



KEN PAXTON  
ATTORNEY GENERAL OF TEXAS

August 30, 2019

Mr. Jesse Moore  
Assistant General Counsel  
Texas Department of Banking  
2601 North Lamar Boulevard  
Austin, Texas 78705

OR2019-24448

Dear Mr. Moore:

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# 783536.

The Texas Department of Banking (the "department") received two requests from the same requestor for specified requests for proposals or requests for qualifications during a specified time period; specified contracts created during a specified time period; e-mail and text communications between the Texas Finance Commission and any serving hearing officer during a specified time period; and information pertaining to the department's response to the requestor's first public information request.<sup>1</sup> You claim the submitted information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note you have not submitted any information responsive to the portion of the request for e-mail and text communications between the Texas Finance Commission and any serving hearing officer during a specified time period. Thus, to the extent any additional responsive information existed when the present request was received, we assume it has been released. If such information has not been released, then it must be released at this time. *See* Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

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<sup>1</sup> We note the department 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).

Next, we note some of the submitted information, which we marked, is not responsive to the instant request because it does not consist of the requested specified requests for proposals or requests for qualifications during a specified time period; specified contracts created during a specified time period; e-mail and text communications between the Texas Finance Commission and any serving hearing officer during a specified time period; or information pertaining to the department's response to the requestor's first public information request. The department need not release nonresponsive information in response to this request, and this ruling will not address that information.

We next note some of the responsive information is subject to section 552.022 of the Government Code. Section 552.022 provides, in relevant part, the following:

(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 responsive information includes a contract relating to the receipt or expenditure of funds by the department that is subject to section 552.022(a)(3). The department must release this information pursuant to section 552.022(a)(3) unless it is made confidential under the Act or other law. *See id.* Although the department raises section 552.103 of the Government Code for this information, 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 (governmental body may waive section 552.103); ORDs 665 at 2 n.5 (discretionary exceptions generally), 663 at 5 (waiver of discretionary exceptions). Therefore, the department may not withhold any of the information subject to section 552.022(a)(3), which we marked, under section 552.103. Accordingly, the department must release the information we marked pursuant to section 552.022(a)(3) of the Government Code. However, we will address the department's arguments against disclosure of the remaining information.

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 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 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).

You state, and submit documentation demonstrating, prior to the department's receipt of this request, a lawsuit styled *E Mex Financial Services, Inc. v. Cooper, Texas Banking Commissioner*, Cause No. D-1-GN-19-003237, was filed against the department and is currently pending in the 200th District Court of Travis County, Texas. You further state the remaining responsive information is related to the pending litigation because it pertains to the claims in the lawsuit. Upon review of your arguments and the information at issue, we find the remaining responsive information relates to litigation that was pending when the department received this request for information. Accordingly, the department may withhold the remaining responsive information under section 552.103 of the Government Code.

We note 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 the opposing party in the 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 department must release the information we marked pursuant to section 552.022(a)(3) of the Government Code.<sup>2</sup> The department may withhold the remaining responsive information under section 552.103 of the Government Code.<sup>3</sup>

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.

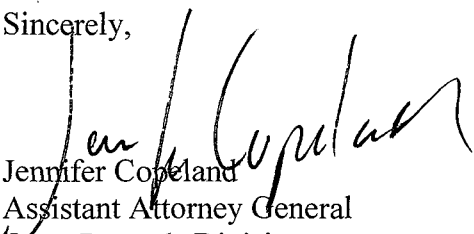
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<sup>2</sup> We note this information contains a social security number. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act. *See* Gov't Code § 552.147(b).

<sup>3</sup> As our ruling on this information is dispositive, we need not address the department's remaining argument against disclosure.

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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,



Jennifer Copeland  
Assistant Attorney General  
Open Records Division

JC/gw

Ref: ID# 783536

Enc. Submitted documents

c: Requestor  
(w/o enclosures)