



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

May 12, 2015

Mr. Matthew C.G. Boyle  
Counsel for the City of Grapevine  
Boyle & Lowry, L.L.P.  
4201 Wingren Drive, Suite 108  
Irving, Texas 75062-2763

OR2015-09219

Dear Mr. Boyle:

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# 563331.

The City of Grapevine and the Grapevine Police Department, (collectively, the "city"), which you represent, received multiple requests for information pertaining to an officer-involved shooting, including information relating to the incident, personnel records of the officer involved in the shooting, emails pertaining to the officer spanning from a specific date range, all emails spanning from a specific date range, all emails sent or received by four named individuals, all police reports on officer-involved shootings spanning from a specific date range, and the ethnic breakdown of the officers in the city. The city states it will release some information. The city claims the submitted information is excepted from disclosure under sections 552.103, 552.107, 552.108, and 552.119 of the Government Code.<sup>1</sup> We have

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<sup>1</sup>Although the city also raises section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503, Texas Rule of Civil Procedure 192.5, and Texas Disciplinary Rule of Professional Conduct 1.05, this office has concluded section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Further, although the city also raises rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedure, we note sections 552.107 and 552.111 of the Government Code are the proper exceptions to raise when asserting the attorney-client and attorney work product privileges for information not subject to section 552.022 of the Government Code. *See* Open Records Decision Nos. 676 at 1-2, 677 (2002). Additionally, although the city cites to rule 1.05 of the Texas Disciplinary Rules of Professional Responsibility, section 552.107 of the Government Code is the proper exception to claim for attorney-client privileged information.

received comments from one of the requestors. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have considered the submitted arguments and reviewed the submitted information, portions of which consist of representative samples.<sup>2</sup>

Initially, we note the submitted information contains a press release. Section 552.007 of the Government Code provides information that has been voluntarily released to a member of the public may not subsequently be withheld from another member of the public, unless public disclosure of the information is expressly prohibited by law or the information is confidential under law. *See* Gov't Code § 552.007; Open Records Decision Nos. 518 at 3 (1989), 490 at 2 (1988). Accordingly, the city may not withhold previously released information unless its release is expressly prohibited by law or the information is confidential under law. Although the city seeks to withhold the previously released information under section 552.108 of the Government Code, this section is a discretionary exception to disclosure that protects a governmental body's interests and does not make information confidential under the Act. *See* Gov't Code § 552.007; Open Records Decision No. 177 at 3 (1977). Therefore, the city may not withhold the submitted press release under section 552.108 of the Government Code. As the city raises no further exceptions to disclosure for the press release, it must be released.

Next, we note the submitted information includes information subject to section 552.022(a)(17) of the Government Code, which provides for required public disclosure of "information that is also contained in a public court record," unless it is "made confidential under [the Act] or other law[.]" Gov't Code § 552.022(a)(17). Although the city seeks to withhold this information under section 552.108 of the Government Code, this section is a discretionary exception to disclosure that protects a governmental body's interests and does not make information confidential under the Act. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 177 at 3 (1977) (statutory predecessor to section 552.108 subject to waiver). Therefore, the city may not withhold the information subject to section 552.022, which we have marked, under section 552.108. However, we note some of this information is subject to section 552.130 of the Government Code.<sup>3</sup> Because section 552.130 makes information confidential under the Act, we will address the applicability of this section to the information subject to section 552.022(a)(17). We will also address the city's argument under section 552.108 of the Government Code for the information not subject to section 552.022.

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<sup>2</sup>We 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 those records contain substantially different types of information than that submitted to this office.

<sup>3</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Section 552.108(a) of the Government Code excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov’t Code § 552.108(a)(1). A governmental body claiming section 552.108(a)(1) must reasonably explain how and why release of the requested information would interfere with the detection, investigation, or prosecution of crime. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). We note section 552.108 is generally not applicable to the records of an internal affairs investigation that is purely administrative in nature and that does not involve the investigation or prosecution of crime. *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no pet.); *Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. Civ. App.—El Paso 1992, writ denied) (statutory predecessor to section 552.108 not applicable to internal investigation that did not result in criminal investigation or prosecution); *see also* Open Records Decision No. 350 at 3-4 (1982). However, section 552.108 may be invoked by any proper custodian of information relating to a pending investigation or prosecution of criminal conduct. *See* Open Records Decision No. 474 at 4-5 (1987) (section 552.108 may be invoked by any proper custodian of information relating to pending investigation or prosecution of criminal conduct). Where a governmental body has custody of information relating to a pending case of a different law enforcement agency, the custodian of records may withhold the information if it provides this office with a demonstration that the information relates to a pending case and a representation from the law enforcement agency that it wishes to have the information withheld.

