



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

January 7, 2019

Ms. Patricia A. Rigney
City Attorney
City of Pharr
P.O. Box 1729
Pharr, Texas 78577

OR2019-00379

Dear Ms. Rigney:

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#744913 (Request #R000785).

The City of Pharr (the "city") received a request for communications involving the city, IDEA Public Schools ("IDEA"), and the Boys and Girls Club of Pharr (the "Club") during a specified time period. The city claims the submitted information is excepted from disclosure under section 552.103 of the Government Code.¹ We have considered the exception the city claims and reviewed the submitted representative sample of information.²

Initially, we note some of the submitted information is subject to section 552.022(a)(3) of the Government Code. Section 552.022(a)(3) provides for the required public disclosure of

¹We note that although you also cite sections 552.101 and 552.108 of the Government Code, you make no arguments to support these exceptions. Therefore, we assume you have withdrawn your claim these sections apply to the submitted information. *See* Gov't Code §§ 552.301, .302.

²We assume that 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 that those records contain substantially different types of information than that submitted to this office.

“information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body,” unless it is made confidential under the Act or other law. Gov’t Code § 552.022(a)(3). The city seeks to withhold the information at issue under section 552.103 of the Government Code. However, this section 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* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the information subject to section 552.022(a)(3), which we marked, may not be withheld under section 552.103 of the Government Code. As the city raises no further exceptions to disclosure of this information, the city must release the information we marked pursuant to section 552.022(a)(3). We will address the city’s arguments for the information not subject to section 552.022.

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 that 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 that the department 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 under section 552.103(a).

To establish litigation is reasonably anticipated for the purposes of section 552.103, a governmental body must provide this office with “concrete evidence showing 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.

You state the city anticipated litigation on the date it received the request for information. You explain the Club is a tenant of the city and entered into an agreement with IDEA in violation of an occupancy agreement with the city for the use of the city’s facilities. You state the city and the Club have been attempting to “negotiate and settle issues surrounding the occupancy agreement and alleged violations of the occupancy agreement” but “if these issues cannot be resolved, the [c]ity anticipates having to sue for eviction or breach of contract.” Based on your representations and our review, we determine the city reasonably anticipated litigation when it received the request for information. The city asserts, and we agree, the information at issue relates to the anticipated litigation. Therefore, we conclude the city may withhold the remaining 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. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing parties in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

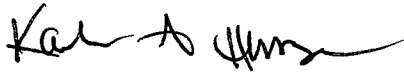
In summary, the city must release the information we marked pursuant to section 552.022(a)(3). The city may withhold the remaining information under section 552.103 of the Government Code.

The city also asks this office to issue a previous determination that would permit the city to withhold certain information without requesting a ruling from this office. Open Records Decision No. 673 (2001). We decline to issue such a previous determination at this time. Accordingly, 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, appearing to read "Kael A. Henze". The signature is fluid and cursive, with a long horizontal stroke at the end.

Kaelan A. Henze
Assistant Attorney General
Open Records Division

KAH/som

Ref: ID# 744913

Enc. Submitted documents

c: Requestor
(w/o enclosures)