



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 19, 2009

Mr. Gary Henrichson
Assistant City Attorney
City of McAllen
P.O. Box 220
McAllen, Texas 78505-0220

OR2009-03567

Dear Mr. Henrichson:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 337663.

The City of McAllen (the "city") received a request for five categories of information regarding the installation of an LED light display under a specified city overpass. You inform us that you have released some of the requested information to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We first note that some of the submitted information is subject to required public disclosure under section 552.022 of the Government Code. Section 552.022(a)(3) provides for the disclosure of "information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]" Gov't Code § 552.022(a)(3). Section 552.022(a)(16) provides for the disclosure of "information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege." *Id.* § 552.022(a)(16). The submitted documents contain information in accounts, vouchers, or contracts relating to the expenditure of public funds by the city subject to section 552.022(a)(3) and attorney fee bills, which are subject to section 552.022(a)(16). The city raises sections 552.103 and 552.107 for the submitted information that is subject to section 552.022. Sections 552.103 and 552.107 are discretionary exceptions to disclosure

that protect the governmental body's interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); *see also* Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 665 at 2 n.5 (discretionary exceptions generally). As such, sections 552.103 and 552.107 are not other laws that make information confidential for the purposes of section 552.022. Therefore, the city may not withhold any of the submitted information that is subject to section 552.022 under section 552.103 or section 552.107. However, the Texas Supreme Court has held that the Texas Rules of Evidence are "other law" within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). The attorney-client privilege also is found at Texas Rule of Evidence 503. Accordingly, we will consider your assertion of this privilege under rule 503 with respect to the information that is subject to section 552.022.

Rule 503 of the Texas Rules of Evidence encompasses the attorney-client privilege and provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer's representative;

(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5). Thus, in order to withhold attorney-client privileged information from disclosure pursuant to rule 503, a governmental body must: (1) demonstrate that the document is a communication transmitted between privileged parties or reveals a

confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You represent that the submitted information consists of confidential communications between the city's legal counsel and city employees made for the purpose of facilitating the rendition of professional legal services to the city. Upon review, we agree some of the submitted information, which we have marked, constitutes privileged attorney-client communications that the city may withhold under rule 503. However, we conclude you have not demonstrated that some of the individuals are privileged parties or that the remaining information consists of privileged attorney-client communications. Therefore, the city may not withhold any of the remaining information that is subject to section 552.022 of the Government Code under rule 503.

You claim that the remaining information not subject to section 552.022 of the Government Code is excepted from disclosure under section 552.103 of the Government Code, which provides in part as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request for information and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard*

v. Houston Post Co., 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, *writ ref'd n.r.e.*); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982).

In this instance, you assert that the city reasonably anticipated litigation prior to the receipt of current request for information. You indicate that prior to the city's receipt of the request, the city received several letters containing demands and attempts at negotiation from an attorney representing a potential opposing party. In the latest letter the city has provided, which is dated November 18, 2008, the attorney for the opposing party states that as a result of their failed attempts to come to an agreement, they will be proceeding with litigation against the city. The submitted information also indicates that the city filed an action seeking declaratory judgment in the United States District Court for the Southern District of Texas the day before the request was received. Based on your representations and our review of the submitted documentation, we conclude you have shown that litigation was reasonably anticipated at the time the city received the present request. Further, you explain that the information at issue is related to the anticipated litigation because it directly pertains to the subject matter at issue between the opposing party and the city. Thus, we find that the city has demonstrated the submitted information is related to the anticipated litigation for purposes of section 552.103(a). Therefore, the city may withhold the remaining information that is not subject to section 552.022 of the Government Code under section 552.103 of the Government Code.¹

However, once the information at issue has been obtained by all parties to the anticipated litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to the information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to all parties to the anticipated litigation is not excepted from disclosure under section 552.103(a) and must be disclosed.

¹As our ruling for this information is dispositive, we need not address your remaining argument against disclosure.

Further, the applicability of section 552.103(a) ends once the litigation has concluded or is no longer anticipated. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

In summary, the city may withhold the information we have marked pursuant to Texas Rule of Evidence 503. To the extent the opposing party has not seen or had access to the information not subject to section 552.022, the city may withhold that information under section 552.103. The remaining information must be released.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Greg Henderson
Assistant Attorney General
Open Records Division

GH/jb

Ref: ID# 337663

Enc. Submitted documents

c: Requestor
(w/o enclosures)