The city states, and provides documentation demonstrating, the Tarrant County District Attorney’s Office (the “district attorney’s office”) objects to release of the information the city indicated because its release would interfere with a pending investigation. Based on this representation and our review, we conclude the release of the information at issue would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests that are present in active cases), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Thus, we conclude section 552.108(a)(1) of the Government Code is applicable to the information at issue.

However, as the city acknowledges, section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. Gov’t Code § 552.108(c). Basic information refers to the information held to be public in *Houston Chronicle*. *See* 531 S.W.2d at 186-88; Open Records Decision No. 127 (1976) (summarizing types of information considered to be basic information). Thus, with the exception of basic information, the city may withhold the information it indicated under section 552.108(a)(1) of the Government Code on behalf of the district attorney’s office.<sup>4</sup>

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<sup>4</sup>As our ruling is dispositive, we need not address the city’s remaining argument against disclosure of this information.

Section 552.103 of the Government Code provides, in pertinent part:

(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 that (1) litigation was pending or reasonably anticipated on the date of the receipt of the request for information and (2) the information at issue is related to the pending or anticipated 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 from disclosure 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 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, an attorney for a potential opposing party making a demand for payment and asserting an intent to sue if such payments are not made. Open Records Decision Nos. 555 at 3 (1990), 346 (1982). In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party threatened to sue on several occasions and hired an attorney. *See* Open Records Decision No. 288 at 2 (1981). However, an individual publicly threatening to bring suit against a governmental body, but who does not actually take objective steps toward filing suit, is not concrete evidence that litigation is reasonably anticipated. *See* Open Records Decision No. 331 at 1-2 (1982).

The city states, prior to its receipt of the instant requests, it reasonably anticipated litigation as it received a formal claim for damages from the deceased's estate. The city also states the submitted information relates to this litigation. Based on these representations and our

review, we find the city reasonably anticipated litigation at the time it received the present requests for information. Further, we find the submitted information is related to the anticipated litigation for purposes of section 552.103. Thus, the city may withhold the information it has indicated under section 552.103 of the Government Code.

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 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 (1982); 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) 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).

The city states the information it indicated consists of communications between city employees, city attorneys and legal staff, and outside consultants retained by the city. The city explains the communications at issue were created for the purpose of facilitating the rendition of legal services for the city, and that the communications were not intended to be disclosed and have remained confidential. Based on the city's representations and our review, we find the information the city indicated consists of privileged attorney-client communications the city may withhold under section 552.107(1) of the Government Code.

Section 552.119 of the Government Code provides the following:

(a) A photograph that depicts a peace officer as defined by Article 2.12, Code of Criminal Procedure, the release of which would endanger the life or physical safety of the officer, is excepted from [required public disclosure] unless:

- (1) the officer is under indictment or charged with an offense by information;
- (2) the officer is a party in a civil service hearing or a case in arbitration; or
- (3) the photograph is introduced as evidence in a judicial proceeding.

(b) A photograph excepted from disclosure under Subsection (a) may be made public only if the peace officer gives written consent to the disclosure.

Gov't Code § 552.119. Under section 552.119, a governmental body must demonstrate, if the documents do not demonstrate on their face, that release of the photograph would endanger the life or physical safety of a peace officer. Upon review, we find the city has not demonstrated, and it is not apparent from our review of Exhibit F, that release of Exhibit F would endanger the life or physical safety of the peace officer depicted. Therefore, the city may not withhold Exhibit F under section 552.119 of the Government Code.

Section 552.130 provides that information relating to a motor vehicle operator's or driver's license or permit or motor vehicle title or registration issued by an agency of this state or another state or country is excepted from public release. *Id.* § 552.130(a)(1)-(2). Accordingly, the city must withhold the information we have marked under section 552.130 in the information subject to section 552.022(a)(17) of the Government Code.

In summary, the city must release the press release and the court-filed documents we have marked. In releasing the court-filed documents, the city must withhold the motor vehicle

record information we have marked under section 552.130 of the Government Code. With the exception of basic information, which must be released, the city may withhold the information it has indicated under section 552.108(a)(1) of the Government Code on behalf of the district attorney's office. The city may withhold the information it has indicated under section 552.103 of the Government Code. The city may withhold the information it has indicated under section 552.107(1) of the Government Code. The city must release the remaining information.

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](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,



Rahat Huq  
Assistant Attorney General  
Open Records Division

RSH/eb

Ref: ID# 563331

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Mr. Drew E. Shenkman  
CNN  
One CNN Center  
Atlanta, Georgia 30303-2762  
(w/o enclosures)