



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

March 3, 2022

Ms. Lauren Downey
Public Information Coordinator
Assistant Attorney General
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

OR2022-06417

Dear Ms. Downey:

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# 933079 (PIR Nos. R011030 and R011050).

The Office of the Attorney General (the "OAG") received two requests from the same requestor for information pertaining to investigations and/or litigation regarding two named entities. The OAG states it will release some responsive information with redactions allowed by law. The OAG claims some of the submitted information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. Additionally, the OAG states release of the information at issue may implicate the proprietary interests of JUUL Labs, Inc. ("JLI"). Accordingly, the OAG states, and provides documentation showing, it notified JLI of the requests for information and of its right to submit arguments to this office.¹ *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received comments from JLI. We have considered the submitted arguments and reviewed the submitted information, a portion of which consists of a representative sample.²

¹ We note, and the OAG acknowledges, the OAG did not comply with the requirements of section 552.301 of the Government Code in requesting this decision with respect to some of the submitted information. *See* Gov't Code § 552.301(e). Nonetheless, third party interests can provide a compelling reason to overcome the presumption of openness caused by failure to comply with section 552.301. *See id.* §§ 552.007, .302; Open Records Decision No. 150 at 2 (1977). Thus, we will consider whether the information at issue is excepted from disclosure under the Act.

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
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Initially, we note JLI asserts some of the information at issue is not responsive to the present requests for information. However, we note the Act requires a governmental body to make a good-faith effort to relate a request for information to information the governmental body holds or to which it has access. *See* Open Records Decision Nos. 563 (1990), 561 at 8-9 (1990), 555 at 1-2 (1990), 534 at 2-3 (1989). Because the OAG has submitted the information at issue for our review, we find the OAG has made a good-faith effort to relate the present requests to information within its possession or control and submit information to this office that is responsive to the requests. Accordingly, we will consider whether information at issue is excepted from disclosure under the Act.

Section 552.101 of the Government Code excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses section 17.61(f) of the Business and Commerce Code, which provides, in relevant part, the following:

(f) No documentary material produced pursuant to a demand under this section, unless otherwise ordered by a court for good cause shown, shall be produced for inspection or copying by, nor shall its contents be disclosed to any person other than the authorized employee of the [OAG] without the consent of the person who produced the material. The [OAG] shall prescribe reasonable terms and conditions allowing the documentary material to be available for inspection and copying by the person who produced the material or any duly authorized representative of that person.

Bus. & Com. Code § 17.61(f). This provision requires the OAG to withhold from required public disclosure all documentary material the OAG obtained pursuant to a Civil Investigative Demand (“CID”). The OAG explains its Consumer Protection Division (“CPD”) issued several CIDs to various companies under section 17.61(a) of the Business and Commerce Code. The OAG informs us the companies complied by providing the information at issue to the OAG. Thus, we agree the OAG must withhold the information it indicated under section 552.101 because it is information obtained pursuant to a CID and, therefore, is confidential under section 17.61(f).

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

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.

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.

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To establish litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* In the context of anticipated litigation in which the governmental body is the prospective plaintiff, the concrete evidence must at least reflect that litigation is “reasonably anticipated.” *See* Open Records Decision No. 518 at 5 (1989); *see also* Attorney General Opinion MW-575 (1982) (finding that investigatory file may be withheld from disclosure if governmental body attorney determines that it should be withheld pursuant to section 552.103 and that litigation is “reasonably likely to result”).

The OAG states CPD is investigating activity that may constitute violations of the Texas Deceptive Trade Practices Act. The OAG explains, if CPD uncovers violations of law during the investigation, the OAG will initiate enforcement proceedings and, therefore, anticipates litigation in the matter. We find the OAG reasonably anticipated litigation when it received the present requests for information. The OAG asserts, and we agree, the information at issue relates to the anticipated litigation. Accordingly, the OAG has demonstrated the applicability of section 552.103 to the information at issue and may withhold the information it indicated under section 552.103.³ JLI asserts the remaining information is excepted under section 552.103 of the Government Code. We note section 552.103 is designed to protect the interests of governmental bodies and not the interests of third parties. *See* Gov't Code § 552.103 (excepts from disclosure litigation or settlement negotiations involving the state or a political subdivision). We note the OAG did not raise 552.103 for the information other than the representative sample of information it indicated. Thus, we do not address JLI's argument under section 552.103.

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 anticipated

³ As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

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 concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Section 552.110(c) of the Government Code excepts from disclosure “commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]” Gov’t Code § 552.110(c). JLI argues the remaining information consists of commercial or financial information subject to section 552.110(c). Upon review, however, we find JLI has failed to provide specific factual evidence demonstrating the remaining information constitutes commercial or financial information, the release of which would result in substantial competitive harm. Therefore, the OAG may not withhold any of the remaining information under section 552.110(c).

In summary, the OAG must withhold the information it indicated under section 552.101 of the Government Code in conjunction with section 17.61(f) of the Business and Commerce Code. The OAG may withhold the information it indicated under section 552.103 of the Government Code. The OAG 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/jm

Ref: ID# 933079

Enc. Submitted documents

c: Requestor
(w/o enclosures)

cc: Third Party
(w/o enclosures)