



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

October 13, 2022

Mr. Kieran Hillis
Assistant General Counsel
Office of the Governor
P.O. Box 12428
Austin, Texas 78711

OR2022-31473

Dear Mr. 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# 977859 (Reference No. 463-22).

The Office of the Governor (the "OOG") received a request for certain information pertaining to Operation Lone Star during a stated time period. The OOG claims the submitted information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. In addition, the OOG states release of some of the information at issue may implicate the interests of third parties. Accordingly, the OOG states it notified these interested parties of the request for information and of the right to submit arguments to this office. *See* Gov't Code §§ 552.304, .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 exceptions in the Act in certain circumstances). We have received comments from the Texas Military Department. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note in a letter dated August 23, 2022, the OOG states it wishes to withdraw its request for an open records decision with regard to part of the information because the OOG determined this information is not responsive to the instant request. Thus, this information, which the OOG indicated, is not responsive to the present request. This ruling does not address the public availability of any information that is not responsive to the request, and the OOG is not required to release such information in response to this request.¹

¹ As we are able to make this determination, we need not address the submitted arguments against disclosure of this information.

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 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 OOG asserts the submitted responsive information is related to pending litigation to which the OOG is a party. The OOG informs us litigation styled *Barcenas v. McCraw*, Case No. 1:22-cv-00397, was pending in the United States District Court for the Western District of Texas, Austin Division, on the date the OOG received the request. The OOG explains the information at issue is related to the pending lawsuit because it pertains to constitutional challenges to the law enforcement activities being conducted under Operation Lone Star. Based upon these representations and our review of the information at issue, we find litigation was pending when the OOG received the instant request for information, and we find the information at issue is related to the pending litigation for purposes of section 552.103. Accordingly, the OOG may withhold the submitted responsive 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 concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 at 3 (1982).

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/jxd

Ref: ID# 977859

Enc. Submitted documents

c: Requestor
(w/o enclosures)

cc: Third Party
(w/o enclosures)