



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 22, 2009

Mr. Miguelangel Matos
Denton, Navarro, Rocha & Bernal, P.C.
2517 North Main Avenue
San Antonio, Texas 78212

OR2009-08522

Dear Mr. Matos:

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# 346563.

Karnes County (the "county"), which you represent, received two requests from the same requestor for information related to (1) a contract with the Texas Historical Commission, (2) demolition of the Agriculture Building, and (3) contracts, purchases and expenditures related to the new county annex building and implementation of the recycling grant.¹ You claim that portions of the requested information are excepted from disclosure under sections 552.103, 552.110, and 552.136 of the Government Code. You state that the submitted information may contain proprietary information subject to exception under the Act. Accordingly, we understand you to have notified Syncro Architecture Studio ("Syncro") of the request for information and of its right to submit comments. *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 considered the exceptions you claim

¹You state that the county has made a good-faith effort to relate the requestor's questions to responsive information. *See* Open Records Decision Nos. 563 at 8 (1990), 561 at 8-9 (1990), 555 at 1-2 (1990). You inform us that the county has no information relating to the requestor's question about the name of a commissioner. We note that the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. *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), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

and reviewed the submitted information. We have also considered comments submitted by the requestor. Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note the submitted documents include the minutes and agendas of public meetings. The minutes and agendas of a governmental body's public meetings are specifically made public under the Open Meetings Act, chapter 551 of the Government Code. *See id.* §§ 551.022 (minutes and tape recordings of open meeting are public records and shall be available for public inspection and copying upon request), .041 (governmental body shall give written notice of date, hour, place, and subject of each meeting); *see also* Open Records Decision No. 221 (1979) (stating that records of public proceedings among most public information and are not excepted under predecessor to Gov't Code § 552.103). Accordingly, the submitted minutes and agendas, which we have marked, must be released in accordance with the Open Meetings Act.

Next, we note that the submitted information contains a resolution adopted by the Karnes County commissioner's court. Because laws and ordinances are binding on members of the public, they are matters of public record and may not be withheld from disclosure under the Act. *See* ORD 221 at 1; *see also* Open Records Decision No. 551 at 2-3 (1990) (laws or ordinances are open records). The submitted resolution is analogous to an ordinance. Accordingly, the county must release the submitted resolution.

We also note that some of the remaining information is subject to section 552.022 of the Government Code. Section 552.022 provides, in relevant part, as follows:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body;

(5) all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate[.]

Gov't Code § 552.022(a)(3), (5). Portions of the submitted information, which we have marked, are subject to sections 552.022(a)(3) and 552.022(a)(5) of the Government Code.

The information subject to section 552.022 must be released, unless it is confidential under other law. You claim the submitted information is excepted from disclosure under sections 552.103, 552.110, and 552.136 of the Government Code. Section 552.103 is a discretionary exception under the Act and does not constitute "other law" for purposes of section 552.022. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Accordingly, the county may not withhold the information we have marked that is subject to section 552.022 under section 552.103 of the Government Code. However, sections 552.110 and 552.136 are "other law" for section 552.022 purposes. Accordingly, we will address these sections for the information subject to section 552.022. In addition, we note that some of the information at issue may be subject to section 552.137.² As section 552.137 is also "other law" for the purposes of 552.022, we will address the applicability of this exception to the information at issue. We will also consider your arguments under sections 552.103 and 552.110 for the remaining information not subject to section 552.022.

An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) of the Government Code to submit its reasons, if any, as to why requested information relating to that party should be withheld from disclosure. *See Gov't Code § 552.305(d)(2)(B)*. As of the date of this letter, Syncro has not submitted any comments to this office explaining how release of its information would affect its proprietary interests. On behalf of Syncro, you assert that the submitted information is excepted under section 552.110 of the Government Code. However, we note that section 552.110 is designed to protect the interests of third parties, not the interests of a governmental body. Therefore, Syncro has not demonstrated that any of its submitted information is confidential or proprietary for the purposes of the Act. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (stating that business enterprise that claims exception for commercial or financial information under section 552.110(b) must show by specific factual evidence that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret). Accordingly, the county may not withhold any of the submitted information on the basis of any proprietary interests Syncro may have in it.

We begin by addressing your claim under section 552.103 of the Government Code for the information not subject to section 552.022. Section 552.103 provides in part 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

²The Office of the Attorney General will raise mandatory exceptions, such as section 552.137, on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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). The 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 is 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, 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 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 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.³ 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).

³ Among other examples, this office has concluded that litigation was reasonably anticipated where the opposing party took the following objective steps toward litigation: (1) filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); (2) 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 (3) threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

In this instance, you state and provide documentation showing that the county was involved in pending litigation before the 81st District Court in Karnes County. The documentation reveals that the requestor filed suit on April 3, 2009. The submitted dismissal was signed by the judge on April 13, 2009. However, you state that the county received the first request on March 31, 2009. Thus, the county received the first request before the lawsuit was filed and litigation was pending. Further, you have not proven that litigation was anticipated by the county prior to its receipt of the first request for information. Thus, you have failed to establish that litigation was pending or reasonably anticipated when the county received the first request for information. *See* Gov't Code 552.103(c) (litigation must be pending or reasonably anticipated at the time the governmental body receives the request for information). Accordingly, none of the information that you have submitted as responsive to the first request for information may be withheld under section 552.103. Additionally, upon reviewing the documents you have submitted as responsive to the second request, we find that all of these documents are also responsive to the first request. Therefore, the county may not withhold any of the submitted information under section 552.103.

Section 552.136 states that “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” *Id.* § 552.136. The county must withhold the account numbers we have marked under section 552.136.

Next, we note that the remaining information contains personal e-mail addresses that are subject to section 552.137 of the Government Code. 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). *See* Gov't Code § 552.137(a)-(c). The e-mail addresses at issue are not a type specifically excluded by section 552.137(c). Accordingly, the county must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses have affirmatively consented to their disclosure.

Finally, we note that some of the submitted information is copyrighted. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, the county must withhold the account numbers we have marked under section 552.136. The county must also withhold the e-mail address we have marked under section 552.137 unless the owners of the e-mail addresses have affirmatively consented to

their disclosure. The county must release the remaining information, but any copyrighted information may only be released in accordance with copyright law.

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,



Tamara Wilcox
Assistant Attorney General
Open Records Division

TW/eeg

Ref: ID# 346263

Enc. Submitted documents

c: Requestor
(w/o enclosures)