No. D-1-GN-19-003072

KEN PAXTON,	§	IN THE DISTRICT COURT OF
TEXAS ATTORNEY GENERAL,	Š	
Petitioner,	Š	
	§	
V.	§	
	§	
CITY OF SAN ANTONIO and	§	
ERIK WALSH, in his official	§	
capacity as City Manager of the	§	TRAVIS COUNTY, TEXAS
City of San Antonio,	§	
Respondents,	§	
	§	
V.	§	
	§	
FIRST LIBERTY INSTITUTE	8	
Petitioner-Intervenor.	Š	200TH JUDICIAL DISTRICT

Original Petition in Intervention for Writ of Mandamus

Under Section 552.321(a) of the Government Code

NOW COMES First Liberty Institute, Intervenor, to file this Original Petition in Intervention for Writ of Mandamus under the Texas Public Information Act ("PIA"), Chapter 552 of the Texas Government Code, against Respondents City of San Antonio and Erik Walsh, in his official capacity as City Manager (collectively the "City"), and to allege as follows:

Discovery Control Plan

1. Intervenor intends to conduct discovery under Level 2 of Texas Rule of Civil Procedure 190.3 and affirmatively pleads that this case is not governed by the expedited actions process in Texas Rule of Civil Procedure 169 because the relief sought includes non-monetary injunctive relief.

Parties

2. Intervenor First Liberty Institute ("First Liberty" or "Intervenor") is a nonprofit law firm dedicated exclusively to defending religious liberty for all Americans. First Liberty's address is 2001 West Plano Parkway, Suite 1600, Plano, Texas 75075. First Liberty is "a requestor" petitioning for a writ of mandamus pursuant to Tex. Gov't Code § 552.321(a).

3. Petitioner is the Honorable Ken Paxton, Attorney General of the State of Texas ("General Paxton" or "Petitioner"), who filed his Original Petition for Writ of Mandamus under Section 552.321(a) of the Government Code. *See* Original Pet. for Writ of Mandamus Under Section 552.321(a) of the Gov't Code, *Paxton v. City of San Antonio*, No. D-1-GN-19-003072 (200th Dist. Ct., Travis County, Tex. filed Jun. 3, 2019). As General Paxton has already appeared in these proceedings, he may be served through his attorney of record.

4. Respondent City of San Antonio is a home-rule municipality located within Bexar County, Texas. San Antonio, Tex., Charter of the City of San Antonio, art. I, §§ 1, 3(1) (1951).

5. Respondent Erik Walsh is the City Manager for the City of San Antonio (the "City Manager") and must enforce all laws and ordinances, as well as supervise city administration and control all other departments. Charter of the City of San Antonio at § 46(1), (3). As chief administrative officer, the City Manager also presides as the officer for public information. *Id.* § 46(3); Tex. Gov't Code § 552.201(a). In this role, the City Manager is required to promptly disclose public information. Tex. Gov't Code § 552.221(a).

6. As Respondents have appeared in these proceedings, they may be served through their attorney of record.

Jurisdiction and Venue

7. Intervenor joins this lawsuit pursuant to Texas Rule of Civil Procedure 60 and Texas Government Code §§ 552.321(a), 552.325, seeking the release of certain public information held by the city.

8. The Court has jurisdiction over this mandamus action under Texas Government Code § 552.321(a). *See Kallinen v. City of Houston*, 462 S.W.3d 25 (Tex. 2015).

9. Venue for this petition in intervention is proper in Travis County because venue was mandatory in Travis County for Petitioner's Original Petition for Writ of Mandamus under Section 552.321(a) of the Government Code. *See* Tex. Gov't Code § 552.321(b); *Thomas v. Cornyn*, 71 S.W.3d 473, 483–84 (Tex. App.—Austin [3d Dist.] 2002, no pet.).

10. Intervenor could have filed this lawsuit in its own right. *See* Tex. Gov't Code § 552.321. Intervention in the case will not complicate the issues in this case. It is a matter of right and essential to protect Intervenor's interests. *See Guar. Fed. Sav. Bank v. Horseshoe Operating Co.*, 793 S.W.3d 652, 657 (Tex. 1990).

Background

General Paxton's Open Records Request

11. On April 11, 2019, General Paxton, through Assistant Attorney General Cleve W.

Doty, submitted a request pursuant to the PIA requesting that the City of San Antonio release the

following information:

- Communications between or among any city councilmember and other councilmembers, city employees, and/or third parties concerning the inclusion or exclusion of Chick-fil-A in the concessionaire contract for the airport;
- Calendars of city councilmembers indicating meetings or phone calls regarding the inclusion or exclusion of Chick-fil-A in the concessionaire contract;
- Records of meetings between or among any city councilmember and other city councilmembers, city employees, and/or third parties

concerning the inclusion or exclusion of Chick-fil-A in the concessionaire contract; and

• Communications and records of city employees concerning the inclusion or exclusion of Chick-fil-A in the concessionaire contract.

See Paxton Pet. Ex. B. This request is the subject of the underlying mandamus action. Correspondence relating to General Paxton's open records request is attached to General Paxton's Original Petition for Writ of Mandamus. *See* Paxton Pet. Exs. B, C, D. Such correspondence is incorporated by reference as if fully set out herein.

12. On April 24, 2019, Edward F. Guzman, Deputy City Attorney for the City of San Antonio, submitted a letter to the Open Records Division of the Texas Attorney General's Office stating that the City sought to assert sixty-three (63) exceptions to disclosure in the PIA and requesting a ruling. *See* Paxton Pet. Ex. C.

13. On May 2, 2019, the City submitted an additional letter presenting arguments in support of only one PIA exception—the "litigation exception" set forth in Texas Government Code § 552.103. *See* Paxton Pet. Ex. D (citing Tex. Gov't Code § 552.103(a)). In support of its argument, the City stated that "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." *See id*.

14. In response, on June 3, 2019, General Paxton filed the underlying action—his Original Petition for Writ of Mandamus under the Texas Public Information Act under Section 552.321(a) of the Government Code.

