



June 5, 2019

*Via U.S. Mail*  
Open Records Division  
Office of the Attorney General  
P.O. Box 12548  
Austin, Texas 78711-2548

**Re: Response to Request for Ruling**

Dear Assistant Attorney General:

On April 17, 2019 I submitted an open records request to the City of San Antonio, which it designated COSA File number W260956-041719. On May 15, 2019, the City of San Antonio submitted a “10-day” letter requesting an opinion from the Attorney General’s office. On May 23, 2019, the City submitted to the Attorney General’s office a “15-day letter” seeking to withhold records under Tex. Gov’t Code § 552.103.<sup>1</sup> This letter is submitted pursuant to Tex. Gov’t Code § 552.304 and responds in opposition to the City’s request to withhold records.

The City of San Antonio is not exempt under Tex. Gov’t Code § 552.103 from producing the requested records.<sup>2</sup> Accordingly, I respectfully request that the Attorney General determine that the City of San Antonio is not entitled to an exemption and direct the City to promptly produce the requested records.

**San Antonio does not qualify for the litigation exception to the TPIA.**

The Texas Public Information Act (“TPIA”) must be liberally construed “in favor of granting a request for information.” Tex. Gov’t Code § 552.001. Accordingly, exceptions to the TPIA must be construed narrowly. *See Harris Cty. Appraisal Dist. v. Integrity Title Co.*, 483 S.W.3d 62, 71 (Tex. App—Houston [1st Dist.] 2015, pet. denied). San Antonio claims that the requested records are exempt under Tex. Gov’t Code § 552.103, which exempts from the TPIA information “relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party.” However, the exemption only applies “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.” *Id.* § 552.103(c). Therefore, San Antonio may not withhold the requested records unless litigation was pending or reasonably anticipated on April 17, 2019.

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<sup>1</sup> Copies of each of these letters are attached herein.

<sup>2</sup> Although the City’s “10-day” letter listed sixty-three TPIA provisions under which it sought to withhold the requested documents, the City’s “15-day” letter presented legal arguments only as to one, Tex. Gov’t Code § 552.103. Accordingly, this letter addresses only that provision but maintains that the requested information is not exempt under any other provisions listed in the City’s “10-day” letter and that the City has waived those provisions by failing to argue them, *see* Tex. Gov’t Code § 552.301(e)(1)(A) (requiring “written comments stating the reasons why the stated exceptions apply”).

The City of San Antonio cannot meet this high bar. For litigation to be reasonably anticipated, the City must present “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” *See* Tex. Att’y Gen. OR1996-638; *B.W.B. v. Eanes Indep. Sch. Dist.*, No. 03-16-00710-CV, 2018 Tex. App. LEXIS 223, at \*15 (Tex. App.—Austin [3d Dist.] Jan. 10, 2018, no pet.) (“Litigation cannot be regarded as ‘reasonably anticipated’ unless there is more than a ‘mere chance’ of it . . . .”) (quoting Tex. Att’y Gen. OR1986-452); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref’d n.r.e.). In fact, even where “a requestor publicly states on more than one occasion an intent to sue, that alone does not trigger the litigation exception.” *Eanes Indep. Sch. Dist.*, 2018 Tex. App. LEXIS at \*15 (quoting Tex. Att’y Gen. OR1986-452) (internal quotation marks omitted). Rather, concrete evidence demonstrating that the anticipation of litigation is more than conjecture takes the form of, for example, a written demand for disputed payments stating further legal action would be necessary if payment was denied, *see* Tex. Att’y Gen. OR1983-346, or a statement in the open records request itself explaining that the requestor intends to use the information to organize a lawsuit, *see Univ. of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 482 (Tex. App.—Austin [3d Dist.] 1997, no pet.). Moreover, that the requestor is an attorney does not automatically render an anticipation of litigation reasonable. *See* Tex. Att’y Gen. OR1983-361; *see also* Tex. Gov’t Code § 552.223 (requiring uniform treatment of requests regardless of the requestor’s occupation).

