



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 6, 2014

Mr. Frank L. Melton
Assistant City Attorney
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283-3966

OR2014-03846

Dear Mr. Melton:

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# 516491 (COSA File No. ORR W022282-121313).

The City of San Antonio (the "city") received a request for information pertaining to a specified project, including RFPs and related correspondence. The city claims some of the submitted information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code. The city also states, and provides documentation showing, it notified the following third parties of the city's receipt of the request for information and of the right of each to submit arguments to this office as to why the requested information should not be released: Capital Excavation; E.E.Hood & Sons, Inc.; EZ Bel Construction, LLC; Reytec Construction Resources, Inc.; Shannon-Mork, Inc.; Texas Sterling Construction Co.; V.K. Knowlton Construction & Utilities, Inc.; and Yantis Co. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 at 3 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have considered the claimed exceptions and reviewed the submitted representative sample of information.¹

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

Initially, we note some of the information you have submitted to us for review is not responsive to the request for information because it was created after the city received the request. This ruling does not address the public availability of any information that is not responsive to the request, and the city is not required to release this information, which we have marked, in response to this request. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. App.—San Antonio 1978, writ dismissed).

We next note the city seeks to withhold a copy of a city ordinance under section 552.103 of the Government Code. In Open Records Decision No. 551 (1990), this office considered whether a city ordinance could be withheld from the public under the Act, stating:

It is difficult to conceive of a more open record. The law, binding upon every citizen, is free for publication to all. *Banks v. Manchester*, 128 U.S. 244, 253 (1888). This policy is based on the concept of due process which requires that the people have notice of the law. *Building Officials & Code Admin. v. Code Technology, Inc.*, 628 F.2d 730, 734 (1st Cir. 1980). Given this constitutional consideration, it is difficult to hypothesize a circumstance that would bring a law or ordinance within an exception to public disclosure.

Thus, the city must release the submitted ordinance, which we have marked, to the requestor.

You assert some of the remaining information is excepted from disclosure under section 552.103 of the Government Code, which provides in 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 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, 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 from disclosure 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). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *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.² 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 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).

You inform us the requested information pertains to a construction project by a city contractor, the Yantis Company ("Yantis"), on land owned by the Alamo Aircraft Supply, Inc. ("Alamo"). You inform us Alamo has brought a lawsuit against the city related to the construction project. You also explain Yantis and the city are involved in a dispute over contractual payments and Yantis has invoked the dispute resolution process established in the construction contract. Based on your representations and our review of the submitted documents, we conclude, for purposes of section 552.103, you have established litigation was both reasonably anticipated and pending when the city received the request for information. We also find you have established the remaining information you have marked under section 552.103 is related to the litigation. Therefore, we agree section 552.103 of the Government Code is applicable to the remaining information you have marked on that ground.³

However, once information has been obtained by all parties to the anticipated 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 anticipated

²In addition, this office has concluded 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).

³As our ruling is dispositive, we do not address your other arguments to withhold this information.

litigation is not excepted from disclosure under section 552.103(a). We note Yantis, the opposing party to the anticipated litigation at issue, has seen or had access to some of the information related to that litigation under section 552.103. Therefore, the city may not withhold this information pursuant to section 552.103 but, instead, must release it to the requestor. However, we agree the city may withhold the remaining information you have marked under section 552.103. We note the applicability of section 552.103(a) ends once the litigation has been concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why requested information relating to it should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, no interested third party has submitted to this office any reasons explaining why the requested information should not be released. Thus, we have no basis for concluding any portion of the remaining information constitutes proprietary information of these third parties, and the city may not withhold any portion of the remaining information on that basis. *See* Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3.

The submitted information contains insurance policy numbers. Section 552.136(b) of the Government Code provides that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential."⁴ Gov't Code § 552.136(b). This office has determined an insurance policy number is an access device number for purposes of section 552.136. Open Records Decision No. 684 at 9 (2009). Thus, the city must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code.

To conclude, the city must release the copy of a city ordinance we have marked. With the exception of any information Yantis has seen or had access to, which the city must release, the city may withhold the remaining responsive information you have marked under section 552.103 of the Government Code. The city must withhold the information we have

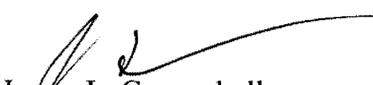
⁴The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body. *See* Open Records Decision Nos. 481 at 2 (1987), 480 at 5 (1987); *see, e.g.*, Open Records Decision No. 470 at 2 (1987) (because release of confidential information could impair rights of third parties and because improper release constitutes a misdemeanor, attorney general will raise predecessor statute of section 552.101 on behalf of governmental bodies).

marked under section 552.136 of the Government Code. The city must release the remaining responsive information.⁵

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,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/tch

Ref: ID# 516491

Enc. Submitted documents

c: Requestor
(w/o enclosures)

EZ Bel Construction, LLC
203 Recoleta
San Antonio, Texas 78216
(w/o enclosures)

Capital Excavation
3901 South Lamar
Austin, Texas 78767
(w/o enclosures)

⁵We note the submitted information contains social security numbers. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act. Gov't Code § 552.147(b).

Yantis Company
3611 Paesanos Parkway
San Antonio, Texas 78231
(w/o enclosures)

Shannon-Monk, Inc.
P.O. Box 1049
Helotes, Texas 78023-1049
(w/o enclosures)

E.E. Hood & Sons, Inc.
17000 Senior Road
Von Ormy, Texas 78073
(w/o enclosures)

Texas Sterling Construction Company
2819 Woodcliffe, #203
San Antonio, Texas 78230
(w/o enclosures)

Reytec Construction Resources, Inc.
1901 Hollister
Houston, Texas 77080
(w/o enclosures)

V.K. Knowlton Construction & Utilities,
Inc.
18225 FM 2252
San Antonio, Texas 78266
(w/o enclosures)