



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

October 30, 2019

Mr. Ronny H. Wall
Senior Associate General Counsel
Texas Tech University System
P.O. Box 45031
Lubbock, Texas 79409-5031

OR2019-30641

Dear Mr. Wall:

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# 792674.

Texas Tech University (the "university") received a request for a named individual's e-mails relating to a named individual during a specified date range.¹ You claim some of the submitted information is not subject to the Act. You also claim the submitted information is excepted from disclosure under sections 552.103, 552.107, 552.111, 552.117, 552.1235, and 552.137 of the Government Code. We have considered the submitted arguments and reviewed the submitted representative sample of information.² We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, you argue some of the submitted information does not consist of public information that is subject to disclosure under the Act. The Act is applicable only to "public information." *See id.* §§ 552.002, .021. Section 552.002(a) reads as follows:

¹ You inform us the university sent the requestor an estimate of charges pursuant to section 552.2615 of the Government Code. *See* Gov't Code § 552.2615. The estimate of charges required the requestor to provide a deposit for payment of anticipated costs under section 552.263 of the Government Code. *See id.* § 552.263(a). You inform us the university received the required deposit on August 12, 2019. *See id.* § 552.263(e) (if governmental body requires deposit or bond for anticipated costs pursuant to section 552.263, request for information is considered to have been received on date governmental body receives bond or deposit).

² We 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.

(a) In this chapter, “public information” means information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

(1) by a governmental body;

(2) for a governmental body and the governmental body:

(A) owns the information;

(B) has a right of access to the information; or

(C) spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information; or

(3) by an individual officer or employee of a governmental body in the officer’s or employee’s official capacity and the information pertains to official business of the governmental body.

Id. § 552.002(a). Section 552.002(a-1) also provides the following:

Information is in connection with the transaction of official business if the information is created by, transmitted to, received by, or maintained by an officer or employee of the governmental body in the officer’s or employee’s official capacity, or a person or entity performing official business or a governmental function on behalf of a governmental body, and pertains to official business of the governmental body.

Id. § 552.002(a-1). Thus, virtually all of the information in a governmental body’s physical possession constitutes public information and, thus, is subject to the Act. *Id.* § 552.002(a)(1); *see* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). The Act also encompasses information that a governmental body does not physically possess, if the information is collected, assembled, or maintained for the governmental body, and the governmental body owns the information or has a right of access to it. Gov’t Code § 552.002(a)(2); *see* Open Records Decision No. 462 at 4 (1987). Further, information that is written, produced, collected, assembled, or maintained by an individual officer or employee of a governmental body in the officer’s or employee’s official capacity may be subject to disclosure under the Act if the information pertains to official business of the governmental body. Gov’t Code § 552.002(a)(3).

You assert Attachment E-1 is not subject to the Act. You argue the information at issue is not subject to the Act because it is personal in nature and is not related to the transaction of official university business. *See* Open Records Decision No. 635 at 7 (1995) (section 552.002 not applicable to personal information unrelated to official business and created or maintained by state employee involving *de minimis* use of state resources). However, upon review, we find Attachment E-1 is maintained in connection with the transaction of official

business of the university and, thus, is subject to the Act. Accordingly, we will address your arguments for this information as well as the remaining information.

Next, you inform us Attachment D was the subject of previous requests for information, in response to which this office issued Open Records Letter Nos. 2018-03986 (2018), 2018-08255 (2018), and 2018-15320 (2018). In Open Records Letter No. 2018-03986, we determined (1) with the exception of the information shared during previous litigation, the university may withhold the information it marked under section 552.107(1) of the Government Code; (2) the university may withhold information we marked and indicated under section 552.111 of the Government Code, including the indicated draft documents to the extent the university released the draft documents to the public in their final form; (3) the university must withhold the donors' identifying information it marked under section 552.1235 of the Government Code; (4) the university must withhold the information we marked under section 552.117(a)(1) of the Government Code if the individual whose information is at issue timely requested confidentiality pursuant to section 552.024 of the Government Code; and (5) the university must release the remaining information. In Open Records Letter Nos. 2018-08255 and 2018-15320, we determined the university may withhold the submitted information under section 552.103 of the Government Code. You now seek to withhold Attachment D under section 552.103 of the Government Code. We note section 552.007 of the Government Code provides that, 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 prohibited by law or the information is confidential under law. *See Gov't Code § 552.007*; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Accordingly, pursuant to section 552.007, the university may not now withhold the previously released information unless its release is expressly prohibited by law. Because section 552.103 does not prohibit the release of information or make information confidential, the university may not now withhold any previously released information under this exception. *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). Nevertheless, there is no indication the law, facts, and circumstances on which the prior rulings were based have changed. Therefore, upon review, we find the university must continue to rely on Open Records Letter Nos. 2018-03986, 2018-08255 and 2018-15320 as previous determinations and withhold or release Attachment D in accordance with those rulings.³ *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 information is or is not excepted from disclosure). However, we will address your argument under section 552.103 for the information not subject to the prior rulings.

³ As we are able to make this determination, we need not address your remaining arguments against disclosure of this information.

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 has the burden of providing relevant facts and documents to show section 552.103(a) 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 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). The governmental body must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a).

You state the information at issue is the subject of pending litigation. You inform us, and provide documentation showing, prior to the receipt of the instant requests, a lawsuit was filed against the university styled *Dolcefino Communications, LLC v. Texas Tech University*, Cause No. 2018528740, on January 8, 2018, in the 99th Judicial District Court for Lubbock County, Texas. Based upon your representation and our review, we find litigation was pending at the time the university received the present request. Further, we agree the information at issue relates to the pending litigation for the purposes of section 552.103. Therefore, we conclude the university may withhold the remaining information under section 552.103 of the Government Code.⁴

Generally, however, once information has been obtained by all parties to the litigation though 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 pending 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 been concluded. *See*

⁴ As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.


Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

In summary, the university may continue to rely on Open Records Letter Nos. 2018-03986, 2018-08255 and 2018-15320 as previous determinations and withhold or release Attachment D in accordance with those rulings. The university may withhold the remaining information under section 552.103 of the Government Code.

Finally, the university asks this office to issue a previous determination permitting it to withhold the information at issue under section 552.103 of the Government Code for subsequent requests for the same information as long as the law, facts, and circumstances have not changed without seeking a ruling from this office. *See* Gov't Code § 552.301(a) (allowing governmental body to withhold information subject to previous determination); ORD 673 (listing elements of second type of previous determination under section 552.301(a) of the Government Code). 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 <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,



Deborah Southerland
Attorney
Open Records Division

DS/rm

Ref: ID# 792674

Enc. Submitted documents

c: Requestor
(w/o enclosures)