



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 21, 2015

Ms. Ann-Marie Sheely
Assistant County Attorney
Transactions Division
Travis County Attorney's Office
P.O. Box 1748
Austin, Texas 78767

OR2015-26896

Dear Ms. Sheely:

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# 591455.

The Travis County Attorney's Office (the "county attorney's office") received a request for (1) six categories of information pertaining to previous public information requests sent by the requestor, including all public information sent to the requestor in response to the requests; (2) all communications between the requestor and any person pertaining to a specified lawsuit; and (3) all communication for a specified time period between the requestor and five specified entities, relating to certain complaints filed by the requestor. You claim the submitted information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information. We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, you claim the request for information is not a valid request under the Act because the requestor sent the instant request only to himself and blind copied the county attorney's office. Thus, you assert the requestor did not submit the request to the Travis County Attorney or the designated officer for public information. Upon review of the submitted information, we find the instant request was received by the county attorney's office. *See id.* § 552.301(c). Thus, we find the instant request to be a valid information request under the Act to the county attorney's office. Thus, we will address the applicability of the claimed exception to the submitted information.

Next, we note the county attorney's office may have previously released some of the requested information in response to prior requests for information. We note the Act does not permit the selective disclosure of information. *See id.* §§ 552.007(b), .021; Open Records Decision No. 463 at 1-2 (1987). If information has been voluntarily released to any member of the public, then that same information may not subsequently be withheld unless public disclosure of the information is expressly prohibited by law or the information is confidential under law. *See* Gov't Code § 552.007(a); Open Records Decision Nos. 518 at 3 (1989), 490 at 2 (1988); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Accordingly, the county attorney's office may not withhold previously released information unless its release is expressly prohibited by law or the information is confidential under law. You claim the information at issue is protected by section 552.103 of the Government Code. However, we note this exception is discretionary in nature 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); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions in general). As such, section 552.103 neither prohibits public disclosure of information nor makes information confidential under law. Therefore, to the extent the county attorney's office has previously released the requested information, the county attorney's office may not withhold any portion of the previously released information under section 552.103. However, to the extent the county attorney's office has not previously released the requested information, we will consider your argument against disclosure of the information at issue under section 552.103 of the Government Code.

Next, the requestor asserts the county attorney's office violated section 552.301 in requesting a decision from this office because the county attorney's office submitted a representative sample of information. The requestor contends a governmental body may only submit a representative sample "when the information is both *voluminous and repetitive*." Section 552.301(e)(1)(D) provides a governmental body is required to submit to this office within fifteen business days of receiving an open records request "a copy of the specific information requested or . . . representative samples of the information if a voluminous amount of information was requested[.]" Gov't Code § 552.301(e)(1)(D). The county attorney's office states it submitted a representative sample and we assume the representative sample of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). Thus, contrary to the requestor's assertion, we find the county attorney's office complied with section 552.301(e)(1)(D). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

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).

You state the submitted information is the subject of pending litigation. You inform us, and provide documentation showing, before the county attorney's office received the present request for information, the requestor filed a lawsuit, styled *Hopkins v. Escamilla*, Cause No. D-1-GN-15-003115, in the 345th Judicial District Court of Travis County against the county attorney's office. Based upon your representations and our review, we find litigation was pending at the time the county attorney's office received the present request. Further, we find the information at issue relates to the pending litigation for the purposes of section 552.103. Therefore, we find section 552.103(a) is generally applicable to the submitted information.

However, once information has been obtained by all parties to the 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 litigation is not excepted from disclosure under section 552.103(a). We note the opposing party to the litigation has seen or had access to some of the information at issue. Therefore, the county attorney's office may not withhold this information under section 552.103(a). However, we determine the county attorney's office may withhold the remaining information, which we have marked, under section 552.103(a). We note the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision No. 350 (1982).

We note a portion of the remaining information is subject to section 552.137 of the Government Code.¹ Section 552.137 excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body,” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). Gov’t Code § 552.137(a)-(c). The e-mail address we have marked is not of the type specifically excluded by section 552.137(c). Accordingly, the county attorney’s office must withhold the e-mail address we have marked under section 552.137, unless the owner of the e-mail address affirmatively consents to its release.

In summary, to the extent the county attorney’s office has not previously released the information at issue, the county attorney’s office may withhold the information we have marked under section 552.103(a) of the Government Code. The county attorney’s office must withhold the e-mail address we have marked under section 552.137 of the Government Code, unless the owner of the e-mail address affirmatively consents to its release. The remaining information must be released.²

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, 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,



Cole Hutchison
Assistant Attorney General
Open Records Division

CH/bhf

¹The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

²We note the requestor has a right of access to his own e-mail address in the information that is being released pursuant to section 552.137(b) of the Government Code. *See* Gov’t Code § 552.137(b) (personal e-mail address of member of public may be disclosed if owner of address affirmatively consents to its disclosure).

Ref: ID# 591455

Enc. Submitted documents

c: Requestor
(w/o enclosures)