



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

November 8, 2022

Mr. Matthew J. Engelbaum  
Assistant City Attorney  
City of El Paso  
P.O. Box 1890  
El Paso, Texas 79950-1890

OR2022-34836

Dear Mr. Engelbaum:

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# 984079 (Reference No. 22-1050-11768).

The City of El Paso (the "city") received a request for all audio and video recordings pertaining to a specified incident involving the requestor's client. You claim the submitted information is excepted from disclosure under section 552.103 of the Government Code.<sup>1</sup> We have considered the claimed exception and reviewed the submitted 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.

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<sup>1</sup> Although you also raise section 552.101 of the Government Code in conjunction with a statutory grant of confidentiality, a judicial grant of confidentiality, common-law privacy, and constitutional privacy for the submitted information, you provide no arguments explaining how a statutory grant of confidentiality, a judicial grant of confidentiality, the doctrine of common-law privacy, or the doctrine of constitutional privacy are applicable to the information at issue. Therefore, we assume you no longer assert these claims. *See* Gov't Code §§ 552.301, .302.

(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.

Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986). 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.” *Id.* In Open Records Decision No. 638 (1996), this office stated a governmental body has met its burden of showing litigation is reasonably anticipated by representing it received a notice-of-claim letter that is in compliance with the Texas Tort Claims Act (“TTCA”), chapter 101 of the Civil Practices and Remedies Code. If that representation is not made, the receipt of the claim letter is a factor we will consider in determining, from the totality of the circumstances presented, whether the governmental body has established litigation is reasonably anticipated. *See* ORD 638 at 4.

You assert the submitted information pertains to litigation reasonably anticipated by the city. To support this assertion, you state, and provide supporting documentation showing, on the same date the city received the present request for information, the city received a notice of claim against the city from the requestor’s law firm, claiming the law firm represents an individual alleging damages in connection with the specified incident, which involved the requestor’s client and a city vehicle. You do not affirmatively state the letter meets the requirements of the TTCA; thus, we will only consider the letter as a factor in determining whether the city reasonably anticipated litigation pertaining to the incident at issue. Nevertheless, upon review and the totality of the circumstances, we find the city reasonably anticipated litigation related to the matter at issue. Additionally, upon review, we find the information at issue is related to litigation that was reasonably anticipated on the date the city received the request for information. Accordingly, we conclude the city 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 anticipated 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).

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# 984079

Enc. Submitted documents

c: Requestor  
(w/o enclosures)