First Liberty's Open Records Request

15. On April 17, 2019, Intervenor submitted, through its General Counsel Hiram S.

Sasser, III, and by both U.S. Mail and electronic submission, a request pursuant to the PIA requesting that the City of San Antonio release the following information:

- 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.

A true and correct copy of the request is attached as Exhibit A.

16. On May 2, 2019, the City requested by electronic mail clarification of the records

request, and Intervenor responded by stating that Item 4 sought records since January 1, 2018,

rather than January 1, 2012. A true and correct copy of such request and response is attached as

Exhibit B.

17. The City failed to disclose any documents responsive to Intervenor's PIA request.

18. On May 15, 2019, the City submitted a "10-day" letter to the Open Records Division of the Texas Attorney General's Office stating that it sought to assert sixty-three (63) statutory exemptions to disclosing public information under the PIA. A true and correct copy of the "10-day" letter is attached as Exhibit C.

19. On May 23, 2019, the City submitted the statutorily required "15-day letter." *See* Tex. Gov't Code § 552.301(e). That letter presented reasons relating only to one PIA exception—the "litigation exception" set forth in Texas Government Code § 552.103. A true and correct copy of the "15-day" letter is attached as Exhibit D.

20. On June 5, 2019, Intervenor submitted a letter pursuant to Texas Government Code § 552.304 responding in opposition to the City's "15-day" letter. A true and correct copy of this letter is attached as Exhibit E.

Intervention Is Necessary to Protect Intervenor's Interests

21. Petitioner and Intervenor requested substantially the same information from the Respondents. *See supra* paras. 11, 15; Ex. A; Paxton Pet. Ex. B.

22. In both instances, the City withheld documents responsive to the PIA requests. *See supra* paras. 13, 17, 19; Paxton Pet. paras. 34–39.

23. The letters the City sent to the Open Records Division of the Texas Attorney General's Office relating to General Paxton's and First Liberty's PIA requests are essentially identical. On both occasions, the City initially claimed sixty-three (63) PIA exceptions before arguing only the litigation exception in each "15-day" letter. The City's arguments as to the litigation exception's applicability to each respective request were, likewise, essentially identical. *See supra* paras. 13–14, 19–20; Exs. C, D; Paxton Pet. Exs. C, D.

24. The City's "15-day" letter regarding Intervenor's PIA request urged that its submissions relating to Intervenor's request be considered together with the City's submissions regarding General Paxton's information request. *See* Ex. D at 2 ("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.").

25. The City's correspondence relating to the two requests occurred close in time. *See supra* para. 12 (Apr. 24); para. 13 (May 2); para. 18 (May 15); para. 19 (May 23); *see* Exs. C, D; Paxton Pet. Exs. C, D.

26. Under these circumstances, whether the information General Paxton requested is subject to disclosure under the PIA and whether the information Intervenor requested is subject to disclosure under the PIA present the same question. As a result, adjudicating General Paxton's petition will necessarily affect Intervenor's interest in receiving the public information it requested.

The City May Not Withhold the Requested Information under Tex. Gov't Code § 552.103

27. In response to Intervenor's PIA request, the City attempted to invoke Texas Government Code § 552.103, which states in pertinent part:

(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....

(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. Tex. Gov't Code §§ 552.103(a), (c); Exs. A, C, D; *see also* Tex. Att'y Gen. OR1986-452 (requiring a governmental body to provide "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture"); 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).

28. To Intervenor's knowledge, no relevant litigation was pending as of the date of the PIA request (or as of the present date).

29. To Intervenor's knowledge, neither Intervenor nor General Paxton threatened litigation against the City with respect to this matter.

30. To Intervenor's knowledge, not even Chick-fil-A has expressed an intent to challenge the City's discriminatory actions in court.¹

31. As of the date of this filing, Intervenor does not represent Chick-fil-A or any other client with respect to San Antonio's discriminatory actions concerning its airport concession contract.

32. The City did not cite any actual litigation, or even a threat of litigation, either by Intervenor, General Paxton, or the federal government. *See* Ex. D. A mere investigation—without any specific, expressed threat of litigation—does not support a reasonable anticipation of litigation within the meaning of the litigation exception. *See* Tex. Gov't Code § 552.103(c).

¹ See, e.g., Sam Dorman, *FAA investigating religious discrimination complaints after airports exclude Chick-fil-a*, FOX NEWS (May 24, 2019), https://www.foxnews.com/faith-values/faa-investigating-airports-amid-claims-it-discriminated-against-chick-fil-a (quoting a Chick-fil-A representative's statement that "Chick-fil-A is not involved in this investigation. Recent coverage about our company continues to drive an inaccurate narrative about who we are. We are a restaurant company focused on food and hospitality for all, and we have no social or political stance.") (last visited June 24, 2019).

33. As General Paxton's petition asserts, the City's attempt to invoke the litigation exception based merely on calls for an investigation, without any indication such investigation will ever lead to litigation, would render virtually all public information requests subject to the litigation exception. *See* Paxton Pet. at 6–7.

34. Moreover, regardless of the City's speculation whether litigation might arise at some future point, the City cannot inquire into a requestor's motive or take their occupation into account in responding to the request. *See* Tex. Gov't Code §§ 552.222, 552.223; *see, e.g.*, Tex. Att'y Gen. OR1983-361.

35. The City's actions to withhold the requested records do not comport with the legislature's intent that the PIA be construed broadly in favor of disclosure. *See* Tex. Gov't Code § 552.001(b).

Count One: Mandamus

36. Intervenor repeats and realleges each of the preceding paragraphs as though set forth fully herein.

37. Intervenor petitions for a writ of mandamus to compel Respondents to make public information available to Intervenor as a requestor. Tex. Gov't Code § 552.321. Intervenor is entitled to mandamus because Respondents have refused to supply public information. *Id.*

38. The public has an interest in the information. As an organization devoted exclusively to defending religious liberty for all Americans, First Liberty frequently educates the public about instances of religious discrimination. The public in general, and the citizens of San Antonio in particular, have a civic interest in knowing the extent to which elected officials and government staff engage in religious discrimination while carrying out the City's business.

