ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 21, 2011

Ms. Cary Grace
Assistant City Attorney
City of Austin
P.O. Box 1088
Austin, Texas 78767-8828

OR2011-08804

Dear Ms. Grace:

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# 421602.

The City of Austin (the "city") received a request for three categories of information relating to three named entities, including records regarding encroachments on city parkland or environmental issues. You claim the requested information is excepted from disclosure under sections 552.103 and 552.107(1) of the Government Code. We have considered the exceptions you claim and reviewed the information you submitted.[1]

Section 552.103 of the Government Code provides in 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.

[1]This letter ruling assumes the submitted representative samples of information are truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the city to withhold any information that is substantially different from the submitted information. *See* Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

. . .

> (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 that claims section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information at issue. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See* Open Records Decision No. 551 at 4 (1990).

To establish that litigation is reasonably anticipated for the purposes of section 552.103, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *See* Open Records Decision No. 452 at 4 (1986). In the context of anticipated litigation in which the governmental body is the prospective plaintiff, the concrete evidence must at least reflect litigation is "realistically contemplated." *See* Open Records Decision No. 518 at 5 (1989); *see also* Attorney General Opinion MW-575 (1982) (finding investigatory file may be withheld if governmental body attorney determines it should be withheld pursuant to Gov't Code § 552.103 and that litigation is "reasonably likely to result"). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* ORD 452 at 4.

You explain the city is involved in a dispute with Driveway Austin, LP ("Driveway") concerning Driveway's encroachment on city parkland. You state, and have provided documentation demonstrating, the city has requested in writing that Driveway cease and desist from encroaching on the parkland and remove all improvements Driveway has placed there. You inform us Driveway had not ceased its encroachment as of the date of your request for this decision. You also state the city believes other code violations that require correction are present on the property. You inform us the city may file suit to correct the encroachment and code violations. You state the city anticipates Driveway's failure to correct these issues will result in litigation. You also state the submitted information is related to the anticipated litigation. Based on your representations and documentation, our review of the information at issue, and the totality of the circumstances, we find the submitted information is related to litigation the city reasonably anticipated on the date of

its receipt of this request for information. We therefore conclude section 552.103 of the Government Code is generally applicable in this instance.[2]

We note, however, the opposing party in the anticipated litigation has already seen some of the submitted information. 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. If the opposing party has seen or had access to information relating to anticipated litigation, through discovery or otherwise, there is no interest in withholding such information from the public under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Therefore, the city may withhold most of the requested information under section 552.103 of the Government Code but may not withhold the submitted e-mail communications with Driveway and/or its attorneys on that basis. We note the applicability of section 552.103 ends once the related litigation concludes or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

We also note the information that may not be withheld under section 552.103 includes e-mail addresses of members of the public. Section 552.137 of the Government Code states that "an 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 Act]," unless the owner of the e-mail address has affirmatively consented to its public disclosure or the e-mail address falls within the scope of section 552.137(c).[3] Gov't Code § 552.137(a)-(c). We note section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address a governmental entity maintains for one of its officials or employees. We have marked e-mail addresses that do not appear to fall within the scope of section 552.137(c). The city must withhold the marked e-mail addresses under section 552.137 of the Government Code, unless the owner of an e-mail address has affirmatively consented to its public disclosure.[4]

In summary, the city (1) may withhold the requested information under section 552.103 of the Government Code, except for the e-mail communications with Driveway and/or its

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[2]As we are able to make this determination, we need not address your claim under section 552.107(1) of the Government Code.

[3]This office will raise section 552.137 on behalf of a governmental body, as this section is a mandatory exception to disclosure. *See* Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

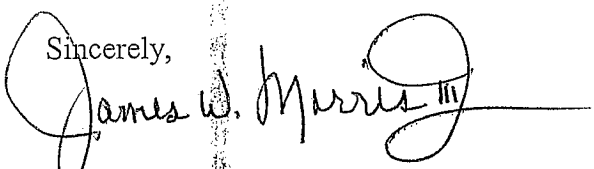
[4]We note Open Records Decision No. 684 (2009) is a previous determination issued by this office authorizing all governmental bodies to withhold ten categories of information without the necessity of requesting an attorney general decision, including an e-mail address of a member of the public under section 552.137 of the Government Code.

attorneys and (2) must withhold the e-mail addresses we have marked under section 552.137 of the Government Code. The city must release the rest of the requested 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 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,



James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/em

Ref: ID# 421602

Enc: Submitted documents

c: Requestor
(w/o enclosures)