



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

This ruling has been modified by court action.
The ruling and judgment can be viewed in PDF
format below.



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 7, 2014

Ms. Heather Silver
Assistant City Attorney
City of Dallas
1500 Marilla Street, Room 7DN
Dallas, Texas 75201

The ruling you have requested has been amended as a result of litigation and has been attached to this document.

OR2014-05700

Dear Ms. Silver:

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# 518836.

The City of Dallas (the “city”) received a request for information pertaining to agreements between the city and the Tarrant Regional Water District (“TRWD”) regarding the Integrated Pipeline Project during a specified time period. You state the city will release some of the requested information upon payment of production costs. You claim the remaining requested information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code and privileged under Texas Rule of Evidence 503. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹ We have also received and considered comments from TRWD. *See* Gov’t Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we must address the obligations of the city under section 552.301 of the Government Code, which prescribes the procedures a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(e) of the Government Code, a governmental body

¹We 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.

is required to submit to this office within fifteen business days of receiving an open records request: (1) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *Id.* § 552.301(e)(1)(A)-(D). You state the city received the request for information on December 26, 2013. You explain, and submit documentation showing, the city sought clarification of the request from the requestor on January 6, 2014, and the requestor responded to this request for clarification on January 14, 2014. *See id.* § 552.222(b) (providing that if request for information is unclear, governmental body may ask requestor to clarify request); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (if governmental entity, acting in good faith, requests clarification of unclear or over-broad request, ten-day period to request attorney general ruling is measured from date request is clarified). You inform us the city was closed on January 20, 2014. This office does not count the date the request was received or holidays for the purpose of calculating a governmental body's deadlines under the Act. Accordingly, you were required to provide the information required by subsection 552.301(e) by February 5, 2014. However, the box in which the city provided the information required by subsection 552.301(e) was received by this office on February 7, 2013, and does not bear a postmark. *See id.* § 552.308(a)(1) (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Accordingly, we conclude the city failed to comply with the procedural requirements mandated by section 552.301 of the Government Code.

A governmental body's failure to comply with section 552.301 results in the waiver of its untimely claim, unless that claim is a compelling reason for withholding information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); *see also* Open Records Decision No. 630 (1994). A compelling reason to withhold information exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). Although you assert the submitted information is excepted from release under sections 552.103, 552.107, and 552.111 of the Government Code and privileged under rule 503 of the Texas Rules of Evidence, these sections and privilege are discretionary in nature and serve only to protect a governmental body's interests. As such, the city's claims under these sections and privilege are not compelling reasons to overcome the presumption of openness. *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 Nos. 676 at 12 (2002) (attorney-client privilege under section 552.107 or Texas Rule of Evidence 503 constitutes compelling reason to withhold information under section 552.302 only if information's release would harm third

party), 470 at 7 (1987) (deliberative process privilege under statutory predecessor to section 552.111 subject to waiver); *see also* Open Records Decision No. 522 (1989) (discretionary exceptions in general). Because you failed to comply with section 552.301, you have waived your claims under sections 552.103, 552.107, and 552.111 and your claim under rule 503. However, the interests under section 552.103 of a governmental body other than the one that failed to comply with section 552.301 can provide a compelling reason for non-disclosure under section 552.302. *See* Open Records Decision No. 586 at 2-3 (1991). TRWD asserts some of the requested information should be withheld under section 552.103 of the Government Code. Therefore, we will consider whether the information at issue may be withheld on behalf of TRWD under section 552.103.

Next, we note portions of the submitted information, which we have marked, are not responsive to the instant request because they were created after the date the request was received. The city need not release nonresponsive information in response to this request, and this ruling will not address that information.

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 purpose of section 552.103 is to protect the litigation interests of governmental bodies that are parties to the litigation at issue. *See id.* § 552.103(a); Open Records Decision No. 638 at 2 (1996) (section 552.103 only protects litigation interests of the governmental body claiming exception). A governmental body has the burden of providing relevant facts and documents to show section 552.103(a) 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

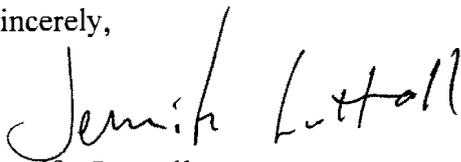
Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). *See* ORD 551 at 4.