39. The City refuses to supply public information by arguing against the PIA's very purpose—to enable citizens to participate fully in civic life by investigating their government's

behavior and holding it politically accountable for its actions. *See* Tex. Gov't Code § 552.001 ("The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.").

40. Intervenor may bring a mandamus action regardless of whether an attorney general's opinion has been requested or issued. *Thomas*, 71 S.W.3d at 483; *Kallinen*, 462 S.W.3d at 26.

41. The failure of the City and its Manager to release public information causes irreparable harm to Intervenor for which there is no adequate remedy at law.

Claim for Attorneys' Fees

42. Intervenor seeks recovery of all costs incurred and reasonable attorney's fees, pursuant to Tex. Gov't Code § 552.323(a). Attorney's fees are mandatory if Intervenor prevails on the petition for a writ of mandamus.

Request for Disclosure

43. Intervenor requests that Respondents disclose, within fifty (50) days of the service of this request, the information or material described in Tex. R. Civ. P. 194.3.

Conclusion and Prayer

44. Respondents' refusal to release the requested documents violates the PIA.

45. Therefore, Intervenor respectfully requests that the Court summon Respondents to show cause why a writ of mandamus should not be issued, and, after final hearing, to issue a writ of mandamus compelling Respondents to make the information requested available to the Intervenor.

46. Intervenor further asks that all costs of litigation, including costs and attorney's fees, be adjudged against Respondents.

47. Intervenor prays for such other and further relief, in law or in equity, to which it may be entitled.

Dated: July 9, 2019

Respectfully submitted,

HIRAM S. SASSER, III General Counsel State Bar No. 24039157

/s/ Lea E. Patterson

LEA E. PATTERSON Counsel State Bar No. 24102338

KEISHA T. RUSSELL Counsel State Bar No. 24110308

First Liberty Institute 2001 West Plano Parkway Suite 1600 Plano, Texas 75075 Telephone: 972-941-4444



ATTORNEYS FOR PETITIONER-INTERVENOR

<u>Certificate of Service</u>

In accordance with Texas Rule of Civil Procedure 21, I hereby certify that the foregoing was served upon Petitioner's and Respondents' attorneys in charge electronically through the Court's electronic filing manager.

Dated: July 9, 2019

Respectfully submitted,

/s/ Lea E. Patterson

LEA E. PATTERSON Counsel

First Liberty Institute 2001 West Plano Parkway Suite 1600 Plano, Texas 75075 Telephone: 972-941-4444

ATTORNEY FOR PETITIONER-INTERVENOR



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 <u>additional information</u>, you can reach me by telephone at 972-941-4444 or by email at

Sincerely,

Hiram S. Sasser, III General Counsel First Liberty Institute

Subject: Open Records Request :: W260956-041719

Date: Tuesday, April 30, 2019 at 16:24:26 Central Daylight Time

From: City of San Antonio - Open Government



--- Please respond above this line ---



04/30/2019

<u>Via EMail</u> Hiram Sasser

Dear Hiram Sasser:

The City received a public information request from you on 4/17/2019. Your request mentioned Mayor and City Council 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).

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RE: Response to Public Information Request COSA ORR No: W260956-041719

relating to Chick-fil-A.

*The letter attached below will also be sent via U.S. mail.

This letter is to clarify what information that you are seeking from the City. In item 4 you indicate you want records from January 1, 2012. Did you mean January 1, 2018, since that's when the RFP was created.

If you would like for the City to proceed with your public information request, please respond in writing to the City by replying to this email within sixty-one (61) days from 04/30/2019. Otherwise, the City will consider your request withdrawn. Please note, the ten (10) business days to provide a response to your request will restart upon receipt of your clarification.

Sincerely,

Chris Callanen City Council Subject: Re: Open Records Request :: W260956-041719

Date: Thursday, May 2, 2019 at 10:05:39 Central Daylight Time

From:

To: City of San Antonio - Open Government

Attachments: image001.png

Hello,

In response to your clarification request to item 4 below, we would like records since January 1, 2018.

Thank you,

Greg Horne Legal Assistant FIRST

First Liberty Institute Restoring Religious Liberty for All Americans

o. 972-941-4444

2001 W Plano Pkwy Suite 1600 Plano, TX 75075 <u>FirstLiberty.org</u>

CONFIDENTIALITY NOTICE:

This electronic mail message and any accompanying documents contain information belonging to the sender which is confidential and legally privileged. This information is intended only for the use of the individual or entity to whom it was sent as indicated above. If you are not the intended recipient, any disclosure, copying, distribution, or action taken in reliance on the contents of the information contained in this electronic mail message is strictly prohibited. If you have received this message in error, please delete it immediately, and call (972-941-4444) to advise me that you received it. Thank you. PRIVILEGED AND CONFIDENTIAL - ATTORNEY CLIENT COMMUNICATION/ATTORNEY WORK PRODUCT

From: City of San Antonio - Open Government < Date: Tuesday, April 30, 2019 at 16:24 Subject: Open Records Request :: W260956-041719

Hello,

In response to your clarification request to item 4 below, we would like records since January 1, 2018.

--- Please respond above this line ---



04/30/2019

<u>Via EMail</u> Hiram Sasser

RE: Response to Public Information Request COSA ORR No: W260956-041719

Dear Hiram Sasser:

The City received a public information request from you on 4/17/2019. Your request mentioned Mayor and City Council 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).

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*The letter attached below will also be sent via U.S. mail.

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Sincerely,

Chris Callanen City Council



ITY 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 15th 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



TY OF SANANTONIO

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-til-A.

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

Page 1 of 7

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: <u>https://sanantoniotx.new.swagit.com/videos/26748</u>

Re: Open Records Request from Hiram Sasser COSA File No. W260959-041719 Page 2 of 5 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.

Re: Open Records Request from Hiram Sasser COSA File No. W260959-041719 Page 3 of 5 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 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.

