



August 8, 2002

Ms. Ruth Reyes
Assistant City Attorney
City of El Paso
2 Civic Center Plaza
El Paso, Texas 79901-1196

OR2002-4369

Dear Ms. Reyes:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 166837.

The City of El Paso (the “city”) received two requests for information concerning a Request for Proposal Number 2002-018R. The first request seeks all documents relating to the RFP from May 2, 2002, to the date the city received the request. Similarly, the second request seeks all documents relating to the RFP from May 17, 2002, to the date the city received the request. You claim that the requested information is excepted from disclosure under section 552.103 of the Government Code. You also apparently notified a third party—Intergraph Public Safety (“Intergraph”)—of the request. In turn you have submitted a letter from Intergraph in which Intergraph contends that portions of its response to the RFP are excepted from public disclosure. *See* Gov’t Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances). We have considered all of the submitted arguments and reviewed the submitted information.

We begin by noting that some of the submitted information is not responsive to either request. The requests at issue cover information regarding the RFP from May 2, 2002, to May 30, 2002. Some of the submitted documents were produced before this time period and

therefore need not be released to the requestor in response to either of the requests at issue.¹ We have marked the documents that are not responsive to the instant requests.

We also note that Intergraph has submitted arguments in favor of withholding portions of its response to the RFP. However, because we do not have this information before us for review, this ruling does not address any such information and is limited to the information submitted as responsive by the city. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested, or representative sample if voluminous amount of information was requested).

Next, we turn to your argument that the submitted information is excepted from disclosure under section 552.103 of the Government Code. Section 552.103 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.

The city 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 is pending or reasonably anticipated, 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, no pet.); *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 city must meet both prongs of this test for information to be excepted under 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere

¹We note that the requestor's law firm made another request for records regarding the RFP on May 2, 2002. It does not appear that the city requested a ruling from this office to withhold information responsive to the May 2 ruling. Therefore, to the extent the submitted information was responsive to May 2 request, we assume you released the information to the requestor's law firm. If you have not done so, you must do so at this time. *See* Gov't Code §§ 552.021, .221, .301, .302.

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.² 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 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). In determining whether litigation is reasonably anticipated, this office cannot consider information about occurrences that took place after the date of the request for information.

You contend that litigation was reasonably anticipated or pending at the time the city received both requests for information. In support of your argument you have submitted to this office a copy of a protest letter dated May 3, 2002, and a copy of the Original Petition for Injunctive Relief filed on May 21, 2002 in the case of *Schydlower v. City of El Paso*, No. 2002-2021 (34th Dist. Ct., El Paso County, Tex. May 21, 2002). The requestor’s law firm submitted the protest letter to the city on behalf of its client, SAGEM MORPHO, Inc. (“SMI”). In the letter, the requestor’s law firm protests the award of a contract to Printrak/Motorola over SMI and requests that the city vacate its contract with Printrak/Motorola. While SMI was clearly dissatisfied with the outcome of the bid process and sought a revocation of the contract, there is no indication in the protest letter that SMI or its attorneys threatened to file a lawsuit against the city. Furthermore, although you submitted a petition filed against the city regarding the contract awarded to Printrak/Motorola, the petition was not filed until after the first request for information had been made. Based on the information in existence at the time of the first request, we find that litigation against the city was neither pending nor reasonably anticipated. Therefore, the information responsive to the first request may not be withheld under section 552.103 of the Government Code.

On the other hand, we find that you have adequately demonstrated that litigation against the city was pending at the time of the second request. Furthermore, we find that the information responsive to the second request relates to the pending litigation. Therefore, information responsive to the second request may be withheld under section 552.103 of the Government Code. We have marked the information that the city may withhold under section 552.103.

We note, however, that 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

²In addition, this office has concluded that 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).

information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

With respect to the information that is not protected under section 552.103, we note that some of the information must be withheld under section 552.137 of the Government Code. Section 552.137 provides that “[a]n e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Public Information Act].”³ Therefore, unless the relevant individuals have affirmatively consented to the release of their e-mail addresses, the city must withhold the e-mail addresses in the submitted information that we have marked under section 552.137.

In summary, the city need not release the submitted information that is not responsive to the requests at issue. Furthermore, we do not reach the issue of whether Intergraph’s response to the RFP must be released. The city may withhold the information responsive to the May 30, 2002 request under section 552.103 of the Government Code. The city must withhold the marked e-mail addresses under section 552.137 of the Government Code unless the individuals to whom the e-mail addresses belong consented to their release. The city must release the remainder of the submitted information.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public

³The identical exception has been added as section 552.136 of the Government Code.

records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Nathan E. Bowden
Assistant Attorney General
Open Records Division

NEB/seg

Ref: ID# 166837

Enc: Submitted documents

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