



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 11, 2016

Ms. Jessica Vu
Assistant General Counsel
Office of Governor Greg Abbott
P.O. Box 12428
Austin, Texas 78711

OR2016-18174

Dear Ms. Vu:

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# 622513 (OOG File ID# 16-149 and 16-174).

The Office of the Governor (the "governor's office") received two requests from different requestors for information pertaining to a specified letter, transgender individuals using locker rooms or bathrooms, and e-mails sent between the governor's office, the Office of the Lieutenant Governor, the Office of the Speaker of the House, and the Office of the Attorney General (the "attorney general's office") containing five specified terms during a specified time period. You state the governor's office is releasing some of the requested information with the redaction of personal e-mail addresses under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).¹ You claim the remaining requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code. You also state release of some of the requested information implicates the interests of the attorney general's office, the Texas Education Agency, and the Texas Juvenile Justice Department, which you have notified. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have considered the exceptions you claim and reviewed the

¹Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of seeking a decision from this office.

submitted representative sample of information.² We have also received and considered comments from the attorney general's office.³

Section 552.103 of the Government Code provides 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.

Id. § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception 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. *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).

You and the attorney general's office state, and submit documentation demonstrating, on the same day as the governor's office's receipt of the first request and prior to the governor's office's receipt of the second request, a lawsuit styled *State of Texas v. United States of America*, Cause No. 7:16-cv-00054-0, was filed in the United States District Court for the Northern District of Texas, Wichita Falls Division. You and the attorney general's office explain the governor's office is not a party to the pending litigation and, thus, does not have a litigation interest in the case for purposes of section 552.103. *See* Gov't Code § 552.103; Open Records Decision No. 575 at 2 (1990) (statutory predecessor to section 552.103 only

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

³As of the date of this letter, we have not received comments from the Texas Education Agency or the Texas Juvenile Justice Department.

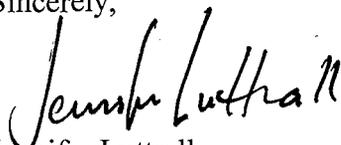
applies when governmental body is party to litigation). Under these circumstances, we require an affirmative representation from the governmental body with the litigation interest that it wants the information at issue withheld from disclosure under section 552.103. The attorney general's office has submitted a written representation to our office stating it objects to release of the submitted information because it relates to pending litigation in which the State of Texas is a party and the attorney general's office is representing the State of Texas in the litigation at issue. The attorney general's office further states the submitted information is related to the pending litigation because it pertains to the claims in the lawsuit. Upon review of these arguments and the information at issue, we find the submitted information relates to litigation that was pending when the governor's office received this request for information. Accordingly, the governor's office may withhold the submitted information under section 552.103 of the Government Code.⁴

We note once information has been obtained by all parties to the pending 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 the opposing party 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 been 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 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,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/akg

⁴As our ruling is dispositive, we need not address the remaining arguments against its disclosure.

Ref: ID# 622513

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)

4 Third Parties
(w/o enclosures)