



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

July 11, 2016

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

OR2016-15585

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# 617795 (PIR No. 16-44037).

The Office of the Attorney General (the "OAG") received a request for information pertaining to a named company, a specified organization, and a specified fund during a certain time period. You state the OAG will release some information. Additionally, you state the OAG will withhold some of the responsive information pursuant to Open Records Letter No. 2012-08540 (2012).¹ *See* Open Records Decision No. 673 (2001) (listing elements of second type of previous determination under section 552.301(a) of the Government Code). You further state the OAG will continue to rely on Open Records Letter Nos. 2015-16713 (2015) and 2016-14077 (2016) with respect to some of the requested information.² *See id.* at 6-7 (so long as law, facts, and circumstances on which prior ruling

¹In Open Records Letter No. 2012-08540 this office issued the OAG a previous determination authorizing it to withhold information it compiles in connection with a Medicaid fraud investigation under section 552.101 of the Government Code in conjunction with section 531.1021(g) of the Government Code without the need of requesting a ruling from this office when requests for such information are not made by individuals or entities who are authorized to obtain such information under chapter 531 of the Government Code.

²In Open Records Letter No. 2015-16713, this office held the OAG may withhold the information at issue in that ruling under section 552.103 of the Government Code. In Open Records Letter No. 2016-14077, this office held the OAG may withhold the information at issue in that ruling under section 552.107(1) of the Government Code.

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 information is or is not excepted from disclosure). You claim some of the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.³

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). The 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 that (1) litigation is 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). The governmental body must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a).

To establish litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation might ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). In the context of anticipated litigation in which the governmental body is the prospective plaintiff, the concrete evidence

³We 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 that those records contain substantially different types of information than that submitted to this office.

must at least reflect that litigation is “realistically contemplated.” 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”). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. See ORD 452 at 4.

The OAG states the Antitrust Section of its Consumer Protection Division is involved in a multi-state investigation into the named company for alleged violations of the Texas Free Enterprise and Antitrust Act. The OAG states the investigation was initiated for enforcement purposes, and if violations are uncovered, the OAG will initiate enforcement proceedings. Based on these representations, we agree the OAG reasonably anticipated litigation regarding this matter when the OAG received the present request for information. Upon review of the OAG’s arguments and the information at issue, we find the OAG has also established the information at issue relates to the reasonably anticipated litigation. Accordingly, the OAG has demonstrated the applicability of section 552.103 to the information at issue. Thus, the OAG may withhold Exhibit B under section 552.103 of the Government Code.⁴

However, once the information has been obtained by all parties to the anticipated litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). We also note the applicability of section 552.103(a) ends when the litigation has concluded. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

Section 552.101 of the Government Code excepts “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. See Open Records Decision No. 455 (1987). Upon review, we find the information the OAG marked and we marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the OAG must withhold the marked information in Exhibit C under section 552.101 of the Government Code in conjunction with common-law privacy.

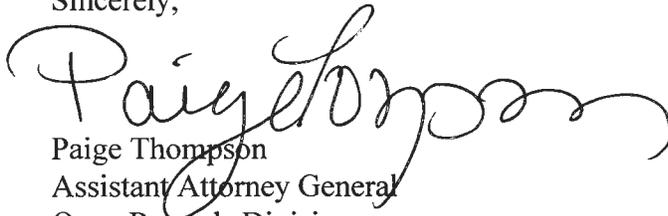
⁴As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

In summary, the OAG may withhold Exhibit B under section 552.103 of the Government Code. The OAG must withhold the information it marked and we marked in Exhibit C under section 552.101 of the Government Code in conjunction with common-law privacy. 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 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,



Paige Thompson
Assistant Attorney General
Open Records Division

PT/dls

Ref: ID# 617795

Enc. Submitted documents

c: Requestor
(w/o enclosures)