San Antonio has presented no concrete evidence demonstrating that litigation is pending or reasonably anticipated. The City’s reliance on conclusory suppositions and “impression[s]” is insufficient. *See* Tex. Att’y Gen. OR1986-452. No litigation is currently pending, and First Liberty Institute has not expressed an intent to file suit against the City of San Antonio. Indeed, apart from the open records request itself, First Liberty has not communicated at all with the City of San Antonio regarding this matter, much less made any demand or threat of legal action. *Cf.* Tex. Att’y Gen. OR1983-346. First Liberty does not represent Chick-fil-A or any other client with respect to this matter, and, thus, San Antonio cannot reasonably anticipate that First Liberty would use the requested information to file a lawsuit. *Cf. Univ. of Tex. Law Sch.*, 958 S.W.2d at 482. At the time of the open records request at issue (and as of the date of this letter), not even Chick-fil-A had publicly expressed an intention to legally challenge San Antonio’s discriminatory actions towards it.<sup>3</sup>

Furthermore, the Texas Attorney General’s investigation into San Antonio’s discriminatory actions will not necessarily culminate in litigation; rather, it may inform state policy changes or legislative action.<sup>4</sup> Likewise, requests that the U.S. Department of Transportation investigate whether San Antonio has complied with its obligations as a

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<sup>3</sup> *See, e.g.,* Chris Morris, *Chick-Fil-A Banned from San Antonio Airport*, FORTUNE (Mar. 22, 2019), <http://fortune.com/2019/03/22/chick-fil-a-banned-san-antonio-airport/> (describing Chick-fil-A’s statement that it planned to reach out to the San Antonio City Council and discuss the issue).

<sup>4</sup> *See, e.g.,* Janine Puhak, *‘Save Chick-fil-A’ Bill Passed by Texas House*, FOX NEWS (May 21, 2019), <https://www.foxnews.com/faith-values/faa-investigating-airports-amid-claims-it-discriminated-against-chick-fil-a> (describing efforts of Texas legislators to enact a policy preventing state and municipal governments from penalizing businesses for contributing to religious organizations).

federal grant recipient do not necessarily imply litigation is forthcoming. In fact, the Federal Aviation Administration's ("FAA") investigations into a grantee's alleged noncompliance with nondiscrimination requirements emphasize informal, voluntary resolution rather than litigation. *See, e.g.*, 14 C.F.R. § 152.423(b).<sup>5</sup> Accordingly, the City has presented no concrete evidence that the possibility of litigation rises above mere speculation. *See* Tex. Att'y Gen. OR1986-452.

## Conclusion

As an organization devoted exclusively to defending religious liberty for all Americans, First Liberty has an interest in educating the public about instances of religious discrimination. In particular, the citizens of San Antonio have an interest in knowing the extent to which their elected officials engage in religious discrimination. Although the City of San Antonio may be reluctant to release information that could indicate its officials hold anti-religious animus, that reluctance does not constitute concrete evidence of reasonably anticipated litigation. Accordingly, we respectfully urge the Office of the Attorney General to determine that San Antonio is not entitled to withhold the requested records.

Should you have any questions related to this topic, you are welcome to contact me at any time.

Sincerely,



Hiram S. Sasser, III  
General Counsel  
First Liberty Institute

Enclosures:

- 1) April 17, 2019 Open Records Request
- 2) May 15, 2019 "10-Day" Letter
- 3) May 23, 2019 "15-Day" Letter

CC: *Via U.S. Mail and Email*  
Edward F. Guzman  
Deputy City Attorney  
P.O. Box 839966  
San Antonio, Texas 78283

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<sup>5</sup> Moreover, at the time of the open records request, the FAA had not announced an investigation into the City's discriminatory acts. Thus, at the time of the request the City could only speculate whether such an investigation would be opened, much less whether such an investigation would ever culminate in litigation.



