



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 12, 2022

Ms. Dylbia L. Jefferies Vega
Attorney
Cameron County Commissioners Court
Civil Legal Division
1100 East Monroe Street
Brownsville, Texas 78520

OR2022-10759

Dear Ms. Vega:

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# 939275 (Reference No. W001880).

Cameron County (the "county") received a request for six categories of information pertaining to Space Exploration Technologies Corporation and its subsidiaries, Dogleg Park, LLC, and The Flats at Mars Crossing, LLC (collectively, "SpaceX"). The county claims the submitted information is excepted from disclosure under section 552.103 of the Government Code. Additionally, the county states release of the submitted information may implicate the proprietary interests of SpaceX. Accordingly, the county states, and provides documentation showing, it notified SpaceX of the request for information and of its right to submit arguments to this office. *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 received comments from SpaceX. We have considered the submitted arguments and reviewed the submitted information.

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 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 (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). *See* ORD 551.

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 establish 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.¹ 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. Open Records Decision No. 331 (1982). Further, 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. Open Records Decision No. 361 (1983).

Although the county states the information at issue is related to pending litigation, we note, and the county acknowledges, the county is not a party to this lawsuit. The litigation exception applies only when the governmental body is a party to the litigation. *See* Gov't Code § 552.103(a); Open Records Decision No. 575 at 2 (1990). Additionally, the county contends it reasonably anticipates litigation to which the information at issue relates because the requestor is an attorney and "could bring in [the county] as a party in the [pending] lawsuit or sue [the county] for potentially landlocking [the requestor's] property." Upon review, however, we find the county has not demonstrated any party has taken concrete steps toward filing litigation to which the county would be a party when the

¹ In 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).

county received the request for information. Thus, we conclude the county has failed to demonstrate it reasonably anticipated litigation when it received the request for information. Therefore, the county may not withhold any of the submitted information under section 552.103(a) of the Government Code.

Section 552.110(c) of the Government Code excepts from disclosure “commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]” Gov’t Code § 552.110(c). SpaceX argues some of its information consists of commercial or financial information subject to section 552.110(c). Upon review, we find SpaceX has demonstrated its information at issue constitutes commercial or financial information, the release of which would cause substantial competitive harm. Accordingly, the county must withhold the information we indicated under section 552.110(c) of the Government Code.² The county must release the remaining 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 <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,

James M. Graham
Assistant Attorney General
Open Records Division

JMG/be

Ref: ID# 939275

Enc. Submitted documents

c: Requestor
(w/o enclosures)

cc: 1 Third Party
(w/o enclosures)

² As our ruling is dispositive, we need not address SpaceX’s remaining argument against disclosure of this information.