



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 13, 2014

Ms. Kasey Feldman
General Law Attorney
Public Utility Commission of Texas
P.O. Box 13326
Austin, Texas 78711

OR2014-04271

Dear Ms. Feldman:

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# 515270.

The Public Utility Commission of Texas (the "commission") received a request for (1) reports or analysis prepared by specified entities pertaining to a specified company subsequent to a specified date; (2) communications between specified entities pertaining to a specified company during any investigation of the company subsequent to a specified date; (3) communications between specified entities and a specified company subsequent to a specified date; (4) materials presented to the commission regarding an investigation of a specified company subsequent to a specified date; and (5) information pertaining to "Current Operating Plans" detailing the expected hourly operation of each individual generation resource seven days into the future, as filed during a specified period of time.¹ You state the commission has released some information to the requestor. You further state the

¹You state the commission sought and received clarification of the information requested. *See* Gov't Code § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

commission does not possess any information responsive to category five of the request.² You claim the remaining requested information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code. Moreover, you state release of some of the remaining requested information may implicate the proprietary interests of the Electric Reliability Council of Texas (“ERCOT”), the United States Commodity Futures Trading Commission (“CFTC”), and Potomac Economics (“Potomac”). Accordingly, you state, and provide documentation showing, you notified these third parties of the request for information and of their right to submit arguments to this office as to why the information at issue should not be released. *See* Gov’t Code § 552.305(d) (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under the Act in certain circumstances). We have received comments from ERCOT and CFTC. We have considered the submitted arguments and reviewed the submitted information.

Section 552.103 of the Government Code provides, in relevant part, the following:

(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 claiming section 552.103 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

²The Act does not require a governmental body to release information that did not exist when it received a request, create responsive information, or obtain information that is not held by the governmental body or on its behalf. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983). Additionally, we note the commission referred the requestor to the Electric Reliability Council of Texas (“ERCOT”) for this information, and ERCOT has informed this office that the information will be released to the requestor.

showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request, 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, orig. proceeding); *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). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

To establish litigation is reasonably anticipated, a governmental body must provide this office “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” Open Records Decision No. 452 at 4 (1986). In the context of anticipated litigation in which the governmental body is the prospective plaintiff, 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 from disclosure if governmental body attorney determines that it should be withheld pursuant to section 552.103 and that litigation is “reasonably likely to result”). Additionally, contested cases conducted under the Texas Administrative Procedure Act (the “APA”), chapter 2001 of the Government Code, constitute “litigation” for purposes of section 552.103. See Open Records Decision No. 588 (1991) (contested case under APA constitutes litigation for purposes of statutory predecessor to section 552.103). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. See ORD 452 at 4.

You state some of the submitted information relates to an investigation of a specified company in relation to allegations of possible market manipulation by the company. You state, and provide documentation demonstrating, the commission reasonably anticipated litigation at the time the request was received in relation to an enforcement action that the commission may bring against the specified company. You also state that an enforcement action taken by the commission under the Public Utility Regulatory Act would result in a contested case under the APA. Based on your representations and our review, we find the commission reasonably anticipated litigation when it received the request for information, and the information at issue relates to the anticipated litigation. Therefore, we conclude the commission may withhold the information we have indicated under section 552.103 of the Government Code.³

We note, however, once information has been obtained by all parties to the anticipated litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. See 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

³As our ruling is dispositive, we do not address the remaining arguments against disclosure of this information.

be disclosed. Further, the applicability of section 552.103(a) ends when the litigation has concluded or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

Section 552.111 of the Government Code excepts from disclosure “[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency[.]” Gov’t Code § 552.111. This exception encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of a governmental body. *See* ORD 615 at 5. A governmental body’s policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body’s policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body’s policy mission. *See* Open Records Decision No. 631 at 3 (1995). Further, section 552.111 does not protect facts and written observations of facts and events severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); *see* Open Records Decision No. 615 at 5. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information may also be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

This office has concluded a preliminary draft of a document that is intended for public release in its final form necessarily represents the drafter’s advice, opinion, and recommendation with regard to the form and content of the final document, so as to be excepted from disclosure under section 552.111. Open Records Decision No. 559 at 2 (1990) (applying statutory predecessor). Section 552.111 protects factual information in the draft that will also be included in the final version of the document. *See id.* at 2-3. Thus, section 552.111 encompasses the entire contents, including comments, underlining, deletions, and proofreading marks, of a preliminary draft of a policymaking document that will be released to the public in final form. *See id.* at 2.

Section 552.111 can also encompass communications between a governmental body and a third party, including a consultant or other party with a privity of interest. *See* Open Records Decision Nos. 631 at 2 (section 552.111 encompasses information created for governmental body by outside consultant acting at governmental body's request and performing task that is within governmental body's authority), 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process), 462 at 14 (1987) (section 552.111 applies to memoranda prepared by governmental body's consultants). For section 552.111 to apply, the governmental body must identify the third party and explain the nature of its relationship with the governmental body. Section 552.111 is not applicable to a communication between the governmental body and a third party unless the governmental body establishes it has a privity of interest or common deliberative process with the third party. *See* ORD 561 at 9.

You state the remaining information you have marked consists of advice, opinion, and recommendations related to policymaking matters of the commission. You inform us the parties involved in these communications are employees of the commission or employees of Potomac, which is an "Independent Market Monitor" that has contracted with the commission to "assist and support [the commission] in its enforcement and prosecution obligations[.]" Accordingly, we find you have established Potomac shares a privity of interest with the commission with respect to the remaining information. Upon review, we conclude the commission may withhold the information we have marked under section 552.111 of the Government Code.⁴ However, we find the remaining information you have marked to be information that is purely factual in nature. You have not explained how this information constitutes internal advice, opinion, or recommendations regarding policymaking issues. Therefore, we find you have failed to establish the applicability of section 552.111 to the remaining information at issue. Accordingly, the commission may not withhold the remaining information on this basis.

In summary, the commission may withhold the information we have indicated under section 552.103 of the Government Code. The commission may also withhold the information we have marked under section 552.111 of the Government Code. The remaining information must be released.

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

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at <http://www.texasattorneygeneral.gov/open/>

⁴As our ruling is dispositive, we do not address your remaining argument against disclosure.

[orl_ruling_info.shtml](#), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



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Assistant Attorney General
Open Records Division

MAK/akg

Ref: ID# 515270

Enc. Submitted documents

c: Requestor
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