision No. 518 at 5 (1989); *see also* Attorney General Opinion MW-575 (1982) (finding that investigatory file may be withheld if governmental body attorney determines that it should be withheld pursuant to section 552.103 and that litigation is "reasonably likely to result").²

The Office of the General Counsel states that the information that it has submitted relates to a pending lawsuit. The Office of the General Counsel also states, and has submitted documentation for the purpose of demonstrating, that the commission was a party to the lawsuit when it received this request for information. The Litigation Division states that the information that it has submitted relates to an enforcement action that was ongoing when the commission received this request for information. The Litigation Division also states that the enforcement action could result in the assessment of administrative penalties.³

The requestor asserts, however, that the Litigation Division has not demonstrated that any related litigation was pending or reasonably anticipated when the commission received his request for information. The requestor also argues that the lawsuit on which the Office of General Counsel relies was "effectively rendered moot" by subsequent developments at the commission. Based on his arguments, we understand the requestor to contend that none of the submitted information may be withheld under section 552.103.

The question of whether the submitted information relates to any pending or anticipated litigation to which the commission is or would be a party involves issues of fact. This office cannot resolve factual disputes in the opinion process. *See* Open Records Decision Nos. 592 at 2 (1991), 552 at 4 (1990), 435 at 4 (1986). Where fact issues cannot be resolved as a matter of law, we must rely on the facts that are represented to us by the governmental body in requesting our decision or upon those facts that are discernible from the information that was submitted for our review. *See* Open Records Decision No. 552 at 4 (1990). Therefore,

²Among other examples, this office also has concluded that litigation was reasonably anticipated where the opposing party took the following objective steps toward litigation: (1) filed a complaint with the Equal Employment Opportunity Commission ("EEOC"), *see* Open Records Decision No. 336 (1982); (2) hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and (3) threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

³We note that a contested case under the Administrative Procedure Act (the "APA"), chapter 2001 of the Government Code, constitutes litigation for purposes of section 552.103 of the Government Code. *See* Open Records Decision No. 588 at 7 (1991) (contested case under statutory predecessor to APA constituted litigation for purposes of statutory predecessor to Gov't Code § 552.103).

having considered the commission's representations and supporting documentation, as well as the arguments and exhibits that we received from the requestor, we find that the information submitted by the Office of the General Counsel relates to pending litigation to which the commission was a party when it received this request for information. Likewise, we find that the information submitted by the Litigation Division relates to litigation that was reasonably anticipated when the commission received this request for information. We therefore conclude that the commission may withhold all of the submitted information at this time under section 552.103.⁴

In reaching this conclusion, we assume that the opposing parties in the pending or anticipated litigation have not seen or had access to any of the information that the commission seeks to withhold under section 552.103. The purpose of this exception is to enable a governmental body to protect its position in litigation by forcing parties to obtain information that relates to the litigation through discovery procedures. See Open Records Decision No. 551 at 4-5 (1990). If the opposing parties in pending or anticipated litigation have seen or had access to information that relates to the litigation, through discovery or otherwise, then there is no interest in withholding such information from public disclosure under section 552.103. See Open Records Decision Nos. 349 (1982), 320 (1982). Furthermore, the applicability of section 552.103 ends when the related litigation concludes or is no longer reasonably anticipated. See Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public

⁴As our conclusion under section 552.103 encompasses all of the information that the commission seeks to withhold, we need not address your other arguments against disclosure.

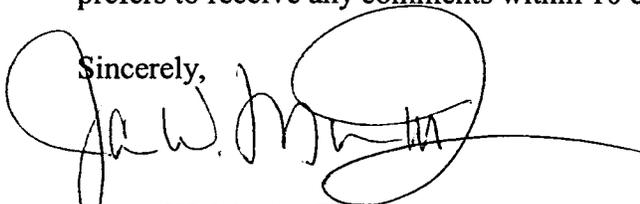
records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 214951

Enc: Submitted documents

c: Mr. Kevin Carmody
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(w/o enclosures)