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ATTORNEY GENERAL OF TEXAS

October 24, 2019

Mr. David M. Oliver, Jr.  
Counsel for the North Fort Bend Water Authority  
Allen Boone Humphries Robinson LLP  
3200 Southwest Freeway, Suite 2600  
Houston, Texas 77027

OR2019-30154

Dear Mr. Oliver:

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# 791756.

The North Fort Bend Water Authority (the "authority"), which you represent, received a request for information pertaining to the Northeast Water Purification Plant project ("NEWPP"). You state you have released some information. You claim the submitted information is excepted from disclosure under sections 552.103 and 552.111 of the Government Code. We have also received and considered comments from the City of Houston (the "city"). *See* Gov't Code § 552.304 (permitting interested third party to submit to attorney general reasons why requested information should or should not be released). We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>1</sup>

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

(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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<sup>1</sup>We 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 that those records contain substantially different types of information than that submitted to this office.

(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.

*Id.* § 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 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). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). ORD 551 at 4.

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. 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 assert the authority reasonably anticipated litigation at the time it received the request. You explain, and submit documentation demonstrating, the city is currently in a dispute with the requestor's client in connection with the selection of a contractor to provide programming and installation of instrumentation and controls for NEWPP. A lawsuit styled *Hatch Associates Consultants, Inc. v. City of Houston*, Cause No. 2019-49987, was pending against the city in the 269th Judicial District Court of Harris County, Texas, when the authority received the request for information. We note, and you acknowledge, the authority is not a party to the pending litigation. However, you explain the authority and the city are parties to the "Second Supplement to Water Supply Contract", which provides the terms by which the city and authority, along with other regional water authorities, will share the costs of NEWPP. These costs include the costs associated with a dispute, including, without limitation, "legal fees, court costs, expert witness fees, filing fees, and judgment payments or settlement payments paid to the Contractor or Consultants" and will be allocated on a pro-rata basis to all parties involved in NEWPP, including the authority. Thus, you state on the date the authority received the request for information, the authority reasonably anticipated litigation to which the authority would be a party. Based on your representations, our review of the submitted information, and the totality of the

circumstances, we find the authority reasonably anticipated litigation on the date the request was received. You also state, and we agree, the information at issue is related to the anticipated litigation for purposes of section 552.103. Accordingly, the authority may withhold the submitted information under section 552.103 of the Government Code.<sup>2</sup>

Generally, however, once information has been obtained by all parties to the 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 all parties to 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 been concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,



D. Michelle Case  
Assistant Attorney General  
Open Records Division

DMC/gw

Ref: ID# 791756

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

c: Third Party  
(w/o enclosures)

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<sup>2</sup> As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.