



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

March 5, 2020

Ms. Lanette Rusmiel
Assistant General Counsel
Texas Department of Public Safety
P.O. Box 4087
Austin, Texas 78773-0001

OR2020-06960

Dear Ms. Rusmiel:

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# 815489 (Ref. No. 19-5302).

The Texas Department of Public Safety (the "department") received a request for four categories of information pertaining to a specified hearing. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.107 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

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.

...

¹ Although the department also raises Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5, we note the proper exception to raise when asserting the attorney-client privilege and attorney work product privilege for information not subject to section 552.022 of the Government Code is section 552.107 and 552.111 of the Government Code, respectively. *See* Open Record Decision Nos. 677 (2002), 676 at 1-2 (2002).

(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 the section 552.103(a) exception 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).

This office has held that “litigation” within the meaning of section 552.103 includes contested cases conducted in a quasi-judicial forum. *See, e.g.*, Open Records Decision Nos. 474 (1987), 368 (1983), 301 (1982). For instance, this office has held that cases conducted under the Texas Administrative Procedure Act (the “APA”), chapter 2001 of the Government Code, constitute “litigation” for purposes of section 552.103. *See, e.g.*, Open Records Decision Nos. 588 at 7 (1991) (construing statutory predecessor to the APA). We further note a contested case before the State Office of Administrative Hearings (the “SOAH”) is considered litigation for purposes of the APA. *See id.* In determining whether an administrative proceeding is conducted in a quasi-judicial forum, this office has considered the following factors: (1) whether the dispute is, for all practical purposes, litigated in an administrative proceeding where (a) discovery takes place, (b) evidence is heard, (c) factual questions are resolved, (d) a record is made, and (2) whether the proceeding is an adjudicative forum of first jurisdiction, *i.e.*, whether judicial review of the proceeding in district court is an appellate review and not the forum for resolving a controversy on the basis of evidence. *See* ORD 588.

You state the submitted information pertains to an administrative license revocation suspension hearing (the “ALR hearing”) to which the department is a party that was filed prior to the date the department received the instant request for information. You explain ALR hearings are conducted by the SOAH and governed by the APA. *See* Transp. Code § 524.002 (designating SOAH to conduct certain administrative hearings and applying the APA to such hearings). Based on your representations and our review, we determine litigation was pending on the date the department received the request for information. You also state, and we agree, the information at issue relates to the pending litigation for purposes of section 552.103. Accordingly, the department may withhold the submitted information under section 552.103 of the Government Code.²

² As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

Generally, however, 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. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing parties in the pending 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).

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 'Meredith L. Coffman', with a long horizontal flourish extending to the right.

Meredith L. Coffman
Assistant Attorney General
Open Records Division

MLC/jxd

Ref: ID# 815489

Enc. Submitted documents

c: Requestor
(w/o enclosures)