



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 26, 2009

Ms. Debra A. Drayovitch
Drayovitch, P.C.
Attorney for City of Corinth
620 West Hickory Street
Denton, Texas 76201

OR2009-15193

Dear Ms. Drayovitch:

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# 359507.

The City of Corinth (the "city"), which you represent, received a request for five categories of information related to two specified agenda items at the August 6, 2009 city council meeting. You state that the city will release some of the requested information to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.103, 552.105, 552.107, and 552.111 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

¹Although we also understand the city to raise section 552.101 of the Government Code in conjunction with Rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedure, this office has concluded that section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Thus, we will not address the city's claim that portions of the submitted information are confidential under section 552.101 in conjunction with either of these rules. We note that the proper exceptions to raise when asserting the attorney-client privilege and the attorney work product privilege in this instance are sections 552.107 and 552.111 of the Government Code, respectively. *See* Open Records Decision Nos. 677 (2002), 676 at 6.

²We assume that the "representative sample" of information submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Initially, we note that in a letter dated September 9, 2009, the city stated that it wishes to withdraw its request for an open records decision with regard to information related to the CoServ agenda item and will release those records to the requestor. Accordingly, this information, which we have marked, is not responsive to the present request. This ruling does not address the public availability of any information that is not responsive to the request.

Next, we note that the submitted information contains completed appraisal reports subject to section 552.022 of the Government Code. Section 552.022(a)(1) provides for required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[,]" unless the information is expressly confidential under other law or excepted from disclosure under section 552.108 of the Government Code. Gov't Code § 552.022(a)(1). You seek to withhold the information at issue under section 552.105 of the Government Code. However, section 552.105 is discretionary in nature and does not constitute "other law" for purposes of section 552.022. *See* Open Records Decision Nos. 665 at 2 n.5 (discretionary exceptions generally), 564 (1990) (statutory predecessor to 552.105 subject to waiver). Thus, none of the information subject to section 552.022 may be withheld under this exception. As no other exception to disclosure of this information has been raised, we conclude that the information we have marked must be released pursuant to section 552.022 of the Government Code.

Next, we address your argument under section 552.105 of the Government Code for the information not subject to section 552.022. Section 552.105 excepts from disclosure information relating to "appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property." Gov't Code § 552.105(2). Section 552.105 is designed to protect a governmental body's planning and negotiating position with regard to particular transactions. *See* Open Records Decision Nos. 564 (1990), 357 (1982), 310 (1982). Information excepted from disclosure under section 552.105 that pertains to such negotiations may be excepted from disclosure so long as the transaction relating to that information is not complete. *See* ORD 310. But the protection offered by section 552.105 is not limited solely to transactions not yet finalized. This office has concluded that information about specific parcels of land obtained in advance of other parcels to be acquired for the same project could be withheld where release of the information would harm the governmental body's negotiating position with respect to the remaining parcels. *See* ORD 564 at 2. A governmental body may withhold information "which, if released, would impair or tend to impair [its] 'planning and negotiating position in regard to particular transactions.'" ORD 357 at 3 (quoting Open Records Decision No. 222 (1979)). The question of whether specific information, if publicly released, would impair a governmental body's planning and negotiating position with regard to particular transactions is a question of fact. Accordingly, this office will accept a governmental body's good-faith determination in this regard, unless the contrary is clearly shown as a matter of law. *See* ORD 564.

You state the city has made a good-faith determination that the information you have marked relates to the appraisal or purchase price of real property that the city intends to purchase. You also state that release of this information would harm the city's negotiating position when purchasing the properties at issue. Based on your representations and our review, we conclude the city may withhold the information we have marked under section 552.105 of the Government Code.

You contend some of the remaining information is excepted under section 552.103 of the Government Code, which provides:

(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). A governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing (1) litigation was 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). A 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.* When the governmental body is the prospective plaintiff in litigation, the evidence of anticipated litigation must at least reflect that litigation involving a specific matter is "realistically contemplated." See Open Records Decision No. 518 at 5 (1989); see also Attorney General Opinion MW-575 (1982) (investigatory file may be withheld if

governmental body's attorney determines that it should be withheld pursuant to Gov't Code § 552.103 and that litigation is "reasonably likely to result").

You state that the city reasonably anticipates litigation with respect to the land parcels at issue. In addition, you state that the city council has authorized its attorney to initiate eminent domain proceedings through adoption of resolutions. Based upon your representations and our review, we conclude litigation involving the land parcels at issue was reasonably anticipated on the date the city received the request. You also state the information at issue is related to the anticipated litigation because the information relates to the land parcels at issue. Based on your representations and our review, we find this information is related to the anticipated litigation for the purposes of section 552.103. Therefore, we conclude the city may withhold the information you have marked under section 552.103 of the Government Code.³

We note, however, once the information at issue has been obtained by all parties to the pending 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, any information at issue that has either been obtained from or provided to all opposing parties in the pending litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

Next, you claim that the remaining information is subject to section 552.107 of the Government Code. Section 552.107(1) protects information that comes within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *See In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *See* TEX. R. EVID. 503(b)(1). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege

³As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

applies only to a *confidential* communication, meaning it was “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).

Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no pet.). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state that the remaining information consists of confidential communications between the city and its representatives and the city’s attorney made for the purpose of facilitating the rendition of professional legal services. We also understand you to claim that the communications were intended to be kept confidential among the intended parties and that the confidentiality of the communications has been maintained. Based on your representations and our review, we find that the city may withhold the remaining information, which you have marked, under section 552.107 of the Government Code.

In summary, the city must release the information we have marked subject to section 552.022(a)(1) of the Government Code. The city may withhold the information we have marked under section 552.105 of the Government Code. The city may withhold the information you have marked under section 552.103 of the Government Code. The city may withhold the remaining information, which you have marked, under section 552.107 of the Government Code.

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, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in cursive script, appearing to read "Tamara Wilcox".

Tamara Wilcox
Assistant Attorney General
Open Records Division

TW/dls

Ref: ID# 359507

Enc. Submitted documents

c: Requestor
(w/o enclosures)