



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 9, 2015

Ms. Barbara L. Quirk
City Attorney for the City of Fort Stockton
McKamie Krueger, LLP
941 Proton
San Antonio, Texas 78258

OR2015-11264

Dear Ms. Quirk:

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# 566475.

The City of Fort Stockton (the "city"), which you represent, received a request for thirteen categories of information pertaining to three specified employees and certain surveillance video recordings during a specified time period. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.137 of the Government Code and privileged under Texas Rule of Evidence 503.¹ We have considered your arguments and reviewed the submitted representative sample of information.²

¹Although you raise section 552.101 of the Government Code in conjunction with section 552.107 of the Government Code, this office has concluded section 552.101 does not encompass other exceptions found in the Act. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Furthermore, although you generally raise the attorney work product privilege, you have not submitted arguments explaining how this privilege applies to the submitted information. Therefore, we assume the city no longer asserts this claim. *See* Gov't Code §§ 552.301, .302.

²We 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 those records contain substantially different types of information than that submitted to this office.

Initially, we must address the city's obligations under section 552.301 of the Government Code, which prescribes the procedural obligations that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. *See Gov't Code* § 552.301(b). Although you timely raised section 552.103 of the Government Code, you did not raise sections 552.101, 552.107(1), and 552.137 of the Government Code or Texas Rule of Evidence 503 until after the ten-business-day deadline had passed. Generally, if a governmental body fails to timely raise an exception, that exception is waived. *See generally id.* § 552.302; Open Records Decision No. 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions). Section 552.107(1) is a discretionary exception to disclosure that protects a governmental body's interests and may be waived, and Texas Rule of Evidence 503 is a privilege that may also be waived. *See Open Records Decision Nos.* 676 at 12 (2002) (claim of attorney-client privilege under section 552.107(1) or rule 503 does not provide compelling reason to withhold information under section 552.302 if it does not implicate third-party rights), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (waiver of discretionary exceptions). Therefore, in failing to timely raise section 552.107(1) of the Government Code and Texas Rule of Evidence 503, the city has waived its claims under these provisions and may not withhold any of the submitted information on those bases. However, because sections 552.101 and 552.137 of the Government Code make information confidential and can provide compelling reasons to withhold information, we will consider the applicability of these exceptions, along with your timely-raised argument under section 552.103 of the Government Code, to the submitted information.

Next, we note the submitted information contains city council meeting minutes. The minutes of a governmental body's public meetings are specifically made public under provisions of the Open Meetings Act (the "OMA"), chapter 551 of the Government Code. *See Gov't Code* § 551.022 (minutes and tape recordings of open meeting are public records and shall be available for public inspection and copying on request to governmental body's chief administrative officer or officer's designee). Although you seek to withhold this information under section 552.103, as a general rule, the exceptions to disclosure found in the Act do not apply to information that other statutes make public. *See Open Records Decision Nos.* 623 at 3 (1994), 525 at 3 (1989). Accordingly, the city must release the city council meeting minutes, which we have marked, pursuant to the OMA.

We note some of the remaining information is subject to section 552.022 of the Government Code, which provides, in relevant part:

- (a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(3). The remaining information includes a contract relating to the receipt or expenditure of funds by the city that is subject to section 552.022(a)(3). The city must release this information pursuant to section 552.022(a)(3), unless it is made confidential under the Act or other law. *See id.* Although you raise section 552.103 of the Government Code for this information, section 552.103 is discretionary in nature and does not make information confidential under the Act. *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); ORDs 665 at 2 n.5, 663 at 5. Therefore, the city may not withhold the contract subject to section 552.022(a)(3), which we have marked, under section 552.103 of the Government Code. As you raise no other exceptions to disclosure for this information, it must be released. However, we will consider the city's argument under section 552.103 of the Government Code for the remaining 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 purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See Open Records Decision No. 551 at 4-5 (1990)*. A governmental body has the burden of providing relevant facts and documents to show section 552.103(a) applies 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 requested information 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.); ORD 551 at 4. The governmental body must meet both parts of this test for information to be excepted under section 552.103(a). *See* ORD 551 at 4.

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.” Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *Id.* In Open Records Decision No. 638 (1996), this office stated a governmental body has met its burden of showing litigation is reasonably anticipated when it has received a notice of claim letter and the governmental body represents the notice of claim letter is in compliance with the requirements of the Texas Tort Claims Act (“TTCA”), Civil Practice and Remedies Code, chapter 101, or an applicable municipal ordinance.

You assert the city reasonably anticipates litigation involving the requestor’s client because, prior to the city receiving the request for information, the requestor submitted a notice of claim letter on behalf of his client alleging the city’s liability for damages sustained by the requestor’s client based on her alleged wrongful termination from employment with the city. You represent the claim letter meets the requirements of the TTCA. Based on your representations and our review, we conclude the city reasonably anticipated litigation when it received the request for information. You state the information at issue relates to the litigation because it pertains to the basis of the anticipated litigation. Accordingly, the city may withhold the remaining information that is not subject to section 552.022(a)(3) of the Government Code under section 552.103 of the Government Code.³

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 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 or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

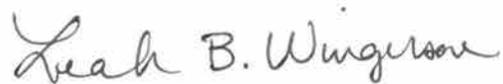
In summary, the city must release the city council meeting minutes we have marked pursuant to the OMA. The city may withhold the remaining information not subject to section 552.022(a)(3) of the Government Code under section 552.103 of the Government Code. The city must release the remaining information.

³As our ruling is dispositive, we need not address your remaining arguments against disclosure for this 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 http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in cursive script that reads "Leah B. Wingerson".

Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/bhf

Ref: ID# 566475

Enc. Submitted documents

c: Requestor
(w/o enclosures)