Re: Open Records Request from Hiram Sasser COSA File No. W260959-041719 Page 4 of 5

III. <u>Summary</u>

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. Guznam

Deputy City Attorney City of San Antonio

cc: Hiram Sasser

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

Re: Open Records Request from Hiram Sasser COSA File No. W260959-041719 Page 5 of 5

Attachment I



Reference Number: W260956-041719

Date Submitted: 4/17/2019 8:54:54 AM Request Submitted via: Online FOIA Submission 10th day deadline: 5/16/2019 8:00:00 AM

Requestor: Hiram Sasser

Information Requested: Mayor and City Council Records

Describe the document(s) you are requesting: • 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. *The letter attached below will also be sent via U.S. mail

Attachment II-A

On 4/30/2019 4:24:25 PM, Jennifer Young wrote to Hiram Sasser Subject: Open Records Request :: W260956-041719 Body:



04/30/2019

Via EMali Hiram Sasser

RE: Response to Public Information Request COSA ORR No: W260956-041719

Dear Hiram Sasser:

The City received a public information request from you on 4/17/2019. Your request mentioned Mayor and City Council 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).

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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.

*The letter attached below will also be sent via U.S. mail.

This letter is to clarify what information that you are seeking from the City. In Item 4 you indicate you want records from January 1, 2012. Did you mean January 1, 2018, since that's when the RFP was created.

If you would like for the City to proceed with your public information request, please respond in writing to the City by replying to this email within sixty-one (61) days from 04/30/2019. Otherwise, the City will consider your request withdrawn. Please note, the ten (10) business days to provide a response to your request will restart upon receipt of your clarification.

Sincerely,

Chris Callanen City Council

Attachment II-B

On 5/2/2019 10:21:51 AM, Hiram Sasser (Attachments: image001.png) wrote:

TO: "City of San Antonio - Open Government" [sanantonlotx@mycusthelp.net]

Hello,

In response to your clarification request to item 4 below, we would like records since January 1, 2018.

Thank you,

Greg Home

Legal Assistant

First Liberty Institute Restoring Religious Liberty for All Americans 0. 972-941-4444

2001 W Plano Pkwy Sulte 1600 Plano, TX 75075 FirstLiberty.org

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Attachment III



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 J 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.

Re: Open Records Request from Hiram Sasser COSA File No. W260956-041719 Page 1 of 2 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 15th 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. Gurnan

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

Re: Open Records Request from Hiram Sasser COSA File No. W260956-041719 Page 2 of 2

Attachment I

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Reference Number: W260956-041719

Date Submitted: 4/17/2019 8:54:54 AM Request Submitted via: Online FOIA Submission 10th day deadline: 5/16/2019 8:00:00 AM

Requestor: Hiram Sasser

Information Requested: Mayor and City Council Records

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Attachment II-A

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04/30/2019

<u>Via EMail</u> Hiram Sasser

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Council, a City Council member, or the mayor regarding or relating to Chick-fil-A.

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Sincerely,

Chris Cailanen City Council

EXHIBIT D

Attachment II-B

On 5/2/2019 10:21:51 AM, Hiram Sasser Attachments: image001.png wrote:

TD: "City of San Antonio - Open Government"[sanantonlotx@mycusthelp.net]

Hello,

In response to your clarification request to item 4 below, we would like records since January 1, 2018.

Thank you,

Greg Home

Legal Assistant

First Uberty Institute

Restoring Religious Liberty for All Americans

2001 W Plano Pkwy Suite 1600 Plano, TX 75075 FirstLiberty.org

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Attachment FB-1

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HOME (/) NEWS (/NEWS) NEWS RELEASES (/NEWS/RELEASES) AG PAXTON OPENS INVESTIGATION INTO SAN ANTONIO BANNING CHICK-FIL-ALASKS TRANSPORTATION SECRETARY CHAO TO DO LIKEWISE

March 28, 2019 / Religious Liberty (/news/categories/religious-liberty)

AG Paxton Opens Investigation into San Antonio **Banning Chick-fil-A; Asks Transportation Secretary** Chao to do Likewise

SHARE THIS:

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Attorney General Ken Paxton today sent a letter to the mayor and council members for the City of San Antonio, informing them he is opening an investigation surrounding the city's decision to exclude Chick-fil-A from a concession contract that City staff recommended. By separate letter, he also requested that Secretary Elaine Chao of the United States Department of Transportation open an investigation into the city of San Antonio's potential violation of federal law and Transportation Department regulations when the city banned Chick-fil-A from operating a restaurant in the San Antonio International Airport based on the company's religious

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Attachment FB-2



March 28, 2019

Mayor Ron Nirenberg Members of the City Council City of San Antonio P.O. Box 839966 San Antonio, Texas 78283

> Re: Discriminatory Treatment of Chick-fil-A in the City's Concessionaire Contract for San Antonio International Airport

Dear Mayor Mirenberg and City Councilmembers:

The Constitution's protection of religious liberty is somehow even better than Chick-fil-A's chicken. Unfortunately, Have serious concerns that both are under assault at the San Antonio airport. Please see the enclosed letter from my office to Secretary of Transportation Elaine Chao highlighting my concerns that the City's recent action to remove Chick-fil-A from the City's new airport concessionaire contract may violate federal law and applicable federal regulations. You should also note that 1 have directed my office to open an investigation into whether the City's action violates state law. I trust the City will fully cooperate with my investigation into this matter, and will abide by relevant federal and state laws in the future.

Very truly yours,

- fare-on

Ken Paxton Attorney General of Texas

Enclosure

EXHIBIT D

Attachment FB-3



March 28, 2019

The Honorable Elaine Chao Secretary of the U.S. Department of Transportation 1200 New Jersey Ave, SE Washington, DC 20590

Re: Potential Religious Discrimination by Grant Recipient City of San Antonio

Dear Madam Secretary:

I write to request that the Department of Transportation open an investigation into San Antonio's potential breach of federal law and your agency's regulations prohibiting religious discrimination by federal grant recipients.

