



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 28, 2017

Ms. Lindsey Wolf
General Counsel
Office of the Secretary of State
P. O. Box 12697
Austin, Texas 78711-2697

OR2017-04323

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# 649526.

The Office of the Secretary of State (the "secretary's office") received a request for all communications between the secretary's office and a specified organization regarding specified allegations involving 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.

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). *See* ORD 551.

To establish that litigation is reasonably anticipated, a governmental body must provide this office with “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” *See* Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.¹ Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be “realistically contemplated”). For purposes of section 552.103(a), this office considers a contested case under the Texas Administrative Procedure Act (the “APA”), Government Code chapter 2001, to constitute “litigation.” Open Records Decision No. 588 at 7 (1991) (construing statutory predecessor to the APA).

You explain the secretary's office is authorized to investigate and enforce the provisions of chapter 2051 of the Occupations Code, regarding the regulation of athlete agents. *See* Occ. Code § 2051.051. You state chapter 2051 authorizes the secretary's office to issue a preliminary report assessing administrative penalties against an athlete agent who violates the provisions of that chapter. *See id.* §§ 2051.451, .452. You explain that the athlete agent may request a contested case hearing conducted pursuant to the APA to contest the alleged violation or the amount of the penalty assessed in the preliminary report. *See id.* §§ 2051.453, .454. In this instance, you explain that the submitted information relates to an

¹In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

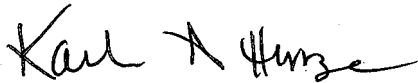
ongoing investigation into possible violations of chapter 2051 of the Occupations Code for which litigation, in the form of a contested case hearing, is anticipated. You state, and provide documentation showing, contemporaneously with the receipt of the present request for information, the requestor notified the secretary's office of his request for an administrative hearing. Based on your representations and our review, we determine litigation involving the secretary's office was pending on the date it received the request for information. We also find the secretary's office has established the information at issue is related to pending litigation for purposes of section 552.103(a). Therefore, the secretary's office may withhold the submitted information under section 552.103 of the Government Code.²

Generally, 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 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, 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,



Kaelan A. Henze
Assistant Attorney General
Open Records Division

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²Because our ruling is dispositive, we do not address your remaining arguments against disclosure.

Ref: ID# 649526

Enc. Submitted documents

c: Requestor
(w/o enclosures)