ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 7, 2012

Ms. Paige H. Saenz
Attorney for City of Jonestown
Knight & Partners
223 West Anderson Lane, Suite A-105
Austin, Texas 78752

OR2012-06712

Dear Ms. Saenz:

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# 452798.

The City of Jonestown (the "city"), which you represent, received a request for information pertaining to the investigation of the Wind Energy Project. You state the city will release some of the requested information. You claim the remaining requested information is excepted from disclosure under sections 552.101, 552.103, 552.106, 552.110, 552.111, and 552.113 of the Government Code. You also state release of some of this information may implicate the proprietary interests of CM Alternative Energies, Inc. ("CM Energies"). Accordingly, you state, and provide documentation showing, you notified CM Energies of the request for information and of its right to submit arguments to this office as to why the submitted information should not be released. *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). Further, you state release of some of this information may implicate the interests of two named individuals. Accordingly, you state you have notified these individuals of the request for information and of their right to submit arguments to this office as to why the submitted information should not be released.[1] *See* Gov't Code § 552.304 (interested party may submit comments stating why information

[1]As of the date of this letter, we have not received correspondence from the two named individuals.

should or should not be released). We have considered the submitted arguments and reviewed the submitted representative sample of information.[2]

Initially, we note portions of the requested information may have been the subject of two previous requests for information, in response to which this office issued Open Records Letter Nos. 2012-02881 (2012) and 2011-12010 (2011). In Open Records Letter No. 2012-02881, we concluded the following: with the exception of certain information that must be withheld under section 552.136 of the Government Code, the city must release the information subject to section 552.022(a)(3) of the Government Code; the city must release information the opposing parties to the litigation have seen or accessed, but in releasing that information, the city must withhold certain information under section 552.117 of the Government Code if the employee at issue timely elected confidentiality under section 552.024 of the Government Code and certain e-mail addresses under section 552.137 of the Government Code unless the owners of the e-mail addresses affirmatively consent to their disclosure; and the city may withhold the remaining information at issue under section 552.103 of the Government Code. In Open Records Letter No. 2011-12010 we concluded the information at issue must be released. We have no indication the law, facts, and circumstances on which Open Records Letter Nos. 2012-02881 and 2011-12010 were based have changed. Accordingly, with regard to the requested information that is identical to the information previously requested and ruled upon by this office in these prior rulings, we conclude the city must continue to rely on Open Records Letter Nos. 2012-02881 and 2011-12010 as previous determinations and withhold or release the identical information in accordance with these rulings. *See* Open Records Decision No. 673 (2001) (so long as law, facts, circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). To the extent the requested information is not encompassed by the previous rulings, we will address the submitted arguments.

Section 552.103 of the Government Code 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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[2]We assume 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.

. . .

> (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 applies in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the requested information is related to that litigation. *See 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 parts of this test for information to be excepted under section 552.103(a). *See* ORD 551 at 4.

You state the city filed suit against some of the parties involved in the Wind Energy Project. We understand the suit, styled *The City of Jonestown, Texas v. CM Alternative Energies, Inc.*, Cause No. D-1-Gr-11-001855, is pending in the 98th District Court of Travis County. You provide documentation showing the suit was filed before the date the city received the instant request. Thus, we agree litigation involving the city was pending on the date of the request. You further state, and we agree, the submitted information pertains to the substance of the suit. Therefore, section 552.103 of the Government Code generally applies to the submitted information.

We note, however, it appears opposing parties in the pending litigation have seen or had access to portions of the information at issue. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to the litigation to obtain such information through discovery procedures. *See* ORD 551 at 4-5 (1990). Thus, if all opposing parties in pending litigation have seen or had access to information that is related to the litigation, whether through discovery or otherwise, there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Accordingly, any of the submitted information that has been seen or accessed by all opposing parties to the litigation may not be withheld under section 552.103. However, information that has not been seen by the opposing parties may be withheld under section 552.103 of the Government Code. We note the applicability of section 552.103 ends once the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). Therefore, with the exception of any information all the

opposing parties to the litigation have seen or had access to, the city may withhold the submitted information under section 552.103 of the Government Code.[3]

You also raise section 552.110 of the Government Code as an exception to disclosure for the information the opposing parties to the pending litigation may have seen or accessed. However, because section 552.110 is designed to protect the interests of third parties, not those of governmental bodies, a governmental body may not raise section 552.110 on behalf of a third party. Therefore, if we do not receive comments from a third party explaining why the information at issue should not be released, we will conclude section 552.110 is not applicable. 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 information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from CM Energies explaining why any portion of the remaining information should not be released. Therefore, CM Energies has not demonstrated it has a protected proprietary interest in the remaining information. *See* Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, third party must show by specific factual evidence, not conclusory or generalized allegations, 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), 542 at 3 (1990). Accordingly, the city may not withhold any of the remaining information on the basis of any proprietary interest CM Energies may have in it.

The information the opposing parties to the pending litigation may have seen or had access to contains information subject to section 552.101 of the Government Code. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses the doctrine of common-law privacy. Common-law privacy protects information that (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type of information considered intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. This office has found personal financial information not relating to the financial transaction between an individual and a governmental body is excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 600 (1992), 545 (1990). This office has also found some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under

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[3]As our ruling on this information is dispositive, we need not address your remaining arguments against its disclosure.

common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Upon review, we find the information we have marked is highly intimate or embarrassing and not of legitimate public concern. Therefore, the city must withhold the information we have marked pursuant to section 552.101 of the Government Code in conjunction with common-law privacy.

We note some of the materials at issue may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). 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.

In summary, with regard to the requested information that is identical to the information previously requested and ruled upon by this office in Open Records Letter Nos. 2012-02881 and 2011-12010, we conclude the city must continue to rely on these prior rulings as previous determinations and withhold or release the identical information in accordance with these rulings. With the exception of any information all the opposing parties to the litigation have seen or had access to, the city may withhold the submitted information under section 552.103 of the Government Code. Any information all the opposing parties to the pending litigation have seen or had access to must be released, but any information protected by copyright may only be released in accordance with copyright law.[4] In releasing this information, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.

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

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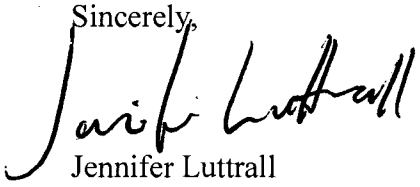
[4]We note the submitted information contains partial social security numbers. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act. *See* Gov't Code § 552.147(b).

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,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/som

Ref: ID# 452798

Enc. Submitted documents

c: Requestor
(w/o enclosures)

c: Mr. Mike Guevara
CM Energies
1322 Hunter Ace Way
Cedar Park, Texas 78613
(w/o enclosures)

c: Ms. Dana McCoy
2402 Marcus Abrams Boulevard
Austin, Texas 78748
(w/o enclosures)

c: Mr. Charles Malouff, Jr.
2402 Marcus Abrams Boulevard
Austin, texas 78748
(w/o enclosures)