I. San Antonio's Potential Discrimination Against Religious Liberty

Last week, the San Antonio City Council voted to discriminate against a popular American fast food restaurant—Chick-fil-A—because of that organization's religious beliefs. The Council was in the process of approving a concessionaire agreement with Paradies Legadere (Paradies) to run concession facilities in the San Antonio airport. The Paradies proposal included a license that would bring Chick-fil-A to the airport.¹ That proposal scored 95.80 on a 100-point scale, while the next best proposal scored a mere 73.40.²

When the Council moved to adopt the staff recommendation to agree to the Paradies contract, a Council member instead moved to exclude and replace Chick-fil-A.⁴ His rationale was that Chick-fil-A has a "legacy of anti-LGET behavior."³ He continued: "Perhaps the [San Antonio] Office of Equity and Inclusion should be involved in the vetting of economic deals to

City Council A Session Video, Mar. 21, 2019, at 5:53:25, at

https://sanantoniotx.new.swagit.com/videos/2674S.

¹ San Antonio Legislation File Regarding Concession Agreement with Paradies, Mar. 21, 2019, *its* <u>https://sanantonio.legistat.com/LegislationDetail.aspxHD=55555046/GUID=EAFACDCC-CDES-4B20-9CBC-9A63195565F1&FulText=1</u> ("Chick-fil-A, which calls itself the home of the original chicken sandwich, will bring their national brand to San Antonio International.").

² San Antonio Legislation File Regarding Concession Agreement with Paradies, Final Score Matrix, Mar. 21, 2019, *et* <u>https://sanattonio.legistar.com/View.ashv3M=F3.ID=7055018&GUID=021CC1D0-479C-4BE5-AC23-3505F91251C4</u>.

³ Vote Slips at 46, San Antonio City Council Meeting, Mar. 21, 2019, at https://sanantonio.legistat.com/View.ashv?M=M&ID=671873&GUID=C5EEC666-2EA5-45EF-3FA5-9IC9A3121131.

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The Hon, Elaine Chao March 28, 2019 Page 2 of 3

ensure they align with our core values as a city.¹⁵ The Council member who seconded the motion referred to Chick-fil-A as a "symbol of hate.¹⁶ This was despite testimony from City staff that, in its contract, Paradies would include compliance with San Antonio's ordinance that prohibits discrimination based on sexual orientation or gender identity.⁷ The Council voted 6-4 with one abstention for the motion to have staff work toward substituting Chick-fil-A in the Paradies agreement.⁵ Ironically, the City's efforts to be "inclusive" resulted in the *exclusion* of Chick-fil-A based on its religious beliefs.

II. Federal Law and Agency Regulations Prohibiting Discrimination Against Religious Beliefs

The City's decision to specifically exclude Chick-fil-A from a government program based on the sincerely-held religious beliefs of its leadership raises serious constitutional questions. As you are no doubt aware, the Supreme Court has affirmed that the Free Exercise Clause protects individuals and organizations of faith alike. See Burnell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014). The Court has also found that exclusion of an entity from participating in a generallyavailable government benefit or program will violate the Free Exercise Clause in most circumstances. See Trinity Latheran Church of Columbia, Inc. v. Conter, 137 S. Ct. 2012 (2017). In addition, the Supreme Court has soundly rebuked state actors for actions based on animosity to religious belief similar to those in question here. See Masterpiece Cakeshop, I.td. v. Colo. Ciril Rights Comm'n, 138 S. Ct. 1719 (2018).

In addition to potential violations of the First Amendment, it seems likely the City of San Antonio's apparent discrimination against Chick-fil-A violates various federal statutes and regulations to which the City is subject as a recipient of Department of Transportation grant funds." Numerous relevant federal statutes and regulations prohibit federal grant recipients from engaging in discrimination based on "creed." Sec. e.g., 49 U.S.C. § 47123; 14 C.F.R. § 152.401; 14 C.F.R. § 405. Because the statute and regulations do not give any special meaning to the term "creed," the common meaning of the word applies, which is "a brief authoritative formula of religious belief."²¹⁴ Thus, the federal policy is clearly intended to prevent grant recipients from discriminating on the basis of sincerely-held religious beliefs.

³ I.I. at 4:52.35

^{5 [}d]

FIL at 4:55:35, 4:55:10.

^{*} Vote Slips at 46, San Antonio City Council Meeting, Mar. 21, 2019, at https://sanantonio.lealstar.com/View.ashx?M=M&ID=671373&GUID=C5EEC666-2EA5-45EF-SFA5-9IC9A3121131.

⁷ See, e.g., Federal Aviation Administration, Press Release — U.S. Department of Transportation Announces 5151.1 Million in Infrastructure Grants to 66 Airports in 35 States, Sept. 7, 2017, ar https://www.faugov/news/press-releases/news-story.cfm?news1d=22135 (announcing \$5.6 million grant to San Antonio to repair an airport taxiway).

Webster's Dictionary (Last visited Mar. 25, 2019), at https://www.marriam-webstar.com/dictionary/greed.

The Hon. Elaine Chao March 28, 2019 Page 3 of 3

There is no evidence indicating that Chik-fil-A has ever maintained any policy or practice of discriminating against any group of people, and the City offered no such evidence as the basis of its action. Indeed, shortly after the City's decision was announced, a member of the City Council who dissented from the City's decision openly apologized to the Chairman of Chick-fil-A, noting that the restaurant "employs and serves everyone, without prejudice, discrimination or hate."¹¹ Furthermore, Chick-Fil-A apparently agreed in the present instance to abide by all applicable nondiscrimination rules imposed by the contract with the City. Nonetheless, the comments of the Council members made clear Chick-fil-A would be excluded based solely on its owners' religious beliefs.

Thank you for your consideration this request to open an investigation of potential religious discrimination by a grantee.

Very truly yours,

1 Tarlow

Ken Paxion Attorney General of Texas

cc: Mayor Ron Nirenberg Members of the San Antonio City Council

¹¹ Letter by Councilman Greg Brockhoese to Dan T. Cathy, Mar. 26, 2019, cuaidable at https://www.seribd.com/document/403231230/Chick-Fil-2-Letter=from_embed.

