



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 12, 2014

Ms. Natasha J. Martin
Counsel for the City of Normangee
Bojorquez Law Firm, PC
12325 Hymeadow Drive, Suite 2-100
Austin, Texas 78750

OR2014-22594

Dear Ms. Martin:

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# 546772.

The City of Normangee (the "city"), which you represent, received a request for the requestor's completed time sheets for a specified time period. You claim the requested information is excepted from disclosure under sections 552.103 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, we note some of the submitted information is not responsive to the instant request because it is not a time sheet, as specified in the request. This ruling does not address the public availability of any information that is not responsive to the request, and the city is not required to release such information in response to this request.

Section 552.103 of the Government Code provides, in relevant part:

¹We 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 those records contain substantially different types of information than that submitted to this office.

(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 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, orig. proceeding); *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 from disclosure 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 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, an attorney for a potential opposing party making a demand for payment and asserting an intent to sue if such payments are not made. Open Records Decision Nos. 555 at 3 (1990), 346 (1982). In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party threatened to sue on several occasions and hired an attorney. *See* Open Records Decision No. 288 at 2 (1981). However, an individual publicly threatening to bring suit against a governmental body, but who does not actually take objective steps toward filing suit, is not concrete evidence that litigation is reasonably anticipated. *See* Open Records Decision No. 331 at 1-2 (1982).

You assert the city reasonably anticipates litigation based on two reasons—a claim against the city by the requestor and a United States Department of Justice (“DOJ”) investigation of the city. You state, and provide documentation showing, prior to the city's receipt of the request for information, the requestor, a former city employee, filed a claim with the city for alleged unpaid wages. You

explain the city disputes the requestor's claim. You further state the city submitted a coverage request to the Texas Municipal League Intergovernmental Riskpool, the city's insurance provider, inquiring about any coverage provided for legal expenses and court costs in the event of litigation with the requestor. However, you have not informed us the requestor has threatened, or otherwise indicated an intent, to sue the city based on his claim for unpaid wages. Therefore, we find the city has not demonstrated any party had taken concrete steps toward filing litigation against the city based on the requestor's claim for unpaid wages when the city received the request for information. *See* Gov't Code § 552.301(e)(1)(A); ORD 331.

You also contend the city anticipates litigation with the DOJ because the DOJ notified the city on September 30, 2014, the DOJ's investigation findings led to a determination the city misused federal grant funds. You assert "it is likely the [DOJ] will pursue legal remedies, such as litigation, against the [c]ity" for repayment of the misused grant funds. You inform us, however, the city received the request for information on September 22, 2014. Thus, the city had not been informed of the DOJ's investigation findings on the date the city received the request for information. Therefore, we conclude the city has failed to demonstrate it reasonably anticipated litigation when it received the request for information. Consequently, the city may not withhold any portion of the submitted responsive information under section 552.103(a) of the Government Code.

Section 552.108(a)(1) of the Government Code excepts from disclosure "[I]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]" Gov't Code § 552.108(a)(1). A governmental body claiming section 552.108(a)(1) must reasonably explain how and why the release of the information at issue would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). Section 552.108 may be invoked by the proper custodian of information relating to a pending investigation or prosecution of criminal conduct. *See* Open Records Decision No. 474 at 4-5 (1987). Where a non-law enforcement agency has custody of information that would otherwise qualify for exception under section 552.108 as information relating to the pending case of a law enforcement agency, the custodian of the records may withhold the information if it provides this office with a demonstration the information relates to the pending case and a representation from the law enforcement agency that it wishes to have the information withheld.

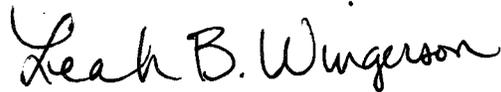
You state the submitted information relates to an ongoing investigation by the DOJ's Office of Community Oriented Policing Services ("COPS office") regarding misuse of federal grant funds by the city. You inform us the city received grant funds from the COPS office. You have provided correspondence from the COPS office to the city stating the COPS office's investigation findings have led the COPS office to question the city's use of the total amount of grant funds and, as such, "will be issuing a Proposed Notice of Noncompliance for Supplanting." You explain federal law provides a Notice of Noncompliance "could result in the violator having to remedy the violations, a suspension and/or termination of the grant award, a restriction from receiving new grants, and

other legal remedies.” *See* 28 C.F.R. § 66.43. Although we agree the DOJ is a law enforcement agency, you have not explained the COPS office’s legal remedies include criminal prosecution, nor have you explained the COPS office’s investigation pertains to criminal conduct. Furthermore, you have not provided our office with any representation to indicate the DOJ wishes to have the submitted information withheld. Therefore, the city may not withhold any of the submitted responsive information under section 552.108(a)(1) of the Government Code. As you have not claimed any other exceptions to disclosure, the city must release the submitted responsive 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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/bhf

Ref: ID# 546772

Enc. Submitted documents

c: Requestor
(w/o enclosures)