



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

February 14, 2006

Ms. Mary Risner  
Acting Director, Litigation Division  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, Texas 78711-3087

Ms. Celeste A. Baker  
General Counsel  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, Texas 78711-3087

OR2006-01467

Dear Ms. Risner and Ms. Baker:

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# 242305.

The Texas Commission on Environmental Quality (the "commission") received a request, which the requestor subsequently clarified, for information relating to Morris Key and Key Associates.<sup>1</sup> You inform us that the commission has no information that is responsive to the request for records involving Tracy Gross.<sup>2</sup> You also inform us that the commission has released some of the requested information. On behalf of the commission and its Office of

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<sup>1</sup>See Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information); Open Records Decision No. 663 at 2-5 (1999).

<sup>2</sup>We note that the Act does not require the commission to release information that did not exist when it received this request or create responsive information. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

General Counsel (the “OGC”), 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.<sup>3</sup>

Section 552.103 of the Government Code, the “litigation exception,” 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 seeks to withhold information under section 552.103 bears 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 [1<sup>st</sup> 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 commission claims that all of its submitted information, marked as Attachments C-1 through C-8, is excepted from disclosure under section 552.103. The OGC seeks to withhold the entire contents of several documents and marked portions of another document under

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<sup>3</sup>This 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).*

section 552.103.<sup>4</sup> The commission and the OGC inform us that the information at issue is related to two pending lawsuits to which the commission was a party when it received this request for information. The commission has provided copies of pleadings in the lawsuits. Based on the representations of the commission and the OGC, the submitted pleadings, and our review of the information at issue, we conclude that all of the information that the parties seek to withhold is excepted from disclosure under section 552.103 of the Government Code.<sup>5</sup>

In reaching this conclusion, we assume that the opposing parties in the pending lawsuits have not seen or had access to any of the information at issue. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information that relates to litigation through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). If the opposing parties in the pending lawsuits have seen or had access to information that relates to the litigation, through discovery or otherwise, there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). We also note that the applicability of section 552.103 ends once the related litigation concludes. *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, upon receiving this ruling, the governmental body

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<sup>4</sup>The OGC informs us that it will release the remaining contents of the marked document to the requestor.

<sup>5</sup>As we are able to make this determination, we need not address the claims of the commission and the OGC under sections 552.101, 552.107, and 552.111 of the Government Code.

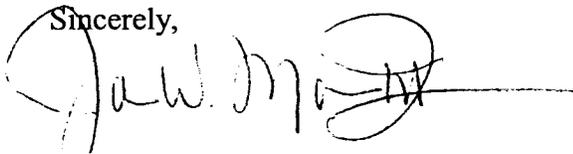
will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to 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 Office of the Attorney General 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. 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,

A handwritten signature in black ink, appearing to read "James W. Morris, III", with a horizontal line extending to the right.

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

JWM/sdk

Ref: ID# 242305

Enc: Submitted documents

c: Ms. Belinda Murphy  
4308 Hyridge Drive  
Austin, Texas 78759  
(w/o enclosures)