



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

July 25, 2008

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

OR2008-10112

Dear 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# 316865.

The Texas Commission on Environmental Quality (the "commission") received a request for the minutes and agendas of meetings, held over a specified period of time, between any employee of Baker Botts, L.L.P and employees or Commissioners of the commission pertaining to the air quality permit renewal request filed by ARSCO, LLC in El Paso County, as well as all supplemental information pertaining to those meetings. You state that you have released some of the requested information. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Initially, you inform us that portions of the submitted information, Exhibits C-1 through C-6 and Exhibit D, were the subject of a previous request for information, in response to which

¹Although you raise section 552.101 of the Government Code in conjunction with Rule 503 of the Texas Rules of Evidence, this office has concluded that section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Thus, we will not address your claim that the submitted information is confidential under section 552.101 in conjunction with this rule.

this office issued Open Records Letter No. 2008-06741 (2008). In Open Records Letter No. 2008-06741, we ruled that the commission may withhold the information issue under section 552.107. As we have no indication that the law, facts, and circumstances on which the prior ruling was based have changed, the commission may continue to rely on that ruling as a previous determination and withhold Exhibits C-1 through C-6 and Exhibit D in accordance with Open Records Letter No. 2008-06741. See Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

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). The governmental body has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) that the information at issue is related to that litigation. See *University of Tex. Law Sch. v. Texas 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.); see also Open Records Decision No. 551 at 4 (1990). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *Id.*

You inform us and provide documentation showing that, prior to the commission's receipt of this request for information, two lawsuits styled *Sierra Club v. Texas Commission on Environmental Quality*, Cause No. D-1-GN-08-001458, and *City of El Paso v. Texas Commission on Environmental Quality*, Cause No. D-1-GV-08-00081, respectively, were

filed and are currently pending in the 345rd Judicial District, District Court of Travis County, Texas. We therefore agree that litigation was pending when the commission received the instant request for information. Furthermore, having reviewed your arguments and representations, we find that the remaining submitted information is related to the pending litigation for purposes of section 552.103. Therefore, the commission may withhold the remaining-submitted information pursuant to section 552.103 of the Government Code.²

We note, however, that once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103 interest exists with respect to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). We also note that section 552.103 is no longer applicable to this information once the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the commission may continue to rely on Open Records Letter No. 2008-06741 as a previous determination and withhold Exhibits C-1 through C-6 and Exhibit D in accordance with that ruling. 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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3). If the governmental body does not file suit over 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

²As our ruling is dispositive, we do not address your remaining arguments against disclosure.

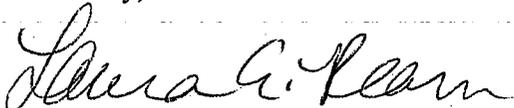
requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can challenge 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,



Laura Ream
Assistant Attorney General
Open Records Division

LER/eeg

Ref: ID# 316865

Enc. Submitted documents

c: Mr. Martin W. Bartlett
KVIA_TV
News Department
4140 Rio Bravo Drive
El Paso, Texas 79902
(w/o enclosures)