



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 12, 2010

Mr. Warren M. S. Ernst
Chief, General Counsel Division
City of Dallas
1500 Marilla, Room 7BN
Dallas, Texas 75201

OR2010-06805

Dear Mr. Ernst:

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# 379127.

The City of Dallas (the "city") received a request for Housing Department memos and e-mails regarding the CDBG Section 108 Loan Guarantee Program during a specified time period. You state some of the requested information will be released. You claim that some of the submitted information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code.¹ You also state that release of some of the submitted information may implicate the proprietary interests of The Courtyards at La Reunion Project and Orleans at La Reunion Project (collectively the "La Reunion Project"). You notified the

¹We assume that 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.

La Reunion Project of this request for information and of its right to submit arguments to this office as to why the information should not be released. *See* Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances). We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, we note that some of the submitted information, which we have marked, is not responsive to the request for information because it falls outside the requested time period. The city need not release non-responsive information in response to this request, and this ruling will not address that information.

Next, we note that 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) to submit its reasons, if any, as to why requested information relating to that party should be withheld from disclosure. *See id.* § 552.305(d)(2)(B). As of the date of this letter, the La Reunion Project has not submitted comments to this office explaining why any portion of its information, submitted as Exhibit B, should not be released to the requestor. Thus, we have no basis to conclude that the release of any portion of the submitted information relating to the La Reunion Project would implicate its proprietary interests. *See id.* § 552.110; Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 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). Accordingly, we conclude that the city may not withhold any portion of Exhibit B on the basis of any proprietary interest that the La Reunion Project may have in this information.

You claim the responsive information submitted in Exhibits D, E, and, F is excepted from disclosure under section 552.103 of the Government Code. 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.

(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.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).

You inform this office, and provide documentation showing, that prior to the submission of the request for information, the requestor filed a complaint with the U.S. Department of Housing and Urban Development ("HUD") against the city alleging violations of the federal Fair Housing Act, 42 U.S.C. §§ 3601-3619. You explain if HUD determines there is reasonable cause to believe an unlawful discriminatory housing practice has occurred, HUD will issue a charge, and the city has the right to choose whether to have the case heard by an administrative law judge or have the matter referred to the appropriate U.S. district court.

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).

Even if HUD dismisses the complaint, you explain the requestor has the right to file an individual lawsuit against the city under the Fair Housing Law. Based on your representations and our review of the submitted documentation, we conclude you have established litigation was reasonably anticipated when the city received the request for information. Furthermore, we agree the responsive information in Exhibits D, E, and F relates to the anticipated litigation. Therefore, we agree that section 552.103 is applicable to this information.³

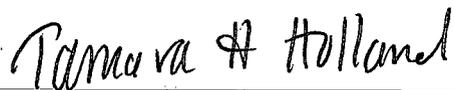
We note, however, that once the information has been obtained by all parties to the pending litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). We also note that the applicability of section 552.103(a) ends when the litigation has concluded. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).

In summary, this decision does not address the public availability of the non-responsive information, which we have marked. The city may withhold the responsive information in Exhibits D, E, and F under section 552.103 of the Government Code. The city must release the information in Exhibit B.

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, toll free at (888) 672-6787.

Sincerely,



Tamara H. Holland
Assistant Attorney General
Open Records Division

THH/jb

³As our ruling is dispositive, we need not address your remaining arguments.

Ref: ID# 379127

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. David Krukiel
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Dallas, Texas 75207
(w/o enclosures)