You inform us the responsive information in Exhibit C relates to pending litigation styled *Bennett v. Tarrant Regional Water District*, cause no. 153-264899-13. We note the city is not a party to this litigation and, therefore, does not have a litigation interest in the matter for purposes of section 552.103. *See* Gov't Code § 552.103(a); Open Records Decision No. 575 at 2 (1990) (stating that predecessor to section 552.103 only applies when governmental body is party to litigation). Furthermore, the city has waived its section 552.103 claim. *See id.* §§ 552.301(e), .302. In such a situation, we require an affirmative representation from the governmental body with the litigation interest that the governmental body wants the information at issue withheld from disclosure under section 552.103. In its comments to this office, TRWD informs us, and provides documentation demonstrating, it is a party to this litigation and requests the responsive information in Exhibit C be withheld from disclosure under section 552.103. TRWD further states, and we agree, the information at issue relates to the pending lawsuit. Based on these representations, the submitted documentation, and our review of the information at issue, we find litigation was pending when the city received this request for information and the responsive information in Exhibit C is related to the pending litigation for the purposes of section 552.103. Therefore, the city may withhold the responsive information in Exhibit C under section 552.103 of the Government Code on behalf of TRWD. As no further exceptions have been raised, the city must release the remaining responsive 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,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/akg

Ref: ID# 518836

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Kyle T. Gray
For the Tarrant Regional Water District
Pope, Hardwicke, Christie, Schell, Kelly & Ray, L.L.P.
500 West 7th Street, Suite 600
Fort Worth, Texas 76102
(w/o enclosures)

SC JAN 22 2016

At 3:00 P.M.
Velva L. Price, District Clerk

CAUSE NO. D-1-GV-14-000475

CITY OF DALLAS, <i>Plaintiff,</i>	§	IN THE DISTRICT COURT OF
	§	
	§	
v.	§	345th JUDICIAL DISTRICT
	§	
GREG ABBOTT, ATTORNEY GENERAL OF TEXAS, <i>Defendant.</i>	§	
	§	
	§	TRAVIS COUNTY, TEXAS

AGREED FINAL JUDGMENT

This is an open records lawsuit brought under the Public Information Act (PIA), Tex. Gov't Code ch. 552, in which Plaintiff City of Dallas (the City or Plaintiff) challenged Attorney General Open Records Letter Ruling OR2014-05700 (2014). All matters in controversy between Plaintiff and Defendant Ken Paxton, in his official capacity as Texas Attorney General (the Attorney General)¹ arising out of this lawsuit have been resolved, and the parties agree to the entry and filing of this Agreed Final Judgment.

Texas Government Code section 552.325(d) requires the Court to allow the requestor of information a reasonable period of time to intervene after notice of the intent to enter into settlement is attempted by the Attorney General. The Attorney General represents to the Court that, in compliance with Tex. Gov't Code § 552.325(c), the Attorney General sent notice by to requestor Mr. James Cowen on October 26, 2015, providing reasonable notice of this setting. The requestor was informed of the parties' agreement that the City had demonstrated the applicability of exceptions to the required disclosure of the requested information under the PIA and that the City need not release the requested information. The requestor was also informed of his right to intervene in

¹ Greg Abbott was named defendant in his official capacity as Texas Attorney General. Ken Paxton became Texas Attorney General on January 5, 2015, and is now the appropriate defendant in this cause.



the suit to contest the agreement of the parties. The requestor has neither informed the parties of his intention to intervene, nor has a motion to intervene been filed.

After considering the agreement of the parties and the law, the Court is of the opinion that entry of an agreed final judgment is appropriate, disposing of all claims between these parties in this suit.

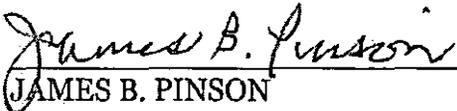
IT IS THEREFORE ADJUDGED, ORDERED AND DECLARED THAT:

1. The City complied with the procedural requirements of the PIA in seeking the letter ruling from the Attorney General.
2. The City has demonstrated the information at issue, consisting of attorney-client privileged communications and agency memoranda, is excepted from required public disclosure pursuant to sections 552.107 and 552.111 of the Government Code and the City may withhold the information at issue from the requestor.
3. All court cost and attorney fees are taxed against the parties incurring the same;
4. All relief not expressly granted is denied; and
5. This Agreed Final Judgment finally disposes of all claims between the City and the Attorney General in this cause, and is a final judgment.

SIGNED this 22 day of January 2016

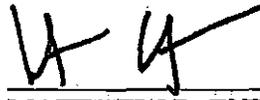

JUDGE PRESIDING

AGREED:



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ATTORNEY FOR DEFENDANT KEN PAXTON,
IN HIS OFFICIAL CAPACITY AS ATTORNEY
GENERAL OF TEXAS