



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 21, 2019

Mr. Brad Bowman
General Counsel
Texas Department of Licensing and Regulation
P.O. Box 12157
Austin, Texas 78711

OR2019-04897

Dear Mr. Bowman:

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# 749001 (PIR-20190900).

The Texas Department of Licensing and Regulation (the "department") received a request for all information pertaining to a specified investigation.¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.137 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note some of the submitted information was released in response to a prior open records request. 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

¹The department sought and received clarification of the information requested. *See* Gov't Code § 552.222 (if request for information is unclear, governmental body may ask requestor to clarify request); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (if governmental entity, acting in good faith, requests clarification of unclear or over-broad request, ten-day period to request attorney general ruling is measured from date request is clarified).

²Although you do not raise section 552.137 of the Government Code in your brief, we understand you to raise this exception based on your markings in the submitted documents.

prohibited by law. See Gov't Code 552.007; Open Records Decision Nos. 518 at 3 (1989), 400 at 2 (1983). Section 552.103 of the Government Code is a discretionary exception to disclosure that protects a governmental body's interests. 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); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). As such, section 552.103 of the Government Code does not expressly prohibit the release of the submitted information or make the information confidential. Accordingly, the department may not withhold the previously released information under section 552.103 of the Government Code. However, because section 552.101 of the Government Code makes information confidential under the Act, we will consider the applicability of this exception to the previously released information. We will address your argument under section 552.103 of the Government Code for the remaining information that was not previously released.

Section 552.103 of the Government Code provides 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). A 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 (1) litigation was 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). A 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, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere

conjecture.” 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 that litigation is “realistically contemplated.” See Open Records Decision No. 518 at 5 (1989); see also Attorney General Opinion MW-575 (1982) (finding that investigatory file may be withheld from disclosure if governmental body attorney determines that it should be withheld pursuant to section 552.103 and that 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. We note contested cases conducted under the Texas Administrative Procedure Act (the “APA”), chapter 2001 of the Government Code, are considered litigation for purposes of section 552.103 of the Government Code. See Open Records Decision No. 588 at 7 (1991).

You state the department opened an enforcement case relating to the information at issue because of alleged violations of the massage therapy laws prior to receipt of the instant request. You explain the investigation remains ongoing in preparation for anticipated prosecution of rule violations. We note a contested case hearing before the State Office of Administrative Hearings is considered litigation for the purposes of section 552.103. See *id.* Based on your representations and our review, we find litigation was pending when the department received this request for information, and the submitted information is related to the pending litigation for the purposes of section 552.103. Therefore, section 552.103 of the Government Code is applicable to the remaining information.

We note, however, the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to that litigation to obtain it through discovery procedures. See ORD 551 at 4-5. Thus, once the opposing party has seen or had access to information relating to the anticipated litigation through discovery or otherwise, there is no interest in withholding such information from public disclosure under section 552.103. See Open Records Decision Nos. 349 (1982), 320 (1982). Upon review, we find some of the remaining information, which we marked for release, was seen by an opposing party and may not be withheld under section 552.103(a). Therefore, the department may withhold the remaining information that was not previously released under section 552.103 of the Government Code. Further, we note the applicability of section 552.103(a) ends once the litigation has been concluded. See Attorney General Opinion MW-575 (1982); see also Open Records Decision No. 350(1982).

Section 552.101 of the Government Code excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 of the Government Code encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. Types of information considered

intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). We note the requestors have a right of access to information pertaining to them that would otherwise be confidential under common-law privacy. *See* Gov't Code § 552.023(a) (“a person or person’s authorized representative has a special right of access, beyond the right of the general public, to information held by a governmental body that relates to a person and that is protected from public disclosure by laws intended to protect that person’s privacy interests”); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning herself). Upon review, we find the information at issue is either not highly intimate or embarrassing or is of legitimate public interest or pertains to the requestor. Accordingly, no portion of the information at issue may be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

The department claims section 552.137 of the Government Code for some of the remaining information. Section 552.137 excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body,” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See id.* § 552.137(a)-(c). The e-mail addresses we have marked are not of the types specifically excluded by section 552.137(c). *See id.* § 552.137(c). Accordingly, the department must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their release.³

In summary, with the exception of the information we have marked for release, the department may withhold the submitted information that was not previously released under section 552.103 of the Government Code. The department must withhold the personal e-mail addresses we marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure. The remaining information must be released.

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

³As our ruling is dispositive, we need not address your remaining arguments against disclosure.

providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Melanie Villars
Assistant Attorney General
Open Records Division

MJV/eb

Ref: ID# 749001

Enc. Submitted documents

c: Requestor
(w/o enclosures)