



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 5, 2020

Mr. Jonathan Miles
Open Records Attorney
Texas Health and Human Services Commission
P.O. Box 13247
Austin, Texas 78711-3247

OR2020-12668

Dear Mr. Miles:

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# 826194 (HHSC Ref. ORR No. 21130).

The Texas Health and Human Services Commission (the "commission") received a request for all communications between specified commission employees, a named individual, and a specified third party related to specified topics during a specified time period.¹ 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 representative sample of information.²

¹ You state you sought and received clarification of the information requested. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

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.

Initially, you state some of the requested information may have been the subject of previous requests for rulings, as a result of which this office issued Open Records Letter Nos. 2020-10889 (2020) and 2020-12560 (2020). In those rulings, we determined: (1) with the exception of the information subject to section 552.022(a)(1) of the Government Code, the commission may withhold the submitted information under section 552.103 of the Government Code; and (2) the commission must release the remaining information; however, the commission may only release any information subject to copyright in accordance with copyright law. We have no indication the law, facts, or circumstances on which the prior rulings were based have changed. Thus, to the extent the requested information is identical to the information previously requested and ruled upon, the commission must continue to rely on Open Records Letter Nos. 2020-10889 and 2020-12560 as previous determinations and withhold or release the identical information at issue in accordance with those rulings. *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 a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). To the extent the submitted information is not encompassed by the previous ruling, we will address the applicability of the Act to 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 the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (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). The

governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). ORD 551 at 4.

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 No. 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.*

You inform us that, prior to the commission’s receipt of the request for information, the commission received a notice of claim under chapter 2260 of the Government Code. You assert the commission reasonably anticipates litigation because chapter 2260 authorizes a contractor to request a hearing before the SOAH under the contested case provisions of the Government Code. We note, and you acknowledge, such contested cases conducted under the APA. Based upon your representations and our review, we find the commission reasonably anticipated litigation when it received the instant requests. Furthermore, you state, and we agree, the information at issue relates to the anticipated litigation. Therefore, the commission may withhold the submitted information under section 552.103 of the Government Code.

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).

In summary, to the extent the requested information is identical to the information previously requested and ruled upon, the commission must continue to rely on Open Records Letter Nos. 2020-10889 and 2020-12560 as previous determinations and withhold or release the identical information at issue in accordance with those rulings. To the extent the information at issue is not identical to the information previously requested and ruled upon, the commission may withhold the submitted information 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,

Tim Neal
Assistant Attorney General
Open Records Division

TN/jxd

Ref: ID# 826194

Enc. Submitted documents

c: Requestor
(w/o enclosures)