



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 20, 2017

Ms. Cathy Cunningham
Counsel for the City of Keller
Boyle & Lowry, L.L.P.
4201 Wingren Drive, Suite 108
Irving, Texas 75062-2763

OR2017-28969

Dear Ms. Cunningham:

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# 688967.

The City of Keller (the "city"), which you represent, received two requests from the same requestor for certain information pertaining to review and permit fees, as well as the development of a proposed tennis facility. We understand the city will release some information. 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.

Initially, we note some of the submitted information may have been the subject of previous requests for information, as a result of which this office issued Open Records Letter No. 2017-16029 (2017). In that ruling, we concluded the city (1) may withhold the information we have marked under section 552.131(b) of the Government Code; (2) must withhold the information we have marked under section 552.136 of the Government Code; (3) must withhold the personal e-mail addresses in the remaining information under section 552.137 of the Government Code to the extent the personal e-mail addresses belong to members of the public and are not excluded by section 552.137(c) of the Government Code, unless the individuals to whom the e-mail addresses belong affirmatively consent to their release; and (4) must release the remaining information. The city now claims section

552.103 of the Government Code for the information we previously directed the city to release in Open Records Letter No. 2017-16029. We note the Act does not permit the selective disclosure of information. Section 552.007 of the Government Code provides if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential by law. *See* Gov't Code § 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Accordingly, pursuant to section 552.007, the city may not now withhold the information that was previously released unless its release is expressly prohibited by law or the information is confidential by law. Because section 552.103 does not prohibit the release of information or make information confidential, the city may not now withhold any previously released information under this exception. *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 Gov't Code § 552.103); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Accordingly, for the requested information that is identical to the information previously requested and ruled upon by this office, we conclude the city must continue to rely on Open Records Letter No. 2017-16029 as a previous determination and withhold or release the identical information in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes information is or is not excepted from disclosure). Nevertheless, to the extent the information responsive to the instant requests was not previously ruled upon in Open Records Letter No. 2017-16029, we will consider the applicability of section 552.103.

Next, we note some of the submitted information 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:

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(3). The information we have marked consists of information in an account, voucher, or contract relating to the receipt of funds by the city subject to section 552.022(a)(3). The city must release this information unless it is made confidential under the Act or other law. *See id.* You seek to withhold the information subject to section 552.022(a)(3) under section 552.103 of the Government Code. However, section 552.103 is discretionary in nature and does not make information confidential under the Act. *See Dallas Area Rapid Transit*, 4 S.W.3d at 475-76; *see also* ORDs 665 at 2 n.5, 663 at 5. Therefore, the city may not withhold the information subject to section 552.022(a)(3), which we have marked, under section 552.103. As you have asserted no other exceptions to disclosure for this information, the city must release it. However, we will consider your assertion of section 552.103 for the information not subject to section 552.022(a)(3).

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 remaining information 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 *Johnson Road Coalition v. Dent*, Cause No. 067-293283-17, on July 18, 2017, in the 67th District Court of Tarrant County, Texas. Based upon your

representations and our review, we find litigation was pending at the time the city received the present requests. 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 information not subject to section 552.022(a)(3) of the Government Code under section 552.103(a) of the Government Code.

However, we note once the responsive information 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.

In summary, for the requested information that is identical to the information previously requested and ruled upon by this office, the city must continue to rely on Open Records Letter No. 2017-16029 as a previous determination and withhold or release the identical information in accordance with that ruling. To the extent the information responsive to the instant requests was not previously ruled upon in Open Records Letter No. 2017-16029, the city must release the information we have marked under section 552.022(a)(3) of the Government Code, and may withhold the remaining information under section 552.103 of the Government Code.

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,



Cole Hutchison
Assistant Attorney General
Open Records Division

CH/sb

Ref: ID# 688967

Enc. Submitted documents

c: Requestor
(w/o enclosures)