



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

January 3, 2018

Ms. Cary Grace
Assistant City Attorney
City of Austin
P.O. Box 1088
Austin, Texas 78767-8828

OR2018-00210

Dear Ms. Grace:

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# 689884 (PIR# 37572).

The City of Austin (the "city") received a request for correspondence pertaining to discussions of five specified terms during a specified time period.¹ You state the city is releasing some of the requested 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 representative sample of information.²

¹We note the city asked for and received clarification regarding this request. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information); *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

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, and you acknowledge, some of the requested information was the subject of previous requests for information, as a result of which this office issued Open Records Letter Nos. 2017-19034 (2017), 2017-22867 (2017), and 2017-23960 (2017). In Open Records Letter No. 2017-19034, we determined the city may withhold the information at issue under section 552.107(1) of the Government Code. In Open Records Letter No. 2017-22867, we determined that, to the extent the requested information is identical to the information previously requested and ruled upon by this office in Open Records Letter No. 2017-19034, the city may rely upon that ruling as a previous determination and withhold the identical information in accordance with that ruling; the city may withhold certain information it marked under sections 552.103 and 552.107(1) of the Government Code; and the city must withhold the remaining information at issue under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code. In Open Records Letter No. 2017-23960, we determined the city may withhold the information at issue under section 552.103 of the Government Code. We have no indication there has been any change in the law, facts, or circumstances on which the previous rulings were based. Accordingly, to the extent the requested information is identical to the information previously requested and ruled upon by this office, we conclude the city may rely on Open Records Letter Nos. 2017-19034, 2017-22867, and 2017-23960 as previous determinations and withhold the identical information in accordance with those rulings. *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 that information is or is not excepted from disclosure). However, to the extent the information in the instant request is not identical to the information responsive in Open Records Letter Nos. 2017-19034, 2017-22867, or 2017-23960, we will address the city's argument against disclosure.

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.

Gov't Code § 552.103(a), (c). The governmental body claiming section 552.103 has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information, and (2) the information at issue is related to that litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See Open Records Decision No. 551 at 4 (1990).*

To establish litigation is reasonably anticipated for the purposes of section 552.103, 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).* In the context of anticipated litigation in which the governmental body is the prospective plaintiff, the concrete evidence must at least reflect litigation is “realistically contemplated.” *See Open Records Decision No. 518 at 5 (1989); see also Attorney General Opinion MW-575 (1982)* (finding investigatory file may be withheld if governmental body attorney determines it should be withheld pursuant to section 552.103 and litigation is “reasonably likely to result”). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See ORD 452 at 4.*

The city states the information at issue relates to “several incidents of carbon monoxide exposure within Ford Explorer vehicles owned, leased, or used by [c]ity personnel.” The city also states the information at issue is related to a lawsuit the city is contemplating filing against the Ford Motor Company (“Ford”) and provides an affidavit from the city’s Division Chief for Litigation stating the city opted out of a class-action settlement involving Ford and its Ford Explorers in order to preserve the city’s right to pursue a separate legal action against Ford. Based on the city’s representations and our review of the information at issue, we conclude litigation was reasonably anticipated on the date the city received the present request for information. Further, we find the information at issue is related to the anticipated litigation for purposes of section 552.103. Therefore, the city may withhold the submitted information under section 552.103 of the Government Code.

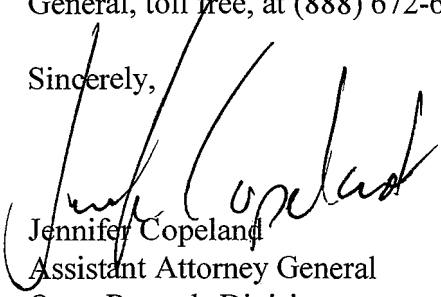
Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *See Open Records Decision Nos. 349 (1982), 320 (1982).* Thus, information that has either been obtained from or provided to all parties to the anticipated litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has concluded. *See Attorney General Opinion MW-575 (1982); see also Open Records Decision No. 350 (1982).*

In summary, to the extent the requested information is identical to the information previously requested and ruled upon by this office, we conclude the city may rely on Open Records Letter Nos. 2017-19034, 2017-22867, and 2017-23960 as previous determinations and withhold the identical information in accordance with those ruling. The city may withhold the submitted 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,



Jennifer Copeland
Assistant Attorney General
Open Records Division

JC/gw

Ref: ID# 689884

Enc. Submitted documents

c: Requestor
(w/o enclosures)