



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 9, 2007

Mr. Lindil Fowler
General Counsel
Office of General Counsel
Railroad Commission of Texas
P. O. Box 12967
Austin, Texas 78711-2967

OR2007-02249A

Dear Mr. Fowler:

This office issued Open Records Letter No. 2007-02249 (2007) on February 26, 2007. We have examined this ruling and determined that we made an error. Where this office determines that an error was made in the decision process under sections 552.301 and 552.306, we will correct the previously issued ruling. Consequently, this decision serves as the correct ruling and is a substitute for the decision issued on February 26, 2007. *See generally* Gov't Code 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of Public Information Act (the "Act"))).

On December 5, 2006, the Railroad Commission of Texas (the "commission") received a request for information relating to an informant's correspondence regarding the requestor's company. You claim that the requested information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code.

In Open Records Letter No. 2007-02249, we determined that some of the submitted information was subject to section 552.022(a)(1) of the Government Code. This section provides that "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body" may not be withheld from the public unless the information is excepted from disclosure under section 552.108 of the Government Code or expressly confidential under other law. Gov't Code § 552.022(a)(1). In Open Records Letter No. 2007-02249, we

concluded that the information subject to section 552.022 could not be withheld under section 552.103 of the Government Code because section 552.103 is a discretionary exception to public disclosure that protects the governmental body's interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). After reexamining the reports at issue, we determine that the reports were not made of, for, or by the commission. *See Gov't Code § 552.022(a)(1)*. Rather, the reports were made by and for a private company. Accordingly, these reports are not subject to section 552.022(a)(1), and we will address your argument under section 552.103 for these reports, as well as for the additional submitted information.

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.

Id. § 552.103(a), (c). 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 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, no pet.); *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).

When the governmental body is the prospective plaintiff in litigation, the evidence of anticipated litigation must at least reflect that litigation involving a specific matter is "realistically contemplated." *See* Open Records Decision No. 518 at 5 (1989); *see also* Attorney General Opinion MW-575 (1982) (investigatory file may be withheld if governmental body's attorney determines that it should be withheld pursuant to Gov't Code

§ 552.103 and that litigation is “reasonably likely to result”). This office considers a contested case under the Administrative Procedure Act (“APA”), Government Code chapter 2001, to constitute “litigation” for purposes of section 552.103. Open Records Decision No. 588 (1991) (discussing previous version of section 552.103).

You inform this office that prior to the commission’s receipt of the request, the commission informed the requestor’s company that it intended to take administrative enforcement action against the company. The commission alleges that the company has acted in violation of section 89.011 of the Natural Resources Code and is subject to civil penalties under section 81.0531 of the Natural Resources Code. *See* Nat. Res. Code §§ 81.0531, 89.011. Based on these representations and our review of the information at issue, we agree that litigation was reasonably anticipated when the commission received the request for information. Furthermore, having reviewed your arguments and representations, we find that the submitted information is related to the anticipated litigation. Accordingly, the commission generally may withhold the submitted information pursuant to section 552.103.

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 is related to litigation through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). If the opposing party already has seen or had access to information that is related to the litigation at issue, through discovery or otherwise, then there is no interest in withholding such information from public disclosure. *See* Open Records Decision Nos. 349 (1982), 320 (1982). We note that the submitted reports were created by the opposing party to the litigation. Thus, the submitted reports are not excepted from disclosure under section 552.103(a). 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).

We now turn to your argument under section 552.101 of the Government Code for the submitted reports.¹ Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. The informer’s privilege, incorporated into the Act by section 552.101, has long been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). This privilege protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided that the subject of the information does not already know the informer’s identity. Open Records Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978). It protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to “administrative officials having a duty of inspection or of law enforcement within their particular spheres.”

¹As our ruling is dispositive for the non-report information, we need not address your remaining argument under section 552.101 of the Government Code and the informer’s privilege for this information.

Open Records Decision No. 279 at 2 (1981) (*citing* Wigmore, Evidence, § 2374, at 767 (McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. *See* Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5 (1988). The informer's privilege protects the content of the informer's communication only to the extent it identifies the informer. *Roviaro v. United States*, 353 U.S. 53, 60 (1957).

You state that the submitted reports pertain to a complaint reported to the commission alleging a violation of section 89.011 of the Natural Resources Code. As noted above, the commission is charged with enforcing this civil statute and violations of this statute are punishable by civil penalties. You argue that because a limited number of people have access to the submitted reports, the reports reveal the identity of the informer. In this instance, the informant is not identified in the submitted reports and release of the reports does not identify any informer. Therefore, the submitted reports cannot be withheld from disclosure under section 552.101 of the Government Code in conjunction with the common-law informer's privilege.

In summary, the submitted reports must be released to the requestor. The commission may withhold the remaining submitted information under section 552.103 of the Government Code.

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 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

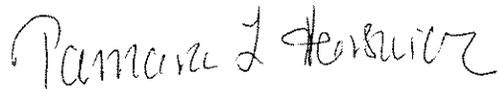
free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

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,



Tamara L. Harswick
Assistant Attorney General
Open Records Division

TLH/krl

Ref: ID# 272070

Enc. Submitted documents

c: Mr. Paul Black
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(w/o enclosures)