April 17, 2019

Ms. Moraima McGraw  
Senior Public Information Officer  
Department of Government and Public Affairs  
P.O. Box 839966  
San Antonio, TX 78283

***Sent via electronic submission and U.S. Mail***

**Re: Open Records Request**

Dear Ms. McGraw:

First Liberty Institute is the nation's largest law firm dedicated exclusively to defending and restoring religious liberty for all Americans. Please direct all communication on this matter to my attention.

Under the Texas Public Information Act, Tex. Gov't Code Title 5, Chapter 552, First Liberty requests the opportunity to inspect and obtain copies of public records. A list of the requested records is included below. Please produce the requested records in an electronic medium, if available. *See* Tex. Gov't Code § 552.228(b).

As disclosure of the information requested is in the public interest of ensuring that government entities respect the religious liberty of all Americans and abide by all relevant nondiscrimination laws, First Liberty requests a waiver of any fees associated with this public records request. *See* Tex. Gov't Code § 552.267.

**Records Requested**

First Liberty requests copies of the following public records:

- Any and all San Antonio City Council staff reports, recommendations, comments, or assessments of any kind whatsoever relating to the January 18, 2018 Request for Proposal for Food, Beverage, and Retail Prime Concessionaire for San Antonio International Airport (RFP 18-014).
- Any and all San Antonio City Council staff reports, recommendations, comments, or assessments of any kind whatsoever relating to the proposed San Antonio International Airport Food & Beverage Prime Concession Agreement between the City of San Antonio and Paradies Lagardère or relating to the proposed ordinance

approving such agreement, considered as Agenda Item 15 in the March 21, 2019 City Council Meeting.

- Any and all communications, notes, or other documents of any kind whatsoever, including but not limited to emails, text messages, notes, statements, letters, reports, and comments, produced by the San Antonio City Council, any San Antonio City Council member, the Mayor of San Antonio, or any employee or staff member of the City Council, a City Council member, or the mayor regarding or relating to the aforementioned proposed ordinance considered as Agenda Item 15 in the March 21, 2019 City Council Meeting.
- Any and all communications, notes, or other documents of any kind whatsoever, including but not limited to emails, text messages, notes, statements, letters, reports, and comments, produced since January 1, 2012 by the San Antonio City Council, any San Antonio City Council member, the Mayor of San Antonio, or any employee or staff member of the City Council, a City Council member, or the mayor regarding or relating to Chick-fil-A.

## Conclusion

The Texas Public Information Act requires that you promptly produce the requested records, within a reasonable time and without delay unless, within ten days, you have sought the Attorney General's opinion. *See* Tex. Gov't Code § 552.221(a); *id.* § 552.301(a), (d).

If you deny any of this request, please cite each specific exemption you are invoking to justify the refusal to release the information. If you have any questions or need any additional information, you can reach me by telephone at 972-941-4444 or by email at [REDACTED]

Sincerely,



Hiram S. Sasser, III  
General Counsel  
First Liberty Institute



# CITY OF SAN ANTONIO

OFFICE OF THE CITY ATTORNEY  
Edward F. Guzman, Deputy City Attorney  
PHONE: (210) 207-8940 / FAX: (210) 207-4004

City of San Antonio | Office of the City Attorney  
P.O. Box 839966  
San Antonio, Texas 78283  
Delivery Address

May 15, 2019

*Via First Class Mail*

Open Records Division  
Office of the Attorney General  
P.O. Box 12548  
Austin, Texas 78711-2548

Re: Request for Ruling  
Requestor: Hiram Sasser  
Organization: City of San Antonio  
Date request received: April 17, 2019  
COSA File No.: W260956-041719

Dear Assistant Attorney General:

On April 17, 2019, the City of San Antonio received a public information request from Hiram Sasser. A copy of that request is attached to this letter as **Attachment I**.

