



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 12, 2016

Ms. Lindsey Wolf
General Counsel
Office of the Secretary of State
P.O. Box 12697
Austin, Texas 78711

OR2016-27461

Dear Ms. Wolf:

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# 637952.

The Office of the Secretary of State (the "secretary's office") received three requests from the same requestor for (1) a list of community groups and organizations the secretary's office has distributed "digital toolkits" to during a specified time period, (2) information pertaining to reservations for television and radio air-time to promote the state's voter education campaign during a specified time period, and (3) copies of scripts for television and radio spots created to promote the state's voter education campaign during a specified time period. You state you provided some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.103, 552.136, and 552.137 of the Government Code. We have also received and considered comments from an attorney representing the requestor. *See* Gov't Code § 552.304 (permitting interested third party to submit to attorney general reasons why requested information should or should not be released). We have considered the submitted arguments and reviewed the submitted representative sample of information.¹

¹We 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). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

Initially, we must address the requestor's attorney's assertion the secretary's office failed to comply with section 552.301(e-1) of the Government Code in requesting this decision. Section 552.301(e-1) requires a governmental body that submits written comments requesting a ruling to the attorney general under subsection 552.301(e)(1)(A), to send a copy of those comments to the person who requested the information from the governmental body not later than the fifteenth business day after the date of receiving the written request. *Id.* § 552.301(e-1). Section 552.301(e-1) authorizes the governmental body to redact information from those written comments that discloses or contains the substance of the information requested. *Id.* We note the secretary's office redacted virtually the entirety of its arguments in support of sections 552.136 and 552.137 in the copy of the comments sent to the requestor. We further note portions of the secretary's office's comments at issue neither disclose nor contain the substance of the information at issue. We, therefore, conclude the secretary's office failed to comply with section 552.301(e-1) in requesting a decision with respect to its arguments under sections 552.136 and 552.137 of the Government Code. However, we find the secretary's office complied with section 552.301(e-1) with regard to its argument in support of section 552.103 of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless there is a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). Generally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). Sections 552.136 and 552.137 of the Government Code can provide compelling reasons to overcome the presumption of openness. Therefore, we will address the applicability of these sections to the submitted information. Further, we will consider whether the submitted information may be withheld under section 552.103.

Section 552.103 of the Government Code provides 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). A 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 (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, 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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You state, and provide documentation showing, prior to the secretary's office's receipt of the instant request, a lawsuit styled *Veasey v. Abbott*, Case No. 14-41127, was pending against the secretary's office in the United States Court of Appeals for the Fifth Circuit. Therefore, we agree litigation was pending on the date the secretary's office received the present request for information. You also state the information at issue pertains to the substance of the lawsuit's claims. The requestor's attorney asserts the information at issue is not related to the pending litigation. However, upon review of the submitted arguments and the information at issue, we find the information at issue is related to the pending litigation. Therefore, we conclude the secretary's office may withhold the submitted information under section 552.103 of the Government Code.²

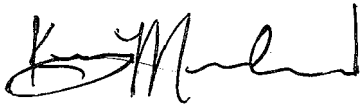
The requestor's attorney contends some of the information at issue has been shared by the secretary's office with the opposing party. Whether the secretary's office has released information to the opposing party is a question of fact. This office cannot resolve disputes of fact in its decisional process. *See* Open Records Decision Nos. 592 at 2 (1991), 552 at 4 (1990), 435 at 4 (1986). Where fact issues are not resolvable as a matter of law, we must rely on the facts alleged to us by the governmental body requesting our decision, or upon those facts that are discernible from the documents submitted for our inspection. *See* ORD 552 at 4. Accordingly, we must accept the secretary's office's representation that the information at issue has not been produced in discovery. However, we note once the information has been obtained by all parties to the pending litigation, through discovery or otherwise, 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 is concluded. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

²As our ruling is dispositive, we need not address your remaining arguments against disclosure of the submitted information.

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,



Kenny Moreland
Assistant Attorney General
Open Records Division

KJM/akg

Ref: ID# 637952

Enc. Submitted documents

c: Requestor
(w/o enclosures)