



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

March 10, 2020

Mr. Jeffrey W. Giles
Assistant City Attorney
City of Houston
P.O. Box 368
Houston, Texas 77001-0368

OR2020-07540

Dear Mr. Giles:

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# 815996 (GC No. 26383).

The City of Houston (the "city") received a request for the complete file regarding a specified violation involving the requestor's client, including all inspection reports, permits, agreements, and evidence. The city claims the submitted information is excepted from disclosure under section 552.103 of the Government Code. We have considered the claimed exception and reviewed the submitted information.

Initially, we note some of the submitted information is subject to section 552.022 of the Government Code, which provides, in relevant part:

(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 information at issue consists of information in an account, contract, or voucher relating to the receipt or expenditure of funds by the city that is subject to section 552.022(a)(3). This information must be released unless it is made confidential

under the Act or other law. *See id.* The city seeks to withhold the information subject to section 552.022(a)(3), which we marked, under section 552.103 of the Government Code. However, section 552.103 is discretionary in nature 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); 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 subject to section 552.022(a)(3) under section 552.103 of the Government Code. Accordingly, as no other exceptions to disclosure are raised, the city must release the information we marked pursuant to section 552.022(a)(3) of the Government Code. However, we will consider the city's argument against disclosure of the information not subject to section 552.022.

Section 552.103 of the Government Code provides, in part, the following:

(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 the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing (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). *See* ORD 551 at 4.

This office has long held that for the purposes of section 552.103, "litigation" includes "contested cases" conducted in a quasi-judicial forum. *See* Open Records Decision Nos. 474 (1987), 368 (1983), 336 (1982), 301 (1982). Likewise, "contested cases" conducted under the Texas Administrative Procedure Act, chapter 2001 of the Government Code, constitute "litigation" for purposes of section 552.103. *See* Open Records Decision Nos. 588 (1991) (concerning former State Board of Insurance proceeding), 301 (concerning hearing before Public Utilities Commission). In determining whether an administrative

proceeding is conducted in a quasi-judicial forum, some of the factors this office considers are whether the administrative proceeding provides for discovery, evidence to be heard, factual questions to be resolved, the making of a record, and whether the proceeding is an adjudicative forum of first jurisdiction with appellate review of the resulting decision without a re-adjudication of fact questions. *See* ORD 588.

The city states, and provides documentation showing, simultaneous with the city's receipt of the instant request for information, the requestor, who represents an individual who received a notice for a sign violation from the city, filed a conditional appeal with the city's General Appeals Board (the "GAB") regarding the sign violation notice. The city argues a hearing before the GAB constitutes litigation in a quasi-judicial forum for purposes of section 552.103. The city explains pursuant to section 4604(e)(1) of the city's Sign Code, any person wishing to appeal decision of the Sign Administrator may make an appeal of the decision to the GAB. The city also explains pursuant to the procedural rules of the GAB, the petitioner has the right to present evidence and to be represented by an attorney. The city informs us pursuant to rule 12 of section 2-2 of the city's Code of Ordinances, the GAB must conduct an evidentiary hearing that may be appealed to the city council, and the city council may only consider the record created by the GAB in its consideration of such an appeal. Based upon the city's representations and our review, we find the city has demonstrated this appeals process is conducted in a quasi-judicial forum and, thus, constitutes litigation for purposes of section 552.103. Therefore, we determine the city reasonably anticipated litigation on the date the instant request was received. The city states the information at issue directly relates to the anticipated litigation. Based upon the city's representations and our review, we find the information at issue is related to the anticipated litigation. Accordingly, the city may generally withhold the remaining information under section 552.103 of the Government Code.

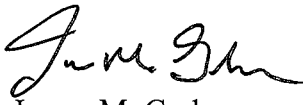
We note, however, the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to that litigation to obtain it through discovery procedures. *See* ORD 551 at 4-5. Thus, once the opposing party has seen or had access to information relating to the anticipated litigation through discovery or otherwise, there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). We note the opposing party to the anticipated litigation has seen or had access to some of the information at issue, which we marked. Therefore, the city may not withhold the information we marked for release under section 552.103. Accordingly, with the exception of the information we marked for release, the city may withhold the remaining information under section 552.103(a) of the Government Code. We also note the applicability of section 552.103(a) ends when the 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 city must release the information we marked pursuant to section 552.022(a)(3) of the Government Code. With the exception of the information we marked for release, the city may withhold the remaining information under section 552.103(a) of the Government Code. The city must release the remaining information.

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,



James M. Graham
Assistant Attorney General
Open Records Division

JMG/rm

Ref: ID# 815996

Enc. Submitted documents

c: Requestor
(w/o enclosures)