



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 18, 2017

Mr. Jacque Cullom
Assistant City Attorney
City of San Marcos
630 East Hopkins
San Marcos, Texas 78666

OR2017-28697

Dear Mr. Cullom:

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# 687910.

The City of San Marcos (the "city") received five requests from the same requestor for all criminal trespass warnings and call notes pertaining to specified incidents. 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.

Initially, we note portions of the submitted information are not responsive to the instant request because they do not pertain to the incidents specified in the present requests. The city need not release non-responsive information in response to this request, and this ruling will not address that information.

Next, we must address the city's procedural obligations under section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. Gov't Code § 552.301(b). Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open

records request (1) written comments stating the reasons why the claimed exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *Id.* § 552.301(e). We note the requestor seeks all criminal trespass warnings and call notes related to specified incidents. The responsive information you have submitted consists of one document listing all incident numbers involving the requestor, but not a copy or representative sample of any additional records. Further, we find the submitted list is not representative of any additional information to which the list may pertain. Accordingly, to the extent the city maintains additional responsive information, we find the city failed to comply with the procedural requirements mandated by section 552.301(e) with respect to any such information.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 630 (1994). You assert the responsive information you have submitted is excepted from disclosure under section 552.103 of the Government Code. However, to the extent the city maintains additional responsive information, because the city has not submitted a copy or representative sample of such information to this office for our review, you have failed to establish a compelling reason to address your argument against disclosure of such information. Thus, we have no choice but to order any additional responsive information released pursuant to section 552.302. Nevertheless, we will consider the applicability of section 552.103 of the Government Code to the responsive information you have submitted.

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 information at issue is the subject of pending litigation. You inform us, and provide documentation showing, prior to the receipt of the instant request a lawsuit was filed against the city styled *Reece v. Insley*, Civil Action No. A17CV0813SS, on August 21, 2017, in the United States District Court for the Western District of Texas, Austin Division. Based upon your representation and our review, we find litigation was pending at the time the city received the present request. Further, we agree the information at issue relates to the pending litigation for the purposes of section 552.103. Therefore, we find the city may withhold the responsive information you have submitted, which we have marked, under section 552.103(a) of the Government Code.

However, we note once the responsive information you have submitted has been obtained by all parties to the 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,

A handwritten signature in black ink that reads "Cole Hutchison". The signature is written in a cursive style with a large initial "C".

Cole Hutchison
Assistant Attorney General
Open Records Division

CH/sb

Ref: ID# 687910

Enc. Submitted documents

c: Requestor
(w/o enclosures)