



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

September 23, 2015

Ms. Lauren Downey  
Assistant Attorney General  
Public Information Coordinator  
General Counsel Division  
Office of the Attorney General  
P.O. Box 12548  
Austin, Texas 78711-2548

OR2015-19908

Dear Ms. Downey:

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# 580732 (OAG PIR Nos. 15-41879, 15-41889).

The Office of the Attorney General (the "OAG") received a request for communications between the OAG and the Texas Commission on Environmental Quality (the "TCEQ"), the Public Utility Commission of Texas, and any industrial concerns regarding four specified topics. The OAG also received a request for all information regarding the Clean Power Plan during a specified time period. You state the OAG will release some responsive information. You claim the remaining requested information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>1</sup>

Initially, you state a portion of the requested information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2015-15493 (2015). In that ruling, we held the OAG may withhold the information at issue under section 552.107(1) of the Government Code. As we have no indication the law, facts, or circumstances upon which the prior ruling was based have changed, we find the

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<sup>1</sup>This letter ruling assumes the submitted representative sample of information is truly representative of the requested information as a whole. This ruling does not reach, and therefore does not authorize, the withholding of any other requested information to the extent the other information is substantially different than that submitted to this office. *See* Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

OAG may continue to rely on Open Records Letter No. 2015-15493 as a previous determination and withhold the information at issue in accordance with that ruling. *See* Open Records Decision No. 673 at 6-7 (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 information is or is not excepted from disclosure). We next address your arguments for the information not subject to Open Records Letter No. 2015-15493.

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 to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is 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, 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 from disclosure under section 552.103(a).

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 demonstrate litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, an attorney for a potential opposing party making a demand for payment and asserting an intent to sue if such payments are not made. Open Records Decision Nos. 555 at 3 (1990), 346 (1982). In addition, this office has concluded litigation

was reasonably anticipated when the potential opposing party threatened to sue on several occasions and hired an attorney. *See* Open Records Decision No. 288 at 2 (1981). However, an individual publicly threatening to bring suit against a governmental body, but who does not actually take objective steps toward filing suit, is not concrete evidence that litigation is reasonably anticipated. *See* Open Records Decision No. 331 at 1-2 (1982). In the context of anticipated litigation in which the governmental body is the prospective plaintiff, the concrete evidence must at least reflect litigation 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 attorney determines it should be withheld pursuant to section 552.103 and litigation is “reasonably likely to result”). 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 pertains to pending litigation involving the OAG. You explain that prior to the OAG’s receipt of the present request for information, the OAG filed a petition for review in the United States Fifth Circuit Court of Appeals over the United States Environmental Protection Agency (the “EPA”) reversing its approval of provisions of Texas’ Clean Air Program, as well as a petition for review challenging the legality of the Clean Water Rule. Additionally, you state the OAG filed a complaint in the United States District Court for the Southern District of Texas challenging issues related to the Clean Water Rule. Based on these representations, we agree the OAG was a party to pending litigation when you received the present request for information.

Further, you state the remaining information pertains to anticipated litigation involving the OAG. You explain that the EPA published Proposed Carbon Rules for New and Existing Electric Generating Units under the Federal Clean Air Act in June of 2014. You state the OAG anticipates challenging the proposed rules in federal court. Further, you state the TCEQ has requested representation from the OAG regarding an enforcement case the United States Department of Justice and the EPA have indicated they plan to bring against the City of Tyler involving violations of the Clean Water Act. You explain section 309(e) of the Clean Water Act states the State will be joined as a party in the enforcement action brought by the federal government against a city. Accordingly, the TCEQ plans to be a co-plaintiff in this case. Based on these representations, we agree the OAG reasonably anticipated litigation regarding these matters when you received the present request for information.

Upon review of your arguments and the submitted information, we find the OAG has also established the submitted information relates to the pending and reasonably anticipated litigation. Accordingly, the OAG has demonstrated the applicability of section 552.103 of the Government Code to the submitted information. Thus, the OAG may withhold the submitted information on that basis.<sup>2</sup>

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<sup>2</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure.

However, once the information has been obtained by all parties to the anticipated or pending litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). We also note the applicability of section 552.103(a) ends when the litigation has concluded. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

In summary, the OAG may continue to rely on Open Records Letter No. 2015-15493 as a previous determination and withhold the information at issue in accordance with that ruling. The OAG may withhold the submitted information under section 552.103 of the Government Code.

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/orl\\_ruling\\_info.shtml](http://www.texasattorneygeneral.gov/open/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,



Kristi L. Godden  
Assistant Attorney General  
Open Records Division

KLG/cz

Ref: ID# 580732

Enc. Submitted documents

c: 2 Requestors  
(w/o enclosures)