On April 30, 2019, the City of San Antonio requested clarification regarding Hiram Sasser's request and received clarification on May 2, 2019. A copy of the clarification request and a copy of the clarification response are attached as **Attachment II-A and II-B**, respectively.

Under Texas Government Code §552.301, a governmental body must submit a request for a ruling from the Office of the Attorney General to obtain authority to withhold documents from disclosure under the exceptions listed in Subchapter C, §552.101 - .158. The request for ruling must be submitted to the Texas Attorney General's Office within 10 business days after receipt of the request.

As noted, the City of San Antonio received Hiram Sasser's public information request on April 17, 2019. The City of San Antonio requested clarification and received clarification on May 2, 2019. Therefore, the request was assigned a receipt date of May 2, 2019. Accordingly, the tenth business day for this request is May 16, 2019; and the fifteenth business day is May 23, 2019.

The City of San Antonio seeks to withhold some of the requested records pursuant to the following sections of Chapter 552 of the Texas Government Code: 552.101, 552.102, 552.103, 552.104, 552.105, 552.106, 552.107, 552.108, 552.1081, 552.1085, 552.109, 552.110, 552.111, 552.112, 552.113, 552.114, 552.115, 552.116, 552.117, 552.1175, 552.1176, 552.118, 552.119, 552.120, 552.121, 552.122, 552.123, 552.1235, 552.124, 552.125, 552.126, 552.127, 552.128, 552.129, 552.130, 552.131, 552.132, 552.1325, 552.133, 552.134, 552.135, 552.136, 552.137, 552.138, 552.139, 552.140, 552.141, 552.142, 552.1425, 552.143, 552.144, 552.145, 552.146, 552.147, 552.148, 552.149, 552.150, 552.151, 552.152, 552.153, 552.154, 552.155, and 552.158.

**Any other applicable section within §552.101 through §552.158.**

Further under Texas Government Code §552.301, within 15 business days of the receipt of the public information request, the City must submit 1) a copy of the request; 2) arguments and law in support of the exceptions claimed; 3) a copy of the records at issue, labeled with exceptions claimed under the Act and all other documents and materials to make a timely request for an Attorney General decision.

By the 15<sup>th</sup> business day after receipt of this request, the City will provide an additional letter discussing the nature of the requested document and the application of the exceptions. The City will also send a copy of this letter to the requestor pursuant to the notice requirement of Texas Government Code §552.301.

Sincerely,



Edward F. Guzman  
Deputy City Attorney  
City of San Antonio

Enclosures:

- Attachment I – Copy of Request
- Attachment II-A – Copy of Request for Clarification
- Attachment II-B – Copy of Clarification Response

cc: *Via E-Mail (w/o enclosures)*  
Hiram Sasser





# CITY OF SAN ANTONIO

OFFICE OF THE CITY ATTORNEY  
Edward F. Guzman, Deputy City Attorney  
TEL NO (210) 207-8940 FAX NO 207-4004

Delivery Address  
P.O. Box 839966  
San Antonio, Texas 78283

May 23, 2019

Open Records Division  
Office of the Attorney General  
P.O. Box 12548  
Austin, Texas 78711-2548

*Via First Class Mail*

Re: Request for Ruling

Requestor: Hiram Sasser  
Organization: City of San Antonio  
Date request received: April 17, 2019  
COSA File No.: W260956-041719

Dear Assistant Attorney General:

On April 17, 2019, the City of San Antonio received a public information request from Hiram Sasser of the First Liberty Institute for the following information:

Description: • Any and all San Antonio City Council staff reports, recommendations, comments, or assessments of any kind whatsoever relating to the January 18, 2018 Request for Proposal for Food, Beverage, and Retail Prime Concessionaire for San Antonio International Airport (RFP 18-014).

