ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 14, 2009

Mr. John R. Batoon
Assistant City Attorney
City of El Paso
2 Civic Center Plaza, 9th Floor
El Paso, Texas 79901

OR2009-00598

Dear Mr. Batoon:

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# 332246.

The City of El Paso (the "city") received a request for information relating to McNeilus Truck and Manufacturing, specifically including correspondence between the city and McNeilus in a given time period, documents showing the frequency with which the city performed certain maintenance on each McNeilus vehicle, and documents demonstrating the city's compliance with McNeilus's "returned good policy" for each warranty claim the city disputes or has submitted to McNeilus. You claim the submitted information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we note some of the submitted information is not responsive to the present request for information because it was created after the city received the request on October 16, 2008. We have marked the nonresponsive information. This ruling does not address the public availability of nonresponsive information, and the city is not required to release nonresponsive information in response to the present request.

We now turn to your argument under section 552.103 of the Government Code with regard to the submitted responsive information. Section 552.103 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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> (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 that the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Thomas v. Cornyn*, 71 S.W.3d 473, 487 (Tex. App.—Austin 2002, no pet.); *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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

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 that litigation is reasonably anticipated, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue 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). 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).

You argue the city anticipated litigation on the date it received the present request for information because the city received a letter from the requestor on the same date, which you have submitted for our review, indicating that the requestor's client would have no choice

but to initiate an interpleader action if the city and McNeilus fail to reach an agreement. *See* Tex. R. Civ. P. 43 (interpleader suits); *see also Great Am. Reserve Ins. Co. v. Sanders*, 525 S.W.2d 956, 958 (Tex. 1975) (insurance company "was entitled to maintain an interpleader suit if there existed a reasonable doubt, either of fact or law, as to which of the rival claimants was entitled to the proceeds of the policy"). Based on your representations and our review, we find this letter is a specific threat to initiate litigation by an attorney for a potential opposing party. *See* ORD 555. Therefore, we agree the city reasonably anticipated litigation on the date the city received the instant request for information. Furthermore, we find the submitted responsive information relates to the anticipated litigation for purposes of section 552.103(a).

We note, however, that the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* ORD 551 at 4-5. 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 the opposing parties, or its representatives, is not excepted from disclosure under section 552.103(a) and must be disclosed. Upon our review, it appears some of the submitted e-mails were either sent or received by representatives of the requestor's client, representatives of McNeilus, and city employees. Thus, these e-mails that have been seen by all three parties to the anticipated litigation may not be withheld under section 552.103. The city may, however, withhold the remaining responsive information under section 552.103 of the Government Code. We note the applicability of section 552.103(a) ends once the litigation has concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

To the extent the submitted responsive information is not excepted under section 552.103, we note e-mail addresses may be excepted under section 552.137 of the Government Code.[1] 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). Section 552.137(c) excludes the e-mail addresses of persons who have or seek to establish a contractual relationship with a governmental body or its agent. *Id.* § 552.137(c)(1)-(2). Section 552.137 is also not applicable to an e-mail address a governmental entity maintains for one of its officials or employees. The e-mail addresses we have marked are not of a type specifically excluded by section 552.137(c). Therefore, the city must withhold the e-mail addresses we have marked in accordance with section 552.137 unless it receives consent for their release.

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[1]The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

In summary, the city need not release nonresponsive information in response to this request. The city may withhold the submitted responsive information that has not been sent or received by all parties to the anticipated litigation under section 552.103 of the Government Code. To the extent the submitted responsive information is not excepted under section 552.103, the city must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the city receives consent for their disclosure.

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.oag.state.tx.us/open/index_orl.php, 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 must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,

Katherine M. Kroll

Katherine M. Kroll
Assistant Attorney General
Open Records Division

KMK/eeg

Ref: ID# 332246

Enc. Submitted documents

c: Requestor
(w/o enclosures)