



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 3, 2019

Ms. Lauren Downey
Assistant Attorney General
Public Information Coordinator
Office of the Attorney General
Post Office Box 12548
Austin, Texas 78711-2548

OR2019-33880

Dear Ms. Downey:

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# 799215 (PIR Nos. R002257, R002267, R002285, R002306, R002386, R002487 and R002496).

The Office of the Attorney General (the "OAG") received seven requests from six requestors for information pertaining to specified investigations. The OAG states it will release some of the requested information to the requestors in response to some of the requests. The OAG claims the submitted information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the claimed exceptions and reviewed the submitted representative sample of information.¹

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses information other statutes make confidential. The OAG raises section 15.10(i)(1) of the Business and Commerce Code, which reads as follows:

¹ 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 that those records contain substantially different types of information than that submitted to this office.

(1) Except as provided in this section or ordered by a court for good cause shown, no documentary material, answers to interrogatories, or transcripts of oral testimony, or copies or contents thereof, shall be available for examination or used by any person without the consent of the person who produced the material, answers, or testimony and, in the case of any product of discovery, of the person from whom the discovery was obtained.

Bus. & Com. Code § 15.10(i)(1). The OAG explains section 15.10(b) authorizes the OAG to issue a Civil Investigative Demand (“CID”) when the OAG has reason to believe any person may be in possession, custody, or control of any documentary material or may have information relevant to a civil antitrust investigation. *Id.* § 15.10(b). The OAG asserts the information at issue consists of information provided to the OAG in response to a CID issued by the OAG’s Antitrust Division. The OAG represents none of the permitted disclosures in section 15.10(i) apply in this instance. After review of the information at issue and consideration of the OAG’s arguments, we agree the OAG must withhold the information it marked under section 552.101 of the Government Code in conjunction with section 15.10(i)(1) of the Business and Commerce Code.

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 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).

To establish litigation is reasonably anticipated, a governmental body must provide this office “concrete evidence showing that the claim that litigation might 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.

The OAG states its Antitrust Division is involved in an investigation into a specified entity regarding potential violations of the Texas Free Enterprise and Antitrust Act. The OAG further states the Antitrust Division initiated the investigation at issue for enforcement purposes. The OAG states, if the Antitrust Division uncovers violations of law during this investigation, the OAG will initiate enforcement proceedings and, therefore, anticipates litigation in this matter. Therefore, we find the OAG reasonably anticipated litigation when it received the present requests for information. The OAG asserts, and we agree, the information at issue relates to the anticipated litigation. Accordingly, the OAG has demonstrated the applicability of section 552.103 to the information at issue and may withhold the information at issue under section 552.103 of the Government Code.

However, once the information has been obtained by all parties to the pending or anticipated litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). We also note the applicability of section 552.103(a) ends when litigation has concluded. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

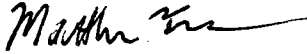
In summary, the OAG must withhold the information it marked under section 552.101 of the Government Code in conjunction with section 15.10(i)(1) of the Business and Commerce Code. The OAG may withhold the information at issue under section 552.103 of the Government Code.

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 <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,

A handwritten signature in black ink, appearing to read "Matthew Taylor", with a long horizontal flourish extending to the right.

Matthew Taylor
Assistant Attorney General
Open Records Division

MHT/eb

Ref: ID# 799215

Enc. Submitted documents

c: 6 Requestors
(w/o enclosures)