• Any and all San Antonio City Council staff reports, recommendations, comments, or assessments of any kind whatsoever relating to the proposed San Antonio International Airport Food & Beverage Prime Concession Agreement between the City of San Antonio and Paradies Lagardère or relating to the proposed ordinance approving such agreement, considered as Agenda Item 15 in the March 21, 2019 City Council Meeting.

• Any and all communications, notes, or other documents of any kind whatsoever, including but not limited to emails, text messages, notes, statements, letters, reports, and comments, produced by the San Antonio City Council, any San Antonio City Council member, the Mayor of San Antonio, or any employee or staff member of the City Council, a City Council member, or the mayor regarding or relating to the aforementioned proposed ordinance considered as Agenda Item 15 in the March 21, 2019 City Council Meeting.

• Any and all communications, notes, or other documents of any kind whatsoever, including but not limited to emails, text messages, notes, statements, letters, reports, and comments, produced since January 1, 2012 by the San Antonio City Council, any San Antonio City Council member, the Mayor of San Antonio, or any employee or staff member of the City Council, a City Council member, or the mayor regarding or relating to Chick-fil-A.

Re: Open Records Request from Hiram Sasser  
COSA File No. W260959-041719



A copy of that request is attached to this letter as **Attachment I**.

On April 30, 2019, the City of San Antonio requested clarification regarding Hiram Sasser's request and received clarification on May 2, 2019. Copies of the clarification request and response are attached as **Attachment II-A and II-B**, respectively.

Under Texas Government Code § 552.301, a governmental body must submit a request for a ruling from the Office of the Attorney General to obtain authority to withhold documents from disclosure under the exceptions listed in Subchapter C, § 552.101 - .158. The request for ruling must be submitted to the Texas Attorney General's Office within 10 business days after receipt of the request.

As noted, the City of San Antonio received Hiram Sasser's public information request on April 17, 2019. The City of San Antonio requested clarification and received clarification on May 2, 2019. Therefore, the request was assigned a receipt date of May 2, 2019. Accordingly, the tenth business day for this request is May 16, 2019, and the fifteenth business day is May 23, 2019.

The City submitted a "10-day" letter to your office by U.S. Mail on May 16, 2019 and provided a copy of that letter to the requestor as well (**Attachment III**). This letter serves as the City's "15-day" letter to your office.

The City of San Antonio will be releasing responsive documents that are available to the public, or have been released through some other forum, to the requestor. However, the City seeks to withhold certain records pursuant to section 552.103 "*Litigation or Settlement Negotiations Involving the State or a Political Subdivision*" pursuant to the Texas Public Information Act.

In accordance with Section 552.301(e)(1)(D) & (2), the City is submitting representative samples of the specific information requested, which the City seeks to withhold, and arguments supporting the asserted exceptions. (**Attachment IV – Copy of Records Submitted for AG Review**)

*Please note that the City of San Antonio previously provided a brief regarding the same or similar information and documents under a request submitted by Cleve Doty of the Texas Attorney General's Office on May 3, 2019 under our record number W260203-041119. If possible, this brief and arguments should be considered along with that submitted brief.*

### **I. Factual Background**

On March 21, 2019, the San Antonio City Council considered an item on its publicly posted agenda regarding a proposal submitted by Paradies Lagadere (Paradies) for a concession contract for the San Antonio International Airport. The proposal included a Chick-fil-A fast food concept as part of the overall package. After an open and transparent deliberation and vote regarding the award of the concession contract, the City Council determined that the contract should be awarded to Paradies, but directed staff to work with Paradies to replace the Chick-fil-A concept within the proposal with some other comparable concept suitable for the designated category. A recording of the meeting can be viewed at: <https://sanantoniotx.new.swagit.com/videos/26748>

On March 28, 2019, Attorney General Ken Paxton issued a press release (**Attachment FB-1**) that stated he sent a letter to the Mayor and City Council advising them that “he is opening an investigation surrounding the city’s decision to exclude Chick-fil-A from a concession contract” and that he also submitted a second letter to the Secretary for the U.S. Department of Transportation requesting that they also “open an investigation” into the same matter. The referenced letters to the Mayor and Council, and the Department of Transportation are attached respectively as **Attachments FB-2 and FB-3**.

