



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

June 4, 2019

Ms. Julie P. Doshier  
Counsel for the City of Farmers Branch  
Nichols, Jackson, Dillard, Hager, Smith, L.L.P.  
500 North Akard Street, Suite 1800  
Dallas, Texas 75201

OR2019-14716

Dear Ms. Doshier:

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# 768680 (Ref. No. 107079).

The City of Farmers Branch (the "city"), which you represent, received a request for 10 categories of information, including communications between named individuals, documents received from named individuals, and specified easement or right of entry requests. You state the city has no information responsive to portions of the request.<sup>1</sup> You state you have released some information. You claim the submitted information is excepted from disclosure under section 552.103 of the Government Code. We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (permitting interested third party to submit to attorney general reasons why requested information should or should not be released). We have considered the exception you claim and reviewed the submitted information.

Initially, 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:

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<sup>1</sup>The Act does not require a governmental body to release information that did not exist when a request for information was received, create responsive information, or obtain information that is not held by or on behalf of the city. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

(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:

...

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(17). The submitted information contains a court-filed document subject to section 552.022(a)(17) of the Government Code. The city must release this information pursuant to section 552.022(a)(17), unless it is made confidential under the Act or other law. *See id.* You seek to withhold this information under section 552.103 of the Government Code. However, this section is discretionary 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 city may not withhold the information at issue under section 552.103. However, we will address your argument for the submitted information not subject to section 552.022(a)(17).

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).

You state, and provide documentation showing, prior to the city's receipt of the instant request, a lawsuit styled *McCracken, et al. v. County of Dallas, et al.*, Cause No. PR-17-01604-2, was pending against the city in the Probate Court No. 2, Dallas County, Texas. Therefore, we agree litigation was pending on the date the city received the present request for information. You also state the information at issue pertains to the substance of the lawsuit's claims. Based on your representations and our review, we find the submitted information is related to the pending litigation. Therefore, we conclude section 552.103 of the Government Code is generally applicable to the remaining information not subject to section 552.022 of the Government Code.

We note, however, the purpose of section 552.103 of the Government Code is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to the litigation to obtain such information through discovery procedures. *See* ORD 551 at 4-5. Thus, once the opposing party in pending litigation has seen or had access to information that is related to the litigation, there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Therefore, the city may withhold under section 552.103 only those portions of the remaining information at issue that the opposing party to the litigation has not seen or had access to. In this instance, the opposing party has seen or had access to some of the information at issue. This information, which we have marked for release, may not be withheld under section 552.103. Accordingly, with the exception of the information we marked for release, the city may withhold the remaining information at issue under section 552.103 of the Government Code. We note the applicability of section 552.103 ends once the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, with the exception of the marked information subject to section 552.022 of the Government Code and the information we marked for release, the city 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](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 "Kimbell Kesling". The signature is written in a cursive, flowing style.

Kimbell Kesling  
Attorney  
Open Records Division

KK/eb

Ref: ID# 768680

Enc. Submitted documents

c: Requestor  
(w/o enclosures)