Attachment FB-4

31

FIRST II LIBERTY

March 28, 2019

The Hon. Elaine Chao U.S. Department on Transportation 1200 New Jersey Ave, SE Washington, DC 20590

Re: Request for Investigation of Religious Discrimination

Secretary Chao:

First Liberty Institute is the nation's largest law firm dedicated exclusively to defending and restoring religious liberty for all Americans.

I write to request that the U.S. Department of Transportation open an investigation into whether allegations of religious discrimination by members of the City Council of San Antonio has caused the City of San Antonio to violate federal law protecting religious liberty and to fail to comply with the assurances of nondiscrimination required as a federal grant recipient.

Evidence of pervasive, intentional religious discrimination by members of the City Council of San Antonio.

As you are likely aware, on March 21, 2019, the City Council of San Antonio voted to approve a concessionaire agreement with Paradies Lagadère ("Paradies") to operate certain concession space in the San Antonio International Airport. The concessionaire contract forms part of a larger expansion and renovation project in Terminal A.¹ Paradies's contract proposal included Chick-fil-A as one of the restaurants it would bring to Terminal A.² Paradies's contract proposal received the highest recommendation, receiving 95.80 out of a possible 100 points (over 20 points more than the runner-up).³ The City Council moved to follow the staff recommendation and adopt the Paradies Contract, but Councilman Roberto Treviño moved to approve the agreement with Paradies on the express condition that Chick-fil-A be excluded from the contract and

https://webapp1.sanantonio.gov/RFPFiles/RFP_3430_201801180304540.pdf.

https://sanantonio.legistar.com/LegislationDetail.aspx?ID=3888304&GUID=EAFACDCC-CDE8-4B26-9CBC-9A63F95865F1.

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[•] See City of San Antonio Aviation Department, Request for Proposal for Food, Beverage, and Retail Prime Concessionaire For San Antonio International Airport at 3, Jan. 18, 2018, available at https://www.available.com/REREileg/RER.avia.com/Receiver.avia/

^{*} See San Antonio Legislation File No. 19-2246 Ex. 1 [hereinafter "Paradies Contract"] at 10, 35, 81, available at https://sanantonio.legistar.com/LegislationDetail.aspx?ID=3888304&GUID=EAFACDCC-CDE8-4B26-9CBC-9A63F95865F1.

³ See San Antonio Legislation File No. 19-2246, Final Score Matrix, available at

replaced.⁴ With that restaurant—and *only* that restaurant—so excluded, the City Council adopted the agreement. No other changes were made to the agreement by the City Council.

During the council's consideration of the agreement, and his motion to exclude Chick-fil-A, Councilman Treviño openly asserted that San Antonio should not contract with Chick-fil-A because of what he described as its supposed "legacy of anti-LGBTQ behavior," and suggested that the City should vet all future economic deals "to ensure they align with our core values as a city."⁵ Importantly, *none* of the other businesses were asked to prove their commitment to any particular issue.

Seconding the motion, Councilman Manny Peláez took a significant amount of time during the debate on the pending agreement to lambaste, denigrate, and openly mock the otherwise upstanding corporate citizen of Chick-fil-A. He described Chick-fil-A as a "symbol of hate" because it has donated to religious charities that he considered to oppose LGBTQ rights. The City Councilman even went so far as to compare Chick-fil-A to such evils bearing public opprobrium as lottery kiosks and e-cigarette shops.⁶

Later, Councilman Trevino proudly claimed credit for the exclusion of an American business that is more profitable per restaurant than McDonald's, Starbucks, and Subway combined.7 In a statement to the media issued by his office on the City Council of San Antonio's website, he explained:

With this decision, the City Council reaffirmed the work our city has done to become a champion of equality and inclusion. San Antonio is a city full of compassion, and we do not have room in our public facilities for a business with a legacy of anti-LGBTQ behavior.

Everyone has a place here, and everyone should feel welcome when they walk through our airport. I look forward to the announcement of a suitable replacement by Paradies.⁸

The City Council's allegations stem from a report? attacking the charitable giving of the privately-owned restaurant. In reality, Chick-fil-A donated to mainstream, faith-

https://sanantonio.legistar.com/DepartmentDetail.aspx?ID=22661&GUID=999BA422-A775-4DE3-

8ABD-1B4851E69C96&Mode=MainBody.

- https://sanantoniotx.new.swagit.com/videos/26748.
- 6 See id. at 4:54–58

7 https://www.entrepreneur.com/article/320615

* https://www.sanantonio.gov/Department-News/ArtMID/6798/ArticleID/15246/Councilman-Roberto-Trevi2410's-statement-regarding-airport-concession-agreement-with-Paradies-Lagard232re

9 Josh Israel, Chick-fil-A donated to anti-LGBTQ group, ThinkProgress (Mar. 20, 2019),

https://thinkprogress.org/chick-fil-a-anti-lgbtq-donations-tax-filings-62ca15281f17/; see also 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/.

⁺ See City Council A Session, Mar. 21, 2019, Vote Slips at 44, 46, available at

⁵ See Mar. 21, 2019 City Council A Session Video at 3:54–55 , available at

rights." (quoting North Miss. Comme'ns, Inc. v. Jones, 792 F.2d 1330 (5th Cir. 1986))); see also Blackburn v. City of Marshall, 42 F.3d 925, 931–934 (5th Cir. 1995) (holding it would be unconstitutional for a city to retaliate against the exercise of First Amendment rights by revoking permission to use the police radio frequency).

The City Council's expressly discriminatory, religiously hostile reasons for excluding Chick-fil-A cannot justify its religious discrimination. See, e.g., Masterpiece Cakeshop Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1729–30 (2018). Members of the San Antonio City Council may disagree with the charitable giving of Chick-fil-A, but whatever disputes Councilmen Treviño and Peláez and their colleagues may have with Chick-fil-A "must be resolved with tolerance, without undue disrespect to sincere religious beliefs" Id. at 1732. Rather than extend such tolerance, the City of San Antonio pronounced Chick-fil-A unsuitable for inclusion within its territory. For such religious discrimination, the City of San Antonio should forfeit its eligibility for federal grant monies.

