



KEN PAXTON  
ATTORNEY GENERAL OF TEXAS

February 6, 2017

Mr. Edward Ray Keith, Jr.  
Regional Public Defender for Capital Cases  
P.O. Box 2097  
Lubbock, Texas 79408

OR2017-02651

Dear Mr. Keith, Jr.:

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# 644717 (ORR.075).

The Texas Regional Public Defender for Capital Cases (the "public defender's office") received a request for specified communications between the public defender's office and the Office of Capital and Forensic Writs (the "OCFW") during a specified time period. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.111 of the Government Code.<sup>1</sup> You also state release of the requested information may implicate the interests of the OCFW. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have received comments from the OCFW.<sup>2</sup> We have also received comments from the requestor. *See id.* We have considered the submitted arguments and reviewed the submitted information.

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<sup>1</sup>Although you raise section 552.022 of the Government Code, this section is not an exception to disclosure. Rather, section 552.022 enumerates categories of information that are not excepted from disclosure unless they are made confidential under the Act or other law. *See* Gov't Code § 552.022.

<sup>2</sup>Although the OCFW raises section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503, this office has concluded section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Additionally, we note the proper exception to raise when asserting the attorney-client privilege for information not subject to section 552.022 of the Government Code is section 552.107 of the Government Code. *See* ORD 676 at 1-2.

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.

*Id.* § 552.103(a), (c). A governmental body 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 showing that (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 the submitted information relates to pending litigation involving the public defender's office. However, we note the public defender's office is not a party to the pending case and, thus, does not have a litigation interest in the case for purposes of section 552.103. *See* Gov't Code § 552.103(a); Open Records Decision No. 575 at 2 (1990) (statutory predecessor to section 552.103 only applies when governmental body is party to litigation). Under these circumstances, we require an affirmative representation from the governmental body with the litigation interest that it wants the information at issue withheld from disclosure under section 552.103. The OCFW has submitted a written representation to our office stating it objects to release of the submitted information because it relates to pending litigation in which the OCFW's client is a party. The OCFW further states the submitted information is related to the pending litigation because it pertains to one of the claims at issue in the pending litigation. Upon review of these arguments and the information at issue, we find the submitted information relates to litigation that was pending when the public defender's office received this request for information. Accordingly, the

public defender's office may withhold the submitted information under section 552.103 of the Government Code.<sup>3</sup>

We note once 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. *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 pending litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, 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).

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,



Sidney M. Pounds  
Assistant Attorney General  
Open Records Division

SMP/sdk

Ref: ID# 644717

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Third Party  
(w/o enclosures)

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<sup>3</sup>As our ruling is dispositive, we need not address the remaining arguments against its disclosure.