



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 7, 2014

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

OR2014-07750

Dear Ms. Hale:

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# 521617 (PIR No. 14-38209).

The Office of the Attorney General (the "OAG") received a request for communications between the OAG and Google, Inc., between the OAG and Competition Commissioner Joaquin Almunia, and between the OAG, or within the OAG, and the Federal Trade Commission (the "FTC") regarding antitrust investigations of Google, Inc. You state the OAG has no information responsive to the second category of requested communications. You state the OAG will release some of the responsive information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.107(1) of the Government Code. We have considered the exceptions you claim and reviewed the submitted information, which you state is a representative sample of the information at issue.¹

¹We assume that 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.

You state the OAG will rely on Open Records Letter No. 2011-07919 (2011) in responding to the request for portions of the requested information. Open Records Letter No. 2011-07919 determined the OAG may withhold portions of the information at issue based on section 552.107(1) of the Government Code and withhold the remainder of the information at issue based on section 552.103 of the Government Code. As we have no indication the law, facts, or circumstances upon which the prior ruling was based have changed, the OAG may continue to rely on Open Records Letter No. 2011-07919 as a previous determination and withhold or release the information at issue in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances upon which prior ruling is 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, is addressed to same governmental body, and ruling concludes information is or is not excepted from disclosure).

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses information other statutes make confidential. You raise section 15.10(i)(1) of the Business and Commerce Code, which reads as follows:

(1) Except as provided in this section or ordered by a court for good cause shown, no documentary material, answers to interrogatories, or transcripts of oral testimony, or copies or contents thereof, shall be available for examination or used by any person without the consent of the person who produced the material, answers, or testimony and, in the case of any product of discovery, of the person from whom the discovery was obtained.

Tex. Bus. & Com. § 15.10(i)(1). The OAG explains section 15.10(b) of the Business and Commerce Code authorizes the OAG to issue a Civil Investigative Demand (“CID”) when the attorney general has reason to believe any person may be in possession, custody, or control of any documentary material or may have information relevant to a civil antitrust investigation. *Id.* § 15.10(b). The OAG asserts portions of the information at issue, which it has marked, were provided to the OAG in response to a CID the Antitrust Section of the OAG’s Consumer Protection Division issued to Google, Inc. The OAG states none of the permitted disclosures in section 15.10(i) applies in this instance. After review of the information at issue and consideration of your arguments, we agree the OAG must withhold the marked portions of the submitted information based on section 552.101 of the Government Code in conjunction with section 15.10(i)(1).

Next, we address the OAG’s arguments against disclosure of the remaining 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 OAG has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in this particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date that the request for information is received, 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, no pet.); *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 OAG must meet both prongs of this test for information to be excepted under section 552.103(a).

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. See Open Records Decision No. 452 at 4 (1986). When the governmental body is the prospective plaintiff in litigation, the evidence of anticipated litigation must at least reflect that litigation involving a specific matter is "realistically contemplated." See Open Records Decision No. 518 at 5 (1989); see also Attorney General Opinion MW-575 (1982) (investigatory file may be withheld if governmental body's attorney determines that it should be withheld pursuant to Gov't Code § 552.103 and that litigation is "reasonably likely to result").

The OAG argues section 552.103 applies to the information it marked because the information relates to pending and anticipated litigation. The OAG states the information it marked relates to an active investigation the OAG Antitrust Division is conducting concerning alleged violations of the Texas Free Enterprise and Antitrust Act of 1983. The OAG states "[o]n the date the OAG received the request, the OAG anticipated initiating litigation, as plaintiff, to enforce the Antitrust Act against Google, Inc." The OAG states the potential opposing party to the anticipated litigation has not seen or had access to the marked information. The OAG additionally states portions of the information it marked relate to a pending lawsuit involving Google and the enforcement of one of the CIDs the OAG issued to Google and this case was pending on the date the OAG received the request. After review of the submitted information and consideration of your arguments, we find the OAG has established litigation was pending and anticipated when it received the request. In addition,

we conclude the marked information relates to the OAG's pending and anticipated litigation. Accordingly, the OAG may withhold the information it has marked under section 552.103.²

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. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing parties 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).

A portion of the submitted information is subject to section 552.137 of the Government Code.³ Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating 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). See Gov't Code § 552.137(a)-(c). The e-mail addresses at issue are not of a type excluded by subsection (c). Therefore, the OAG must withhold the personal e-mail addresses we have marked under section 552.137, unless the owner affirmatively consents to their public disclosure.

In summary, the OAG may rely on Open Records Letter No. 2011-07919 (2011) to release and withhold the responsive information subject to that ruling. In addition, the OAG must withhold the submitted information it has marked under section 552.101 of the Government Code in conjunction with section 15.10(i)(1) of the Business and Commerce Code. The OAG may withhold the submitted information it has marked under section 552.103 of the Government Code. The OAG must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless the owner affirmatively consents to their public disclosure. 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.

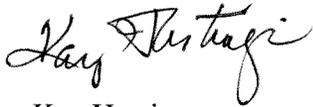
This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for

²As our ruling on this issue is dispositive, we do not address the OAG's other argument for this information.

³The Office of the attorney General will raise a mandatory exception on behalf of a governmental body. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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 "Kay Hastings".

Kay Hastings
Assistant Attorney General
Open Records Division

KH/sdk

Ref: ID# 521617

Enc. Submitted documents

c: Requestor
(w/o enclosures)