KEN PAXTON
ATTORNEY GENERAL OF TEXAS

March 25, 2015

Mr. Christopher C. Hugg
For the City of Floresville
Law Offices of Louis T. Rosenberg, P.C.
322 Martinez Street
San Antonio, Texas 78205

OR2015-05671

Dear Mr. Hugg:

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# 557494.

The City of Floresville (the "city"), which you represent, received ten requests from the same requestor for various documents relating to land use matters. You state the city does not maintain some of the requested information.[1] 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.

Initially, we must address the city's obligations 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. *See* Gov't Code § 552.301. Pursuant to section 552.301(e), a governmental body must 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

[1]The city states it does not maintain information responsive to the first, third, sixth, and ninth requests. The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dism'd); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

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. *See id.* § 552.301(e). You do not inform us the date the city received the second request for information; however, we note this request is dated January 5, 2015. We understand the city was closed for the Martin Luther King, Jr. holiday on January 19, 2015. This office does not count the date the request was received or the date the governmental body was closed as business days for the purpose of calculating a governmental body's deadlines under the Act. Thus, you were required to provide the information required by section 552.301(e) by January 27, 2015. However, the envelope in which the city provided the information required by section 552.301(e) was postmarked January 30, 2015. *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). Furthermore, you have not submitted to this office a copy of the seventh request, which we understand was dated January 22, 2015. Accordingly, we conclude the city failed to comply with the procedural requirements mandated by section 552.301 of the Government Code with regards to the second and seventh requests.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the 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 (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 Nos. 319 (1982), 586 (1991), 630 (1994). This office has held a compelling reason exists to withhold information when third-party interests are at stake or when information is made confidential by another source of law. *See* Open Records Decision No. 150 (1977) (construing predecessor statute). The city claims section 552.103 of the Government Code for the information at issue. However, that exception is discretionary in nature. It serves to protect a governmental body's interests and may be waived; as such, it does not constitute a compelling reason to withhold information. *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. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Accordingly, the city may not withhold the submitted information related to the second and seventh requests under section 552.103 of the Government Code. However, because sections 552.136 and 552.137 of the Government Code can provide compelling reasons to withhold information, we will address these exceptions to the information responsive to the

second and seventh requests.[2] We will also address your arguments for the remaining submitted information.

Next, we note the remaining information contains agendas of public meetings of the city. The notices, agendas, and minutes of a governmental body's public meetings are specifically made public under provisions of the Open Meetings Act, chapter 551 of the Government Code. *See* Gov't Code §§ 551.041 (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 seek to withhold this information under section 552.103 of the Government Code, as a general rule, the exceptions to disclosure found in the Act do not apply to information that other statutes make public. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Accordingly, the city must release the agendas of the public meetings we have marked pursuant to chapter 551 of the Government Code.

We note some of the remaining submitted information is subject to section 552.022 of the Government Code. Section 552.022(a)(3) provides for the required public disclosure of "information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body" unless it is "made confidential under [the Act] or other law[.]" Gov't Code § 552.022(a)(3). The information at issue includes information in an account or contract relating to the receipt or expenditure of funds by a governmental body that is subject to section 552.022(a)(3). The city must release this information pursuant to section 552.022(a)(3), unless it is made confidential under the Act or other law. *See id.* Although you assert this information is excepted from disclosure under section 552.103 of the Government Code, as noted above, this section is discretionary and does not make information confidential under the Act. *See Dallas Area Rapid Transit,* 4 S.W.3d at 475-76; ORDs 665 at 2 n.5, 663 at 5. Therefore, the city may not withhold the information subject to section 552.022 under section 552.103. However, we will consider your argument under section 552.103 for the information that is not subject to section 552.022.

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.

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[2]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).

. . .

> (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 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, an attorney for a potential opposing party making a demand for payment and asserting an intent to sue if such payments are not made. Open Records Decision Nos. 555 at 3 (1990), 346 (1982). In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party threatened to sue on several occasions and hired an attorney. *See* Open Records Decision No. 288 at 2 (1981). However, an individual publicly threatening to bring suit against a governmental body, but who does not actually take objective steps toward filing suit, is not concrete evidence that litigation is reasonably anticipated. *See* Open Records Decision No. 331 at 1-2 (1982).

You assert the city reasonably anticipated litigation at the time the city received all of the requests because the requestor, an attorney, had threatened litigation against the city. You provide a letter and an e-mail communication from the attorney alleging discrimination and permitting delays against his client. The attorney references "the year-and-a half battle with the [city] over land use jurisdiction and development authority" and threatens litigation. Based on your representations and our review, we conclude, for purposes of section 552.103, you have established litigation was reasonably anticipated when the city received the requests for information. Furthermore, we find the remaining information at issue is related to the anticipated litigation. Thus, the city may withhold the remaining information under section 552.103 of the Government Code.

However, once the information has been obtained by all parties to the anticipated litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). We also note the applicability of section 552.103(a) ends when the litigation has concluded or is no longer anticipated. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

We note some of the remaining submitted information responsive to the second request is subject to section 552.136 of the Government Code. Section 552.136(b) states "Notwithstanding 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." Gov't Code § 552.136(b). Accordingly, we find the city must withhold the bank account and credit card numbers we have marked under section 552.136(b) of the Government Code.

We also note some of the remaining information responsive to the seventh request is subject to section 552.137 of the Government Code. 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 id.* § 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). Upon review, we find the city must withhold the personal e-mail addresses we marked under section 552.137 of the Government Code, unless the owners affirmatively consents to their public disclosure.

In summary, the city must release the information responsive to the second and seventh requests. However, in releasing this information, the city must withhold the information we have marked pursuant to section 552.136 of the Government Code. The city must also withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their disclosure. The city must release the agendas we have marked pursuant to chapter 551 of the Government Code. The city must also release the information we have marked pursuant to section 552.022(a)(3) of the Government Code. The remaining submitted information may be withheld under section 552.103 of the Government Code.

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,

Debbie Lee
Assistant Attorney General
Open Records Division

DKL/akg

Ref: ID# 557494

Enc. Submitted documents

c: Requestor
(w/o enclosures)