



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

November 12, 2020

Mr. Kieran Hillis  
Public Information Coordinator  
Office of the Governor  
P.O. Box 12428  
Austin, Texas 78711

OR2020-28456

Dear Mr. Kieran Hillis:

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# 853179 (OOG ID# 509-20).

The Office of the Governor (the "governor's office") received a request for a specified document. You claim a portion of the submitted information is not subject to the Act. In addition, you claim some of the submitted information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code. You also state release of some of the submitted information may implicate the interests of the White House Office of Intergovernmental Affairs (the "White House"). Accordingly, you state, and provide documentation showing, the governor's office notified the White House of the request for information and of their right to submit arguments to this office.<sup>1</sup> See Gov't Code §§ 552.304 (interested party may submit comments stating why information should or should not be released). We have considered the submitted arguments and reviewed the submitted representative sample of information.<sup>2</sup>

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<sup>1</sup> As of the date of this letter, we have not received comments from the White House explaining why the submitted information should not be released.

<sup>2</sup> 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.

Initially, you state a portion of the submitted information carries a caveat stating FEMA has determined the submitted information contains “FOR OFFICIAL USE ONLY” (“FOUO”) information subject to release restrictions as detailed in section 482 of title 6 of the United States Code. Section 482(e) provides:

(e) Federal control of information

Under procedures prescribed under this section, information obtained by State or local government from a Federal agency under this section shall remain under the control of the Federal agency, and a State or local law authorizing or requiring such a government to disclose information shall not apply to such information.

6 U.S.C. § 482(e). Accordingly, the Act does not control the release of the submitted information. See *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990) (state law is preempted to extent it actually conflicts with federal law). Section 482(a)(1) states, in pertinent part, “[t]he President [of the United States (the “President”)] shall prescribe and implement procedures under which relevant Federal agencies-- (A) share relevant and appropriate homeland security information with . . . appropriate State and local personnel.” 6 U.S.C. § 482(a)(1)(A). In section 1(a) of Executive Order No. 13, 311, the functions of the President under section 482(a)(1) were assigned to the Secretary of Homeland Security. Exec. Order No. 13, 311, § 1, 3 C.F.R. 245 (2004), *reprinted in* 6 U.S.C. § 482. In January of 2005, the Department of Homeland Security (“DHS”) issued Management Directive Number 11042.1, establishing DHS policies and procedures regarding the safeguarding of FOUO information. This directive, in relevant part, instructs a state agency in possession of FOUO information from another governmental agency, to handle the information in accordance with the guidance provided by the other governmental agency. Department of Homeland Security Management Directive System, MD Number 11042.1 at 8 (Jan. 6, 2005). The aforementioned caveat contains guidance provided by FEMA, stating the information at issue “is for official government use only” and may not be distributed “to non-governmental entities without the express authorization of FEMA.” Based on the scheme described above, we find the decision to release or withhold the submitted information is not for this office or the governor’s office to make, but rather is a decision for an authorized FEMA official. Therefore, the governor’s office may not release the information at issue, which you marked, at this time under the Act, but must refer the information to FEMA to make a determination concerning disclosure of the 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 claiming section 552.103 has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information, and (2) the information at issue is related to that litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See Open Records Decision No. 551 at 4 (1990).*

You state, prior to receipt of the instant request, several lawsuits were filed against the governor's office, and are currently pending. Therefore, we agree litigation was pending on the date the governor's office received the present request for information. You also state the remaining information pertains to the substance of the lawsuit claims. Based on these representations and our review, we find the remaining information is related to the pending litigation. Therefore, we conclude the governor's office may withhold the remaining information under section 552.103 of the Government Code.<sup>3</sup>

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. *See Open Records Decision Nos. 349 (1982), 320 (1982).* Thus, information that has either been obtained from or provided to all parties to the pending or anticipated litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has concluded. *See Attorney General Opinion MW-575 (1982); see also Open Records Decision No. 350 (1982).*

In summary, the governor's office may not release the information you marked at this time under the Act, but must refer the information to FEMA to make a determination concerning disclosure of the information. The governor's office may withhold the remaining 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

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<sup>3</sup> As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

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,

Matthew Taylor  
Assistant Attorney General  
Open Records Division

MT/rm

Ref: ID# 853179

Enc. Submitted documents

c: Requestor  
(w/o enclosures)