The City of San Antonio's council members violated local and federal policies requiring nondiscrimination.

Even if it was purporting to enforce a law or policy of nondiscrimination, the City Council's derogatory description of Chick-fil-A's charitable endeavors would render its actions in violation of the Free Exercise Clause. See, e.g., id. at 1731 (explaining "the State's duty under the First Amendment not to base laws or regulations on hostility to a religion or a religious viewpoint."). Yet, Chick-fil-A welcomes all customers.¹¹ The City Council cannot even claim to be enforcing a nondiscrimination ordinance. Quite the contrary, by excluding Chick-fil-A because of its charitable giving, the City Council both violated its own nondiscrimination ordinance, see San Antonio Code Sec. 2-550 ("It shall be the general policy of the city to prohibit discrimination on the basis of . . . religion. . . . and it is the express intent of this article to guarantee to all of our citizens fair and equal treatment under the law."), and the nondiscrimination provisions contained in the very contract it was considering, see Paradies Contract, supra n. 2, at 64–65 (incorporating various federal and municipal nondiscrimination law).¹²

Indeed, the City Council refused to even hear from Chick-fil-A prior to excluding them. Further, the City Council chose to ignore staff reports that Chick-fil-A (a) has no history of excluding *any* customer in a way that would violate San Antonio's nondiscrimination ordinance and (b) agreed to be bound by the terms of San Antonio's

[&]quot; See Kelly Tyko, Chick-fil-A banned from opening at San Antonio airport, USA TODAY,

https://www.usatoday.com/story/money/2019/03/22/chick-fil-ban-texas-council-bars-chain-airportlgbtq-past/3247437002/ ("We agree with the councilmember that everyone should feel welcome at Chick-fil-A,' [Chick-fil-A] said in the statement. 'In fact, we have welcomed everyone in San Antonio into our 32 local stores for more than 40 years.'"); see also Jonathan H. Adler, No Airport Concessions for Opponents of Same-Sex Marriage?, THE WASHINGTON POST (Aug. 21, 2015) ("[T]here is no evidence that Chick-fil-A discriminates against gay patrons, and it has restaurants in many cities that ban anti-gay discrimination.").

Available at https://sanantonio.legistar.com/LegislationDetail.aspx?ID=3888304&GUID=EAFACDCC-CDE8-4B26-9CBC-9A63F95865F1.

nondiscrimination ordinance if accepted as a concessionaire. In other words, the only individuals in violation of the San Antonio nondiscrimination ordinance—and those of the Federal government—are the City Council members themselves.

So flimsy a rationale as the one the City Council provided—to avoid offending potential travelers who might disagree with Chick-fil-A's charitable history but to whom Chick-fil-A would serve a tasty chicken sandwich with pleasure—cannot hope to satisfy the demanding standard that strict scrutiny's compelling interest test imposes. *See Lukumi*, 508 U.S. at 546 (describing the compelling interest test); *Masterpiece*, 138 S. Ct. at 1731 ("Just as no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, it is not, as the Court has repeatedly held, the role of the State or its officials to prescribe what shall be offensive.") (citation omitted).¹³

Importantly, multiple federal regulations governing the use of federal grant money preclude discrimination by grant recipients on the basis of religion. See, e.g., 14 C.F.R. § 152.401 (prohibiting discrimination on the basis of "race, creed, color, national origin, or sex," in activities conducted with grant funds from the Airport and Airway Development Act) (emphasis added); 14 C.F.R. § 152.405 (requiring grantees "to ensure that no person shall, on the grounds of race, creed, color, national origin, or sex, be excluded from participating in any employment, contracting, or leasing activities") (emphasis added); see also 49 U.S.C. § 47,123 (prohibiting exclusion on the basis of "race, creed, color, national origin, or sex" from participation in activities carried out with grants under the Airport and Airway Improvement Act of 1982). The contract between San Antonio and Paradies contemplates the application of such regulations. See Paradies Contract, supra n.2, at 64 (requiring adherence to nondiscrimination regulations contained in 14 C.F.R. Part 152); see also 14 C.F.R. § 152.401(b) (requiring effectuation of nondiscrimination requirements through grantees' contracts and leases with third parties).

Given that the blatantly discriminatory statements by San Antonio city councilmembers against Chick-fil-A's religious beliefs culminated in the discriminatory exclusion of Chick-fil-A from participating in the airport concession contract at issue, the Department of Transportation, and any other federal agency administering relevant grants, ought to fully investigate whether federal grant money is funding violations of these (or other) provisions of federal law. *See, e.g.*, 14 C.F.R. §§ 152.423, 152.503, 152.505 (concerning investigation of grantee discrimination and grant suspension or termination). And, if San Antonio is found to be in violation of grant requirements, the grant recipient should be required to return the grant funds immediately.

¹³ For similar reasons, the City Council's actions subject it to liability under the Texas Religious Freedom Restoration Act. See Tex. Civ. Prac. & Rem. Code § 110.003 (prohibiting government agencies from substantially burdening the free exercise of religion unless it "is in furtherance of a compelling governmental interest" and employs the "least restrictive means.").

Conclusion and call for investigation.

At a minimum, all potential grant applications—without limitation to the airport improvement project—involving the City of San Antonio should be placed on indefinite suspension until the U.S. Department of Transportation—and any other federal agencies currently funding grants to the City of San Antonio—completes an investigation into these allegations of religious discrimination. Should it be determined that the City of San Antonio engaged in religious discrimination, it should be required to repay grant monies received from the federal government and, further, be disqualified from future Federal grant monies until such time as city leaders demonstrate an unequivocal commitment to abide by their own nondiscrimination ordinance, and those required by federal law and policy. Federal taxpayers should not be required to fund the bigotry of San Antonio's elected leaders.

San Antonio should welcome the opportunity to add so popular and successful a restaurant as Chick-fil-A to its airport food offerings, not discriminate against it because the City Council disapproves of its charitable choices. In fact, the Constitution, Federal, and Texas law require the City to provide Chick-fil-A an equal opportunity to compete regardless of what City officials may think of its beliefs. The City Council should reconsider its unconstitutional decision to exclude Chick-fil-A.

