



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

June 23, 2017

Ms. Cynthia Trevino  
Mr. Sameer Birring  
Counsel to the City of Pharr  
Denton Navarro Rocha Bernal Hyde & Zech  
2500 William Cannon, Suite 609  
Austin, Texas 78745-5320

OR2017-14109

Dear Ms. Trevino and Mr. Birring:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. This request was originally received by the Open Records Division of this office and assigned ID# 665157. Because the ruling request involves litigation to which the Open Records Division is a party, preparation of this ruling has been assigned instead to the Opinion Committee.

The City of Pharr ("City") received a request regarding the Jackson Place apartment construction project. The request was for

any and all e-mails, texts, or other written communications between any individuals or entities involved with the project, including but not limited to, contractors, subcontractors, architect(s), electrical engineer(s), civil engineer(s), structural engineer(s), mechanical engineer(s), etc., not only D&M Ventures, LLC contractors, from the commencement of the project to when the project was completed.<sup>1</sup>

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<sup>1</sup>The city sought and received clarification of the information requested. See TEX. GOV'T CODE § 552.222 (stating if information requested is unclear to governmental body or if a large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); see also *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date request is clarified or narrowed).

You claim the submitted information is excepted from disclosure under section 552.103 of the Government Code.<sup>2</sup> We have considered the exception you claim and reviewed the submitted representative sample of information.<sup>3</sup>

Initially, we note some of the submitted information in Exhibit K-2 is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(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; [and]

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

TEX. GOV'T CODE § 552.022(a)(1), (17). The submitted information contains a completed report which the City must release pursuant to section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or is expressly made confidential under the Act or other law. *Id.* § 552.022(a)(1). The submitted information also contains a court-filed document that is subject to section 552.022(a)(17) and must be released unless it is made confidential by the Act or other law. *Id.* § 552.022(a)(17). Although you seek to withhold this information under section 552.103 of the Government Code, this exception is discretionary in nature and does not make information confidential under the Act. *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* Tex. Att'y Gen. ORD-665 (2000) at 2 n.5 (discretionary exceptions generally), ORD-663 (1999) at 5 (waiver of discretionary exceptions). Therefore, the City may not withhold the information subject to section 552.022 under section 552.103. While the City must release the information we have marked pursuant to section 552.022, we will address your argument against disclosure of the remaining information.

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<sup>2</sup>Although you also raise sections 552.105, 552.107, 552.110, 552.111 and 552.131 of the Government Code, you have not submitted arguments in support of these exceptions; therefore, we assume you have withdrawn them. *See* TEX. GOV'T CODE §§ 552.301, .302.

<sup>3</sup>We assume the “representative sample” of records submitted to this office is truly representative of the requested records as a whole. 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. *See* TEX. GOV'T CODE §§ 552.301(e)(1)(D), .302; Tex. Att'y Gen. ORD-499 (1988) at 6, ORD-497 (1988) at 4.

Section 552.103 of the Government Code provides in relevant part:

(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.

TEX. 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 [mand. denied]); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Tex. Att'y Gen. ORD-551 (1990) at 4. A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You provide documentation showing that at the time the City received the present request for information the City was a party to a lawsuit styled *City of Pharr v. Paxton*, No. D-1-GN-16-003632, in the 126th Judicial District Court in Travis County, Texas. You further show that the City was, at the time of the request, a party to another lawsuit styled *D&M Ventures, LLC v. City of Pharr*, No. C-3205-16-E, in the 275th Judicial District Court in Hidalgo County, Texas. You state the submitted information is related to the pending lawsuits. We agree litigation was pending when the City received this request for information. We also find that the submitted information in Exhibits K-1, K-2, and K-3 is related to the pending litigation for the purposes of section 552.103. Therefore, the City may withhold under section 552.103(a) of the Government Code the information in Exhibits K-1, K-3, and the information in Exhibit K-2 that is other than that which section 552.022 requires to be disclosed.

However, once the information has been obtained by all parties to the pending litigation, no section 552.103(a) interest exists with respect to this information. Tex. Att'y Gen. ORD-349 (1982) at 2. We also note that the applicability of section 552.103(a) ends once the litigation

has concluded. Tex. Att’y Gen. Op. No. MW-575 (1982) at 1; Tex. Att’y Gen. ORD-350 (1982) at 3.

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,



Charlotte M. Harper  
Assistant Attorney General  
Opinion Committee

CMH/sdk

Ref: ID# 665157

Enc. Submitted documents

c: Requestor  
(w/o enclosures)