



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 8, 2017

Mr. Jeff Rambin
Counsel for the East Texas Council of Governments
Capshaw DeRieux LLP
114 East Commerce Avenue
Gladewater, Texas 75647

OR2017-17881

Dear Mr. Rambin:

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# 669772.

The East Texas Council of Governments (the "council"), which you represent, received two requests from the same requestor for two specified forms related to a specified site visit and a named individual's time sheets and travel expenses during a specified time period. You state the council does not maintain information responsive to a portion of the request.¹ 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 representative sample of information.²

¹The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

²We 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 note the submitted information may have been the subject of previous requests for information, as a result of which this office issued Open Records Letter Nos. 2016-25734 (2016) and 2016-25755 (2016). We note the information that was at issue in Open Records Letter Nos. 2016-25734 and 2016-25755 is currently the subject of pending litigation in *East Texas Council of Governments v. Ken Paxton, Attorney General of Texas*, Cause No. D-1-GN-16-005814, in the 201st Judicial District, Travis County, Texas. Accordingly, to the extent the submitted information is subject to this pending litigation, we will close our file with regard to this request without issuing a decision and will allow the trial court to determine whether the information at issue must be released to the public. To the extent the submitted information is not subject to this pending litigation, we will address your arguments against its disclosure.

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).

You state the submitted information is the subject of pending litigation. You inform us, and provide documentation showing, prior to the receipt of the instant requests the council intervened in a lawsuit, which is styled *Melanie Law d/b/a Punkin' Doodles v. Workforce Solutions East Texas*, Cause No. 16-1519-B, filed in the 114th Judicial District Court in

Smith County. Based upon your representations and our review, we find litigation was pending at the time the council received the present requests. Further, we agree the information at issue relates to the pending litigation for the purposes of section 552.103 of the Government Code. Therefore, we find the council may withhold the submitted information under section 552.103(a) of the Government Code.

However, once the information has been obtained by all parties to the pending litigation, 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 has concluded. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

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,



Tim Neal
Assistant Attorney General
Open Records Division

TN/tdw

Ref: ID# 669772

Enc. Submitted documents

c: Requestor
(w/o enclosures)