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.

CC: President Donald Trump 1600 Pennsylvania Avenue Washington, D.C. 20500

> Attorney General William Barr U.S. Department of Justice 950 Pennsylvania Ave. Washington, D.C. 20530

> > www.FIRSTLIBERTY.org

Attachment FB-5



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Español (/es-news/releases/procurador-paxton-piderecords-sobre-decision-de-chick-fil-del-ayuntataientode-san-antonio)

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HOME (/) NEWS (/NEWS) NEWS RELEASES (/NEWS/RELEASES) AG PAXTON REQUESTS RECORDS ON CHICK-FIL-A DECISION BY SAN ANTONIO CITY COUNCIL



April 11, 2019 [Religious Freedom (/taxonomy/term/891]

AG Paxton Requests Records on Chick-fil-A Decision by San Antonio City Council

SHARE THIS:

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Attorney General Ken Paxton today sent a second letter to the mayor and council members for the City of San Antonio, making 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.

In the letter, Attorney General Paxton requests public records revealing communications between councilmembers, city employees, and third parties that discuss the inclusion or exclusion of Chick-fil-A in the concessionaire contract for the airport. The request also seeks calendars, records of councilmember meetings regarding the contract, and any internal communications among city employees about the inclusion of exclusion of Chick-fil-A from the concessionaire contract.

"The decision to discriminate against any vendor based on religious beliefs associated with the company and its owners files in the face of the Constitution and Texas law." Attorney General Paxton said. "Hook forward to reviewing the City of San Antonio's records explaining why the City Council targeted this respected restaurant chain for exclusion from the City's concessionaire contract for the international airport."

On March 28, Attorney General Paxton sent a letter

<u>(https://www.texasattornevgeneral.gov/news/releases/ag-paxton-opensinvestigation-san-antonio-banning-chick-fil-asks-transportation-secretarychap-do) to the mayor and city council members of San Antonio announcing an investigation regarding their decision. In a separate letter. Attorney General Payton also urged to Secretary Elaine Chao of the United States Department of Transportation to open an investigation into the City of San Antonio's potential viol crop of federal low and Transportation Department regulations. The First Antendment protects individuals anti-closely held companies from governmental restrictions based on their religious views of status. Additionally, federal regulations governing grant money provided to the San Antonio airport prohibit religious discrimination.</u>

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<u>thunsi/ www.texastrornevgeneral.dov.sites_default_tiles_intages-admin_2019_Press_2019.04.1</u> 201 etter1_200AG_s20to1520SA2520City_20Council_520re_520ClAs5 201 ablie%20Records.ocff).

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AG Paxton: Austin ISD Must Respect Religious Liberty Protections Afforded Churches Under the Constitution and Texas Law (/news/releases/ag-paxton-austin-isd-must-respect-religiousliberty-protections-afforded-churches-under-constitution) September 21, 2018

See all News (Inews)

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https://www.texasattorney.general.gov/news/releases/ag-paxton-requests-records-chick-fil-d... 5/1/2019

EXHIBIT D

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EXHIBIT D

Attachment FB-6



April 11, 2019

Mayor Ron Nirenberg Members of the City Council City of Son Antonio P.O. Box 539966 San Antonio, Texas 78293

Ref. Open Records Request

Dear Major Mitent organi City Goundilmembers:

O., Match P., 3919, Attorney General Ken Paxton wrote to you concerning the City of San Analysis of criminitory treatment of Chick-fil-A in the City's concessionaire contract for the San Analysis I second coll Airport. In that letter, General Paxton indicated that this Office would open in investigation for the matter.

Places provide this Office with public records on the following topics from the time period beginning January 1, 2019 to April 9, 2019:

- Commutaizations between or among any city councilmenter and other contailmenters, city employees, and/or third parties concerning the inclusion or exclusion of Chick-fil-A in the concessionaire contract for the sirport;
- Calendars of city councilmembers indicating meetings or phone calls regarding the inclusion or evolusion of Chick-fil-A in the concessionaire contract;
- Records of meetings between or among any city councilmember and other city countilmembers, city employees, and/or third parties concerning the inclusion or evclusion of Chick-fil-A in the concessionaire contract; and
- Communications and records of city employees concerning the inclusion or evclusion of Chick-fil-A in the concessionaire contract.

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You may exclude attorney-client communications from the scope of this request.

Please deliver these records to my office no later than ten business days after your receipt of this letter.

Mayor Nirenberg & City Council April 11, 2019 Page 2 of 2

Very truly yours,

 Πb

Cleve Doty Assistant Attorney General Administrative Law Division

een Moraina Megrav, Senior Public Information Officer



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 § 552.103.¹ 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.² 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 requested records unless litigation was pending or reasonably anticipated on April 17, 2019.

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¹ Copies of each of these letters are attached herein.

² 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.³

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.⁴ Likewise, requests that the U.S. Department of Transportation investigate whether San Antonio has complied with its obligations as a

³ 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).

⁴ 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).

Page 3 Texas Attorney General's Office Open Records Division June 5, 2019

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).⁵ 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,

Hirom Sasser

Hiram S. Sasser, III General Counsel First Liberty Institute

Enclosures:

April 17, 2019 Open Records Request
 May 15, 2019 "10-Day" Letter
 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

⁵ 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 <u>additional information</u>, you can reach me by telephone at 972-941-4444 or by email at

Sincerely,

Hiram S. Sasser, III General Counsel First Liberty Institute



ITY 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, 552.133, 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 15th 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



TY OF SANANTONIO

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

Page 1 of 7

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: <u>https://sanantoniotx.new.swagit.com/videos/26748</u>

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 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.

Re: Open Records Request from Hiram Sasser COSA File No. W260959-041719 Page 4 of 5

III. <u>Summary</u>

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. Guznam

Deputy City Attorney City of San Antonio

cc: Hiram Sasser

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

Re: Open Records Request from Hiram Sasser COSA File No. W260959-041719 Page 5 of 5