



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 4, 2022

Mr. Holt Feemster
Assistant County Attorney
Nueces County Attorney's Office
901 Leopard Street, Room 207
Corpus Christi, Texas 78401-3689

OR2022-23149

Dear Mr. Feemster:

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# 964122 (Ref. No. 22-OR-103).

The Nueces County Commissioner's Office Precinct 2 (the "county") received a request for electronic communications sent to or from a named county commissioner pertaining to specified topics and named individuals during stated time periods.¹ The county states it released some of the requested information. The county claims the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code. We have considered the claimed exceptions and reviewed the submitted information.

Initially, the county indicates some of the submitted information was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2022-15786 (2022). In that ruling, we determined the county must: (1) withhold the submitted date of birth under section 552.102(a) of the Government Code; (2) withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy; (3) withhold the information we marked under section 552.117(a)(1) of the Government Code; and (4) release the remaining information. The county now seeks

¹ The county states it 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).

to withhold the entirety of the information at issue under section 552.103 of the Government Code. We note the Act does not permit the selective disclosure of information. Section 552.007 of the Government Code provides that, if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law, or the information is confidential under law. *See* Gov't Code § 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Therefore, pursuant to section 552.007, the county may not now withhold the previously released information unless its release is expressly prohibited by law. Because section 552.103 of the Government Code does not prohibit the release of information or make information confidential, the county may not now withhold any portion of the previously released information under section 552.103 of the Government Code. *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); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Nonetheless, we have no indication the law, facts, and circumstances on which Open Records Letter No. 2022-15786 was based have changed. Accordingly, the county must continue to rely on Open Records Letter No. 2022-15786 as a previous determination and withhold or release the information the county indicated in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, 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 prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). However, we will address the county's argument under section 552.103 for the remaining information.

Section 552.103 of the Government Code provides in relevant part as follows:

(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 section 552.103(a) 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. *See 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.

To establish litigation is reasonably anticipated, a governmental body must provide this office “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” *See* Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim litigation is reasonably anticipated may include, for example, the governmental body’s receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. *See* Open Records Decision No. 555 (1990); *see also* ORD 518 at 5 (litigation must be “realistically contemplated”). In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, or when an individual threatened to sue on several occasions and hired an attorney. *See* Open Records Decision Nos. 346 (1982), 288 (1981). On the other hand, this office has determined if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish litigation is reasonably anticipated. *See* Open Records Decision No. 361 (1983).

The county states, and provides supporting documentation showing, prior to the county’s receipt of the instant request, the county received a letter of representation from an attorney who represents one of the named individuals and a subsequent letter pertaining to ongoing negotiations regarding the circumstances of the named individual’s employment. The county also states, and submits documentation demonstrating, prior to the county’s receipt of the instant request, the county retained outside legal counsel to represent the county in anticipation of litigation involving the individual’s employment with the county. Thus, the county states on the date it received the request for information, the county reasonably anticipated litigation to which the county would be a party. Based on these representations and our review of the information at issue, we find the county reasonably anticipated litigation on the date the request was received. The county also represents, and we agree, the information at issue is related to the anticipated litigation for purposes of section 552.103. Accordingly, the county may withhold the remaining information under section 552.103 of the Government Code.²

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

² As our ruling is dispositive, we need not address the county’s remaining arguments against disclosure of this information.

that has either been obtained from or provided to all parties to the 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 been concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

In summary, the county must continue to rely on Open Records Letter No. 2022-15786 as a previous determination and withhold or release the information the county indicated in accordance with that ruling. The county 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 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,

Alexandra C. Burks
Assistant Attorney General
Open Records Division

ACB/be

Ref: ID# 964122

Enc. Submitted documents

c: Requestor
(w/o enclosures)