



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

September 12, 2016

Mr. J. Troupe Brewer  
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OR2016-20568

Dear Mr. Brewer:

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# 626288.

The Middle Pecos Groundwater Conservation District (the "district"), which you represent, received a request for information pertaining to a specified meeting. You claim the submitted information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information, some of which constitutes a representative sample.<sup>1</sup>

Initially, we note some of the submitted information may have been previously released by the district. The Act does not permit the selective disclosure of information. *See* Gov't Code §§ 552.007(b), .021; Open Records Decision No. 463 at 1-2 (1987). Section 552.007 of the Government Code provides if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold that exact information from further disclosure unless its public release is expressly prohibited by law or the information is confidential under law. *See* Gov't Code § 552.007; Open Records Decision Nos. 518 at 3

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<sup>1</sup>We 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.

(1989), 490 at 2 (1988). Accordingly, pursuant to section 552.007, the district may not now withhold any previously released information unless its release is expressly prohibited by law or the information is confidential under law. *See* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Although you raise section 552.103 for the requested information, this section is a discretionary exception and does not make information confidential. *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); Open Records Decision No. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, to the extent the district previously released any of the submitted information, it may not now withhold this information from the requestor under section 552.103 of the Government Code, and this information must be released pursuant to section 552.007. However, to the extent the district did not previously release the submitted information, we will consider your argument under section 552.103 against disclosure of this information.

We also note the submitted information contains notices, minutes, and audio recordings of a meeting of the district's Board of Directors conducted in accordance with the Texas Open Meetings Act (the "OMA"), chapter 551 of the Government Code. *See* Gov't Code §§ 551.022 (minutes of open meeting are public records and shall be available for public inspection), .041 (governmental body shall give written notice of date, hour, place, and subject of each meeting), .043 (notice of meeting of governmental body must be posted in place readily accessible to general public for at least 72 hours before scheduled time of meeting). Although you raise section 552.103 of the Government Code as an exception to disclosure of this information, we note that as a general rule, the exceptions to disclosure found in the Act are not applicable to information that other statutes make public. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Therefore, the district must release the information we have marked and indicated pursuant to the OMA. Gov't Code §§ 551.022, .041, .043; *see also* Open Records Decision No. 221 (1979) (board minutes of school district not excepted under predecessor to section 552.103).

Next, we note some of the remaining information is subject to section 552.022 of the Government Code. Section 552.022(a) 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;

...

(5) all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate [and]

...

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(3), (5), (17). The remaining information contains records relating to the expenditure of public funds subject to section 552.022(a)(3) of the Government Code, information used to estimate the need for or expenditure of public funds or taxes by a governmental body subject to section 552.022(a)(5) of the Government Code, and court-filed documents subject to section 552.022(a)(17) of the Government Code. Gov't Code § 552.022(a)(3), (5), (17). Information subject to sections 552.022(a)(3), 552.022(a)(5), and 552.022(a)(17) must be released unless such information is made confidential under the Act or other law. *See id.* § 552.022(a). You seek to withhold this information under section 552.103 of the Government Code. However, section 552.103 is a discretionary exception and does not make information confidential under the Act. *See Dallas Area Rapid Transit*, 4 S.W.3d at 475-76; ORD 542 at 4; *see also* ORDs 665 at 2 n.5, 663 at 5. Therefore, the information at issue may not be withheld under section 552.103. As you raise no other exceptions to disclosure for the information we have marked under sections 552.022(a)(3), 552.022(a)(5), and 552.022(a)(17), this information must be released.

Section 552.103 of the Government Code provides, in relevant 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 claiming section 552.103 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 showing (1) litigation is pending or reasonably anticipated on the date the governmental body received the request, 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 under section 552.103(a).

You explain, and submit supporting documentation demonstrating, multiple lawsuits were filed against the district prior to the date the district received the present request for information. Further, you explain, and we agree, the information at issue is related to the pending litigations. Based on your representations and our review, we find you have demonstrated the information at issue is related to litigation that was pending against the district at the time the district received the request for information. Therefore, the remaining information is subject to section 552.103 of the Government Code.

We note, however, the opposing parties have seen or had access to some of the information at issue. The purpose of section 552.103 of the Government Code is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to that litigation to obtain it through discovery procedures. *See* ORD 551 at 4-5. Thus, once the opposing party has seen or had access to information relating to the litigation through discovery or otherwise, there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Upon review, we find the information we have marked for release has been seen by the opposing parties and may not be withheld under section 552.103. Therefore, with the exception of the information we have marked for release, the district may withhold the remaining information not subject to section 552.022 of the Government Code under section 552.103. We note the applicability of section 552.103(a) ends once the litigation has been concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

We note some of the information that we have marked for release may be subject to section 552.137 of the Government Code.<sup>2</sup> Section 552.137 excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating

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<sup>2</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

electronically with a governmental body,” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). Gov’t Code § 552.137(a)-(c). Section 552.137 does not apply to an institutional e-mail address, the general e-mail address of a business, an e-mail address of a person who has a contractual relationship with a governmental body, an e-mail address of a vendor who seeks to contract with a governmental body, an e-mail address maintained by a governmental entity for one of its officials or employees, or an e-mail address provided to a governmental body on a letterhead. *See id.* § 552.137(c). We note the requestor has a right of access to his own e-mail address under section 552.137(b) and this information may not be withheld from him under section 552.137. *See id.* § 552.137(b). We are unable to determine whether the personal e-mail addresses within the remaining information at issue, which are located within e-mails communicating official business of the district, belong to district officials or employees. Thus, we rule conditionally. To the extent the e-mail addresses within the remaining information are the personal e-mail addresses of district officials or employees, or to the extent subsection (c) applies, this information is not subject to section 552.137 and may not be withheld on that basis. *See Austin Bulldog v. Leffingwell*, 490 S.W.3d 240 (Tex. App.—Austin 2016, no pet.) (holding personal e-mail addresses of government officials used to conduct official government business are not e-mail addresses of “members of the public” for purposes of Gov’t Code § 552.137(a)). However, other than the requestor’s e-mail address, to the extent the e-mail addresses within the remaining information are not the personal e-mail addresses of district officials or employees and subsection (c) does not apply, this information is subject to section 552.137 and must be withheld under section 552.137, unless the owners of the e-mail addresses affirmatively consent to their release.

In summary, to the extent the district previously released any of the submitted information, this information must be released pursuant to section 552.007 of the Government Code. The district must release (1) the notices, minutes, and audio recordings we have marked pursuant to the OMA; (2) the information we have marked under sections 552.022(a)(3), 552.022(a)(5), and 552.022(a)(17) of the Government Code; and (3) the information we have marked for release. The district may withhold the remaining information under section 552.103 of the Government Code. In releasing the information we have marked for release, other than the requestor’s e-mail address, to the extent the e-mail addresses within the remaining information are not the personal e-mail addresses of district officials or employees and subsection (c) does not apply, this information is subject to section 552.137 of the Government Code and must be withheld on that basis, unless the owners of the e-mail addresses affirmatively consent to their release.

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](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,



Cole Hutchison  
Assistant Attorney General  
Open Records Division

CH/dls

Ref: ID# 626288

Enc. Submitted documents

c: Requestor  
(w/o enclosures)