



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 27, 2020

Ms. Loretta Perez
Administrative Secretary II/Public Information Coordinator
San Antonio Housing Authority
818 South Flores Street
San Antonio, Texas 78204

OR2020-11926

Dear Ms. Perez

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# 824808 (Ref. No. W002271-021020).

The San Antonio Housing Authority (the "authority") received a request for several categories of information, including notes, interviews, and records of conversations between named individuals, pertaining to the pending grievance process involving the requestor. You claim the submitted information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information. 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, we address the requestor's contention that the authority failed to comply with section 552.301(e-1) of the Government Code in requesting this decision. Section 552.301 prescribes procedures a governmental body must follow in asking this office to determine whether information is excepted from public disclosure under the Act. *See id.* § 552.301(a). Section 552.301(e)(1)(A) requires the governmental body to submit to this office "written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld[.]" *Id.* § 552.301(e)(1)(A). Section 552.301(e-1) provides as follows:

A governmental body that submits written comments to the attorney general under Subsection (e)(1)(A) shall send a copy of those comments to the

person who requested the information from the governmental body not later than the 15th business day after the date of receiving the written request. If the written comments disclose or contain the substance of the information requested, the copy of the comments provided to the person must be a redacted copy.

Id. § 552.301(e-1). You inform us the authority received the request for information on February 4, 2020. We note this office does not count the date the request was received or holidays for the purpose of calculating a governmental body's deadlines under the Act. You state February 17, 2020, was a holiday for the authority; therefore, the fifteen-business-day deadline was February 26, 2020. The requestor states she received a copy of the authority's written comments pursuant to section 552.301(e-1) on February 26, 2020. Accordingly, we find the authority complied with section 552.301(e-1) of the Government Code.

Next, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) 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:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108; [and]

...

(15) information regarded as open to the public under an agency's policies [.]

Id. § 552.022(a)(1), (15). The submitted information includes completed evaluations that are subject to section 552.022(a)(1). The authority must release this information pursuant to section 552.022(a)(1) unless they are excepted from disclosure under section 552.108 of the Government Code or are made confidential under the Act or other law. *See id.* § 552.022(a)(1). The submitted information also contains a job description that is subject to section 552.022(a)(15) if the authority considers this item to be open to the public under its policies. This information must be released unless it is made confidential under the Act or other law. *See id.* § 552.022(a)(15). Although you assert the information at issue is excepted from disclosure under section 552.103 of the Government Code, this section is discretionary 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. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). Accordingly, the authority may not withhold the completed evaluations we marked and, if the authority considers the job description

open to the public, the job description we marked under section 552.103 of the Government Code. As you raise no further exceptions to disclosure for the information at issue, the authority must release the marked information pursuant to section 552.022 of the Government Code; however, the job description need only be released if the authority considers this item open to the public. Nevertheless, we will consider your argument under section 552.103 for the information not subject to section 552.022 of the Government Code.

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). A governmental body that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate that (1) litigation is pending or reasonably anticipated on the date the governmental body receives the request for information, and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *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). *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). 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* Open Records Decision No. 588 (1991).

You state the information at issue is related to a grievance pending appeal before the authority's Board of Commissioners (the "board") regarding the requestor's termination. You assert employee grievances filed with the authority are "litigation" in that the authority follows administrative procedures in handling such disputes. You explain under the authority's grievance policy, the grievant proceeds through a multi-level process wherein the board hears appeals that proceed to the final level of the process if the grievance involves an employment decision. You inform us during the grievance process the grievant is allowed to be represented by counsel, present favorable evidence, and call witnesses. You state the grievant must complete the authority's grievance process in order to exhaust her administrative remedies before she can file a lawsuit in a court of competent jurisdiction. You inform us the requestor informed the authority on the date of the instant request of her intent to proceed to the final grievance level and present her grievance to the board. Based on your representations, we find you have demonstrated the authority's administrative procedures for employee complaints are conducted in a quasi-judicial forum and, thus, constitute litigation for purposes of section 552.103. Thus, we determine the authority was a party to pending litigation at the time it received the instant request and the submitted information is related to the pending litigation. Therefore, section 552.103 of the Government Code is generally applicable to the information at issue.

We note, however, the opposing party has seen or had access to some of the information at issue. The purpose of section 552.103 of the Government Code is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to the litigation to obtain such information through discovery procedures. *See* ORD 551 at 4-5. Thus, once the opposing party in pending litigation has seen or had access to information that is related to the litigation, there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Accordingly, the authority may withhold under section 552.103 the portions of the information at issue that the opposing party to the litigation has not seen or had access to, which we indicated. The remaining information at issue may not be withheld under section 552.103. We note the applicability of section 552.103 ends once the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the authority must release the information we marked pursuant to section 552.022 of the Government Code; however, the job description need only be released if the authority considers this item open to the public. The authority may withhold the information we indicated under section 552.103 of the Government Code. The remaining information must be released.

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,

Michelle Garza
Assistant Attorney General
Open Records Division

MRG/eb

Ref: ID# 824808

Enc. Submitted documents

c: Requestor
(w/o enclosures)