



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 10, 2013

Ms. Ashley R. Allen  
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Texas General Land Office  
P.O. Box 12873  
Austin, Texas 78711-2873

OR2013-05755

Dear Ms. Allen:

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# 483643.

The Texas General Land Office (the "GLO") received a request for various categories of information related to the City of Galveston Hurricane Ike Housing Recovery Project and Community Development Block Grant disaster funds from January 1, 2009 through December 14, 2012.<sup>1</sup> You claim portions of the submitted information are excepted from disclosure under sections 552.101, 552.103, and 552.111 of the Government Code. You also state release of the submitted information may implicate the proprietary interests of third parties. Accordingly, you state you have notified third parties of the request and of their right to submit arguments to this office as to why the requested information should not be released. *See* Gov't Code § 552.305(d) (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under the circumstances). Further, you also notified the City of Galveston (the "city") and the Galveston Police Department (the "department") of the request for

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<sup>1</sup>You inform us the GLO requested, and received, clarification of the request. *See* Gov't Code § 552.222. You further inform us the GLO provided the requestor with an estimate of charges and a request for a deposit for payment of those charges on January 3, 2013. *See id.* §§ 552.2615, .263(a). You state the GLO received a deposit for payment of the anticipated costs on January 22, 2013. Thus, January 22, 2013 is the date on which the GLO is deemed to have received the request. *See id.* § 552.263(e) (if governmental body requires deposit or bond for anticipated costs pursuant to section 552.263, request for information is considered to have been received on the date the governmental body receives deposit or bond).

information and of their right to submit arguments to this office as to why the information should not be released. *See* Gov't Code § 552.304 (interested party may submit written comments regarding availability of requested information). We have received comments from the URS Corporation ("URS") and the city. We have considered the submitted arguments and reviewed the submitted representative sample of information.<sup>2</sup> We have also received and considered comments from the requestor. *See id.*

Initially, we note a portion of the information in Attachment E, which we have marked, is not responsive to the instant request because it was created after the date the request was received. This ruling does not address the public availability of non-responsive information, and the GLO is not required to release non-responsive information in response to this request.

Next, we note some of the submitted 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 under this chapter unless made confidential under this chapter or other law:

...

(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[.]

Gov't Code § 552.022(a)(5). The information we have marked consists of construction cost estimates that constitute information used to estimate the need for or expenditure of public funds and are subject to section 552.022(a)(5) of the Government Code. Although you raise section 552.103 of the Government Code, section 552.103 is a discretionary exception to disclosure and does not make information confidential under the Act. *See id.* § 552.007; *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. 665 at 2 n.5 (discretionary exceptions generally), 663 (1999) (governmental body may waive section 552.103). Therefore, the GLO may not withhold the information subject to section 552.022 under section 552.103 of the Government Code. However, you also raise section 552.101 of the Government Code for this information, which protects

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<sup>2</sup>We 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.

information made confidential under law. As such, we will consider your argument under section 552.101 for the information that is subject to section 552.022, as well as for the information not subject to section 552.022. We will also address your argument under section 552.103 for the information not subject to section 552.022.

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. This exception encompasses the doctrine of common-law privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is 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 demonstrated. *Id.* at 681-82. This office has found that personal financial information not relating to a financial transaction between an individual and a governmental body is generally intimate or embarrassing. *See generally* Open Records Decision Nos. 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy). Upon review, we find the information subject to section 552.022, which we have marked, is of legitimate public concern. Therefore, the GLO may not withhold any of the information at issue pursuant to section 552.101 of the Government Code in conjunction with common-law privacy. As you raise no other exceptions to disclosure for this information, it must be released.

Next, we address your argument under section 552.103 of the Government Code for the information not subject to section 552.022. Section 552.103 of the Government Code provides:

(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, 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 governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office with “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” *See* Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.<sup>3</sup> Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be “realistically contemplated”). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983).

You state the information in Attachments B, C, and D relates to litigation reasonably anticipated by the city. You state the city is currently in a contract dispute with CDM Smith, Inc. (“CDM”), the requestor's client, concerning CDM's performance, as well as CDM's payment, for work related to the city's Disaster Housing Recovery Program (“program”). You state the GLO was notified that the city received from CDM a Notice to Invoke Mediation, which is a prerequisite to bringing a suit under the agreement between the city and CDM. Based on these representations, we find the city reasonably anticipated litigation at the time it received the request. However, the GLO, which received the request for information, is not a party to this litigation. *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). In such a situation, we require an affirmative

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<sup>3</sup>In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

representation from the governmental body whose litigation interests are at stake that it seeks to withhold the information from disclosure under section 552.103, as well as a demonstration of how that exception applies to the requested information. We have received a letter from the city confirming that the city is in a contract dispute with CDM concerning payment related to services associated with the program. The city asserts that the information at issue is directly related to the anticipated litigation and states it wishes to have the information withheld. Accordingly, based upon these representations and our review, we conclude the GLO may withhold Attachments B, C, and D under section 552.103 of the Government Code on behalf of the city.<sup>4</sup>

We note, however, once the information at issue has been obtained by all parties to the anticipated litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to the information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, any information obtained from or provided to all other parties in the anticipated litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has concluded or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

We note a portion of the remaining information is subject to section 552.137 of the Government Code, which 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 owner of the e-mail address consents to its release or the e-mail address falls within the scope of section 552.137(c). *See* Gov't Code § 552.137(a)-(c). The GLO must withhold the e-mail address we have marked under section 552.137 of the Government Code unless the owner affirmatively consents to its public disclosure.<sup>5</sup>

In summary, the GLO may withhold Attachments B, C, and D under section 552.103 of the Government Code. The GLO must withhold the e-mail address we have marked in Attachment E under section 552.137 of the Government Code. The remaining information must be released.

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.

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<sup>4</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

<sup>5</sup>We note Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold ten 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 requesting an attorney general opinion.

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.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), 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 must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,



Britni Fabian  
Assistant Attorney General  
Open Records Division

BF/dls

Ref: ID# 483643

Enc. Submitted documents

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(w/o enclosures)

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