



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 14, 2015

Mr. Andrew Culpepper
Assistant City Attorney
City of Orange
P.O. Box 520
Orange, Texas 77631-0520

OR2015-19099

Dear Mr. Culpepper:

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# 579196.

The City of Orange (the "city") received a request for information pertaining to International Paper Company ("International Paper"), International Paper's facility, a specified annexation plan, a map or boundary description of the boundaries of the city, any industrial district agreements between the city and entities located outside the city's municipal territory, and municipal annexations, all during a specified time period. You state the city has released some of the requested information. You claim the submitted information is excepted from disclosure under sections 552.103 and 552.131 of the Government Code. You also state release of this information may implicate the proprietary interests of International Paper. Accordingly, you state, and provide documentation showing, you notified International Paper of the request for information and of its right to submit arguments to this office as to why the submitted information should not be released. *See Gov't Code § 552.305(d); see also* Open Records Decision No. 542 (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 exceptions you claim and reviewed the submitted information.

Initially, 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.

Next, we note portions of the responsive information fall within the scope of 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 unless made confidential under this chapter or other law:

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(3). Some of the responsive information consists of contracts subject to 552.022(a)(3), which must be released unless they are made confidential under the Act or other law. *See id.* Although you seek to withhold the information at issue under sections 552.103 and 552.131(b) of the Government Code, these sections are discretionary exceptions to disclosure and do not make information confidential under the Act. *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 No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the city may not withhold any of the information at issue under section 552.103 or section 552.131(b) of the Government Code. As you raise no further exceptions to disclosure, the contracts, which we have marked, must be released pursuant to section 552.022(a)(3) of the Government Code.

Section 552.103 of the Government Code provides 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). A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception 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).

To establish litigation is reasonably anticipated, a governmental body must provide this office with “concrete evidence showing the claim that litigation may ensue is more than mere conjecture.” 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 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.¹ *See* Open Records Decision No. 555 (1990); *see also* 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 a potential opposing party has hired an attorney who makes a request for information does not establish litigation is reasonably anticipated. *See* Open Records Decision No. 361 (1983).

You assert the city anticipates litigation pertaining to the city’s planned annexation of the International Paper facility and the associated land. You explain the planned annexation would remove the International Paper facility and land from the Orange County Emergency Services District No. 3 (the “district”) and is anticipated to have a detrimental financial impact on the district. You state representatives of the district have “spoken out in opposition” to the planned annexation. You also state the district was represented by an attorney from the requestor’s law firm in a previous lawsuit involving the district and the city. However, you have not informed us, nor do the submitted documents indicate, any

¹In 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).

party has taken any concrete steps toward the initiation of litigation. *See* Gov't Code § 552.301(e)(1)(A); ORD 331. Further, you have failed to provide any arguments demonstrating that actual litigation is realistically contemplated by the city. Thus, we find you have not established the city reasonably anticipated litigation on the date the city received the request for information. Accordingly, the city has failed to demonstrate the applicability of section 552.103 of the Government Code to the remaining information, and it may not be withheld on that basis.

Section 552.131 of the Government Code relates to economic development information and provides in relevant part:

...

(b) Unless and until an agreement is made with the business prospect, information about a financial or other incentive being offered to the business prospect by the governmental body or by another person is excepted from [required public disclosure].

Gov't Code § 552.131(b). Section 552.131(b) protects information about a financial or other incentive that is being offered to a business prospect by a governmental body or another person. Gov't Code § 552.131(b).

The city asserts the remaining information relates to financial and economic incentives being offered to a business prospect the city is seeking to have locate, stay, or expand in the city. The city states the negotiations are still pending and an agreement has not been reached with regard to the incentives. Upon review, we find the information we have marked consists of information about financial or other incentives being offered to a business prospect by the city. Accordingly, the city may withhold the information we have marked under section 552.131(b) of the Government Code. However, upon review, we find the city has not demonstrated the remaining information consists of information about a financial or other incentive being offered to a business prospect. Consequently, the city may not withhold the remaining information under section 552.131(b).

Finally, we note 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 information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from International Paper explaining why its information should not be released. Therefore, we have no basis to conclude International Paper has a protected proprietary interest in the remaining information. *See id.* § 552.110; 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, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990)

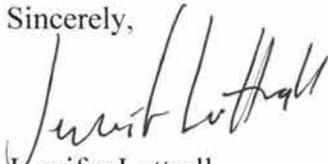
(party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, the city may not withhold any of the remaining information on the basis of any proprietary interest International Paper may have in it.

In summary, the city may withhold the information we have marked under section 552.131(b) of the Government Code. 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# 579196

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Ms. Jackie W. Rozier
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Memphis, Tennessee 38197
(w/o enclosures)