



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

July 25, 2019

Mr. Edward F. Guzman
Deputy City Attorney
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283

OR2019-20410

Dear Mr. Guzman:

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# 776972 (COSA File No W263058-050119).

The City of San Antonio (the "city") received a request for eleven categories of information pertaining to specified food and beverage agreements, including related communications between specified individuals. The city states it will release some information to the requestor. The city states it does not maintain information responsive to portions of the request.¹ The city claims the submitted information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception the city claims and reviewed the submitted representative sample of information.²

¹The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

²We 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 responsive information may have been the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2019-19467 (2019). To the extent the responsive information was the subject of Open Records Letter No. 2019-19467, the city must dispose of any such information in accordance with that ruling, provided there has been no change in the law, facts, and circumstances on which the previous ruling was based. To the extent the responsive information is not the subject of a previous ruling, the underlying law, facts, and circumstances of which have not changed, we will address the city's arguments against disclosure of the information. *See* Open Records Decision No. 673 at 6-7 (2001) (listing elements of first type of previous determination under Gov't Code § 552.301(a)).

Section 552.103 of the Government Code provides, in part, the following:

(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 that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate 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 the pending or anticipated litigation. *See 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).

To demonstrate litigation is reasonably anticipated, the governmental body must provide this office "concrete evidence showing the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). 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. Open Records Decision No. 555 (1990). The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* ORD 452 at 4.

The city informs us, prior to the receipt of the instant request, the Office of the Attorney General (the "OAG") submitted a letter to the city stating the OAG is investigating the city's decision to exclude a named company from one of the contracts at issue, submitted a letter to the Secretary for the United States Department of Transportation (the "department") requesting that the department open an investigation into the same matter, and issued press releases publicizing the submissions of these letters. The city asserts these actions, in concert with the receipt of a previous request from a representative of the OAG, demonstrates the city reasonably anticipated litigation on the date it received the instant request for information. However, we note 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). Additionally, we note 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. *See* Open Records Decision No. 361 (1983). Furthermore, the city has not demonstrated the OAG, the department, or the named company at issue has made any specific threat to sue the city or otherwise taken any objective steps toward the initiation of litigation regarding this matter. The city also informs us it is now a party to pending litigation with the OAG over the release of the remaining requested information. However, we note this lawsuit was filed after the city's receipt of the instant request and does not establish the city reasonably anticipated litigation on the date the city received the instant request. Consequently, we find the city has failed to demonstrate the information at issue is related to litigation the city reasonably anticipated when it received the present request for information. As such, we conclude the city may not withhold the information at issue under section 552.103 of the Government Code.

We note the information at issue contains e-mail addresses of members of the public that are 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). Gov't Code § 552.137(a)-(c). The e-mail addresses we marked are not of the types specifically excluded by section 552.137(c). *See id.* § 552.137(c). Accordingly, the city must withhold the e-mail addresses we marked under section 552.137 of the Government Code unless the owners of the addresses affirmatively consent to their release. The city must release the remaining information.

³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body. *See* Open Records Decision No. 481 (1987), 480 (1987), 470 (1987).

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,



Lecelle Clarke
Attorney
Open Records Division

LC/mo

Ref: ID# 776972

Enc. Submitted documents

c: Requestor
(w/o enclosures)