



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 31, 2015

Ms. Lauren Ferris
Assistant City Attorney
Office of the City Attorney
City of El Paso
P.O. Box 1890
El Paso, Texas 79950-1890

OR2015-18141

Dear Ms. Ferris:

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# 581291 (El Paso ORR# W036468-061115).

The City of El Paso (the "city") received a request for all e-mails sent to or from eighteen named individuals containing one or more of eighteen specified terms during a specified time frame.¹ You state the city has released some responsive information to the requestor. You claim 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 representative sample of information.²

¹We note the city sought and received clarification of this request from the requestor. *See* Gov't Code § 552.222 (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) (if governmental entity, acting in good faith, requests clarification of unclear or over-broad request, ten-day period to request attorney general ruling is measured from date request is clarified).

²We assume that 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, we note some of the submitted information, which we have marked, is not responsive to the instant request because it was created outside the time frame specified in the request. This ruling does not address the public availability of any information that is not responsive to the request and the city is not required to release such information in response to this request.

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 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 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, 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). The 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).

You raise section 552.103 for Exhibit D. You state the city reasonably anticipated litigation because, prior to receiving the request for information, the city received a demand letter from an attorney representing the requestor's daughter seeking to recover damages for breach of contract. Thus, we find the city reasonably anticipated litigation when it received the request for information. We also find you have established Exhibit D is related to the anticipated litigation for purposes of section 552.103(a). Therefore, we agree section 552.103(a) is applicable to the information at issue.

However, once information has been obtained by all parties to the anticipated litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a). We note the opposing party to the anticipated litigation has seen or had access to some of the information at issue. Therefore, the city may not withhold this information under section 552.103(a). However, we agree the city may withhold the information we have marked under section 552.103(a). We note the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision No. 350 (1982).

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *See* Gov't Code § 552.107(1). 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 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. *See* 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 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 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. *See* 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. Finally, 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. *See 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 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 Exhibit F consists of communications involving city attorneys, city representatives, and other city employees and officials. You further state the communications were made for the purpose of facilitating the rendition of professional legal services to the city and these communications have remained confidential. Upon review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the city may withhold Exhibit F under section 552.107(1) of the Government Code.

We note the remaining information contains e-mail addresses that are subject to section 552.137 of the Government Code.³ Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See Gov’t Code* § 552.137(a)-(c). The e-mail addresses at issue are not of a type excluded by subsection (c). Therefore, the city must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure.

In summary, the city may withhold (1) the information we have marked under section 552.103(a) of the Government Code; and (2) Exhibit F under section 552.107(1) of the Government Code. The city must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure. The remaining responsive 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.

³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See Open Records Decision Nos.* 481 (1987), 480 (1987), 470 (1987).

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,

A handwritten signature in black ink, appearing to read "Brian E. Berger". The signature is fluid and cursive, with the first name "Brian" and last name "Berger" clearly distinguishable.

Brian E. Berger
Assistant Attorney General
Open Records Division

BB/akg

Ref: ID# 581291

Enc. Submitted documents

c: Requestor
(w/o enclosures)