On March 28, 2019, Hiram Sasser, General Counsel for the First Liberty Institute, and the requestor in this instance, submitted a similar letter to the Secretary for the Department of Transportation also requesting an investigation and a suspension of federal grants to the City of San Antonio (**Attachment FB-4**).

On April 11, 2019, Attorney General Paxton issued another press release stating that his office had sent a second letter to the Mayor and City Council as an “open records request for documents related to the Office of the Attorney General’s investigation of the City’s decision to exclude Chick-fil-A from the San Antonio International Airport” (**Attachment FB-5**). The letter referenced within the April 11 press release requesting records has been attached as **Attachment FB-6**.

On April 17, 2019 the City received a request for information from Mr. Sasser related to the Paradies concession contract (see **Attachment I**).

## **II. Argument Against Release**

### **Litigation Exception** (Section 552.103, Texas Public Information Act)

The Public Information Act Section 552.103, *Litigation or Settlement Negotiations Involving the State or a Political Subdivision*, provides that:

- (a) Information is excepted from the requirements of Section 552.021 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.
- (b) For purposes of this section, the state or a political subdivision is considered to be a party to litigation of a criminal nature until the applicable statute of limitations has expired or until the defendant has exhausted all appellate and postconviction remedies in state and federal court.
- (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 requester applies to the officer for public information for access to or duplication of the information.

Therefore, for the City to prevail under this exception, it must clearly establish that 1) litigation involving the City is pending or reasonably anticipated and 2) the information must relate to that litigation. What constitutes "pending or reasonably anticipated litigation" is made on a case-by-case basis. The following information supports the City's contention of "pending or reasonably anticipated" litigation involving the publicly announced investigation of the City of San Antonio by the Office of the Attorney General:

- The Office of the Attorney General has issued two press releases clearly stating that the office is investigating the City's decision to exclude Chick-fil-A from the San Antonio International Airport (please see **Attachments FB-1** and **FB-5**).
- The Office of the Attorney General has submitted two letters to the Mayor and City Council for the City of San Antonio that clearly state that the office is investigating the City's decision to exclude Chick-fil-A from the San Antonio International Airport (please see **Attachment FB-2** and **Attachment FB-6**).
- The Office of the Attorney General has actively encouraged a federal department to open its own investigation into the same matter being addressed by the current request for information (please see **Attachment FB-3**).
- The requestor has submitted a letter to the Department of Transportation asserting similar claims and a call for an investigation (please see **Attachment FB-4**), creating an impression that it is aligned with the litigation interests of the State of Texas.

Based on the above, it is reasonable to surmise that the Office of the Attorney General is actively investigating the City of San Antonio in preparation for possible legal action related to the information being requested. Allowing other entities to use of the Texas Public Information Act as a means for collecting information when litigation is anticipated provides an opportunity for release and disclosure of information that is sought by the prospective litigant from the third-party requestor. Mr. Sasser's submission of a letter to the Secretary of the Department of Transportation also creates an impression that his organization would be a willing conduit to provide information to potential litigants outside of an appropriate discovery process. This undermines the litigation process and robs a government entity of its legal protections and reciprocal discovery afforded under state law.

Based on the above, all material requested by the subject open records request as evidenced by the representative samples submitted under **Attachment IV** should be excepted from release.

**III. Summary**

The City is seeking the Attorney General's concurrence that the requested information must not be released to the requestor. The City asserts that the requested information is excepted from release in accordance with Texas Public Information Act, Section 552.103 (Litigation exception).

Sincerely,



Edward F. Guzman  
Deputy City Attorney  
City of San Antonio

cc: Hiram Sasser

[REDACTED]

**w/ Attachments I – III,  
and Attachments FB-1-6**