



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 30, 2015

Ms. Heather Silver
Assistant City Attorney
City of Dallas
1500 Marilla Street, Room 7DN
Dallas, Texas 75201

OR2015-08410

Dear Ms. Silver:

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# 561803.

The City of Dallas (the "city") received a request for specified information pertaining to agreements between the city and the Tarrant Regional Water District ("TRWD") regarding the Integrated Pipeline Project.¹ You claim the submitted information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code and privileged under Texas Rule of Evidence 503. We have considered your arguments and reviewed the submitted representative sample of information.² We have also received and considered comments from TRWD. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

¹We note the city sought and received clarification of the information requested. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date request is clarified or narrowed).

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

Initially, you note portions of the requested information were the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2014-05700 (2014). In Open Records Letter No. 2014-05700, we determined that the city had failed to comply with the procedural requirements of section 552.301(b) of the Government Code, and, thus, waived its claims under sections 552.103, 552.107, and 552.111 and under Texas Rule of Evidence 503. However, we further ruled, the city may withhold the information that TRWD sought to withhold under section 552.103 of the Government Code on the basis of TRWD's litigation interest. In response to our ruling, the city filed a lawsuit against our office for some of the information at issue. *See City of Dallas v. Greg Abbott, Attorney General of Texas*, Cause No. D-1-GV-14-000475. Accordingly, we will allow the trial court to resolve the issue of whether the information at issue in the pending litigation must be released to the public. As to the remaining information in Open Records Letter No. 2014-05700 that is not subject to litigation, we have no indication there has been any change in the law, facts, or circumstances on which the previous ruling was based. Accordingly, the city may rely on Open Records Letter No. 2014-05700 as a previous determination and withhold or release the identical information responsive to the current request in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

We will now address your arguments for the information not subject to the prior ruling. We note a portion of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a)(5) provides for the required public disclosure of "all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate[.]" unless the information is made confidential under the Act or other law. Gov't Code § 552.022(a)(5). The submitted information includes information used to estimate the need for or expenditure of public funds or taxes by a governmental body. Although you assert this information is excepted from disclosure under section 552.103 of the Government Code, this section is discretionary and does not make information confidential under the Act. *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); Open Records Decision No. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the city may not withhold the information subject to section 552.022(a)(5), which we have marked, under section 552.103. As no further exceptions to disclosure are raised for this information, it must be released. However, we will address your arguments under sections 552.103 and 552.107 of the Government Code for the information not subject to section 552.022.

Section 552.103 of the Government Code provides in relevant 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 purpose of section 552.103 is to protect the litigation interests of governmental bodies that are parties to the litigation at issue. *See id.* § 552.103(a); Open Records Decision No. 638 at 2 (1996) (section 552.103 only protects litigation interests of the governmental body claiming exception). A governmental body has the burden of providing relevant facts and documents to show section 552.103(a) is applicable in a particular situation. The test for meeting this burden is a showing that (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, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). *See* ORD 551 at 4.

The city asserts the remaining information in Exhibit C is excepted under section 552.103 of the Government Code. The information in Exhibit C relates to two pending litigations styled *Bennett v. Tarrant Regional Water District*, cause no. 153-264899-13, which is currently on appeal, and *Tarrant Regional Water District v. Lazy W. District No 1*, cause no. 2014C-0144. We note the city is not a party to these litigations and, therefore, does not have a litigation interest in the matter for purposes of section 552.103. *See* Gov't Code § 552.103(a); Open Records Decision No. 575 at 2 (1990) (stating that predecessor to section 552.103 only applies when governmental body is party to litigation). In such a situation, we require an affirmative representation from the governmental body with the litigation interest that the governmental body wants the information at issue withheld from disclosure under section 552.103. In its comments to this office, TRWD informs us, and provides documentation demonstrating, it is a party to these litigations and requests the information in Exhibit C be withheld from disclosure under section 552.103. TRWD further states, and we agree, the information at issue relates to the pending lawsuit. Based on these representations, the submitted documentation, and our review of the information at issue, we find litigations were pending when the city received this request for information and the

responsive information in Exhibit C is related to the pending litigations for the purposes of section 552.103. Therefore, the city may withhold the remaining information not subject to section 552.022 in Exhibit C under section 552.103 of the Government Code on behalf of TRWD.³

We note the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* ORD 551 at 4-5. Thus, once information has been obtained by all parties to the pending litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349(1982), 320 (1982). Further, the applicability of section 552.103(a) ends when the litigation has concluded. Attorney General Opinion MW-575 at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

Section 552.107(1) of the Government Code protects information coming 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. 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 “to facilitate 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. *In re Tex. 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). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). 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 applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those: (A) to whom disclosure is made to further the rendition of professional legal services to the client; or (B) reasonably necessary to transmit 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. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). 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)

³As our ruling is dispositive, we need not address the city’s remaining argument against disclosure of this information.

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).

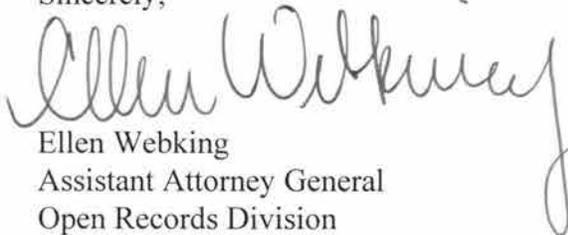
You inform us the information submitted as Exhibit B consists of communications between city attorneys, the city's outside counsel, and city staff that were made for the purpose of facilitating the rendition of professional legal services to the city. You inform us the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the city may withhold the information in Exhibit B under section 552.107(1) of the Government Code.

In summary, we will allow the trial court to resolve the issue of whether the information that is the subject of pending litigation must be released to the public. To the extent the remaining information not at issue in the pending lawsuit is identical to the information previously requested and ruled upon by this office, we conclude the city may rely on Open Records Letter No. 2014-05700 as a previous determination and withhold or release the identical information in accordance with that ruling. The city must release the information we have marked under section 552.022(a)(5) of the Government Code. With the exception of the information subject to section 552.022(a)(5), the city may withhold the information in Exhibit C under section 552.103 of the Government Code. The city may withhold the information in Exhibit B under section 552.107(1) 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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Ellen Webking
Assistant Attorney General
Open Records Division

EW/akg

Ref: ID#561803

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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