



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

February 2, 2017

Mr. Paul A. Ready  
Legal Department  
Galveston County  
722 Moody Street, 5th Floor  
Galveston, Texas 77550

OR2017-02427

Dear Mr. Ready:

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# 644235.

The Galveston County Judge's Office (the "county") received a request for all information related to a specified policy.<sup>1</sup> You state you have released some information to 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 information.

Initially, we note some of the submitted information was previously released to the public because it was published on the county's website. The Act does not permit selective disclosure of information to the public. *See* Gov't Code §§ 552.007(b), .021; Open Records Decision No. 463 at 1-2 (1987). Information that has been voluntarily released to a member of the public may not subsequently be withheld from another member of the public, unless public disclosure of the information is expressly prohibited by law or the information is

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<sup>1</sup>You state the county sought and received clarification of the information requested. *See* Gov't Code § 552.222 (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) (if governmental entity, acting in good faith, requests clarification of unclear or over-broad request, ten-day period to request attorney general ruling is measured from date request is clarified).

confidential under law. *See* Gov't Code § 552.007(a); Open Records Decision Nos. 518 at 3 (1989), 490 at 2 (1988). However, section 552.007 does not prohibit a governmental body from withholding information that is not identical to the information that has been previously released. Although you seek to withhold the previously released information under section 552.103, this section is a discretionary exception to disclosure that protects a governmental body's interests 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 Gov't Code § 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). As such, section 552.103 does not expressly prohibit the release of information to the public nor does it make information confidential under the Act. Therefore, the county may not now withhold this information, which we have marked, under section 552.103 of the Government Code. As you raise no further exceptions to disclosure, the county must release this information. We will address your argument against disclosure of the remaining information.

Next, we note some of the remaining information is subject to section 552.022 of the Government Code. Section 552.022 provides, in relevant part, the following:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body;

...

(5) all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate; [and]

...

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(1), (3), (5), (17). The remaining information includes completed evaluations that are subject to subsection 552.022(a)(1). The county must release the information at issue pursuant to subsection 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or expressly made confidential under the Act or other law. The remaining information also includes information in an account, voucher, or contract relating to the receipt or expenditure of funds by a governmental body that is subject to subsection 552.022(a)(3), budget information that is subject to subsection 552.022(a)(5), and court-filed documents that are subject to subsection 552.022(a)(17). Although you seek to withhold the information at issue under section 552.103 of the Government Code, as noted above, section 552.103 is discretionary in nature and does not make information confidential under the Act. *See Dallas Area Rapid Transit*, 4 S.W.3d at 475-76; ORDs 665 at 2 n.5, 663 at 5. Therefore, the county may not withhold any of the information subject to section 552.022, which we have marked, under section 552.103. As you raise no further exceptions to disclosure, the county must release the information subject to section 552.022 of the Government Code. We will address your argument against disclosure of the remaining information.

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 provide this office “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” *Id.* We note the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. *See* Open Records Decision No. 361 (1983). This office has concluded, when a governmental body receives a notice of claim letter, it can meet its burden of showing that litigation is reasonably anticipated by representing the notice of claim letter is in compliance with the requirements of the Texas Tort Claims Act (the “TTCA”), Civil Practice and Remedies Code chapter 101, or an applicable municipal ordinance. Open Records Decision No. 638 (1996). If that representation is not made, the receipt of a claim letter is a factor we will consider in determining, from the totality of the circumstances presented, whether the governmental body has established litigation is reasonably anticipated.

You state the information at issue pertains to litigation reasonably anticipated by the county. You state, and provide supporting documentation demonstrating, prior to the county’s receipt of the present request for information, the requestor put the county on notice of his intention to pursue a claim for damages against the county under section 1983 of title 42 of the United States Code and the TTCA. We note you do not affirmatively represent to this office the letter complies with the TTCA or an applicable ordinance; therefore, we will only consider the letter as a factor in determining whether the county reasonably anticipated litigation over the incident in question. Nevertheless, based on these representations, our review of the information at issue, and the totality of the circumstances, we determine you have established the county reasonably anticipated litigation prior to the date it received the instant request for information. You assert, and we agree, the information at issue is related to the anticipated litigation for purposes of section 552.103.

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. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing parties in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. We note some of the information at issue has been seen by the opposing party to the anticipated litigation. Therefore, the county may not withhold this information, which we have indicated, under section 552.103(a) of the Government Code. However, the county may withhold the remaining information not previously released or subject to section 552.022 of the Government Code under section 552.103(a) of the Government Code. We note the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the county must release: (1) the information it has previously released, which we have marked, pursuant to section 552.007 of the Government Code; (2) the information

subject to section 552.022 of the Government Code, which we have marked; and (3) the information which has been seen by the opposing party to the anticipated litigation, which we have indicated. The county may withhold the remaining under section 552.103(a) 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,



Tim Neal  
Assistant Attorney General  
Open Records Division

TN/sdk

Ref: ID# 644235

Enc. Submitted documents

c: Requestor  
(w/o enclosures)