



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

November 2, 2015

Ms. Maria Guadalupe Martinez
Assistant City Attorney
City of El Paso
P. O. Box 1890
El Paso, Texas 79950-1890

OR2015-22887

Dear Ms. Martinez:

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# 585239 (El Paso Ref. 14-1006-417).

The City of El Paso (the "city") received a request for certain communications and documents related to a named firefighter. You state the city has released some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note some of the submitted information consists of completed reports. Section 552.022(a)(1) of the Government Code provides for the required disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body," unless it is excepted by section 552.108 of the Government Code or made confidential under the Act or other law. Gov't Code § 552.022(a)(1). You raise sections 552.103, 552.107, and 552.111 of the Government Code for this information. However, sections 552.103, 552.107, and 552.111 do 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); *see also* Open Records Decision Nos. 677 at 8 (2002) (attorney work-product privilege under section 552.111 may be waived), 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions in general).

Accordingly, the city may not withhold the information subject to section 552.022(a)(1) of the Government Code under section 552.103, 552.107, or 552.111 of the Government Code. Nevertheless, section 552.107 encompasses the attorney-client privilege, which is found at rule 503 of the Texas Rules of Evidence, and section 552.111 encompasses the attorney work-product privilege, which is found at rule 192.5 of the Texas Rules of Civil Procedure. Both of these rules are “other law” that make information confidential within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). Accordingly, we will consider the applicability of rule 503 and rule 192.5 to this information. You also raise section 552.101 of the Government Code for this information. Section 552.101 makes information confidential for purposes of the Act, so we will also consider your assertion of that exception.

Texas Rule of Evidence 503 enacts the attorney-client privilege. Rule 503(b)(1) provides:

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

- (A) between the client or the client’s representative and the client’s lawyer or the lawyer’s representative;
- (B) between the client’s lawyer and the lawyer’s representative;
- (C) by the client, the client’s representative, the client’s lawyer, or the lawyer’s representative to a lawyer representing another party in a pending action or that lawyer’s representative, if the communications concern a matter of common interest in the pending action;
- (D) between the client’s representatives or between the client and the client’s representative; 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 to further the rendition of professional legal services to the client or reasonably necessary to transmit the communication. *Id.* 503(a)(5).

Accordingly, in order to withhold attorney-client privileged information from disclosure under Rule 503, a governmental body must 1) show 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. *See* ORD 676. Upon a demonstration of all three factors, the entire communication is confidential under Rule 503 provided the client has not waived the privilege or the communication does not fall within the purview of the exceptions to the privilege enumerated in Rule 503(d). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero Energy Corp.*, 973 S.W.2d 453, 457 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding) (privilege attaches to complete communication, including factual information). The information at issue was sent by the city's third-party claims administrator to an attorney for the city. You state this information was communicated in order to facilitate the rendition of legal services to the city. You also state it was intended to be, and remains, confidential. Based on these representations and our review, we conclude you have demonstrated this information is protected by the attorney-client privilege and the city may withhold it under rule 503 of the Texas Rules of Evidence.¹

We turn now to the remaining information not subject to section 552.022. Section 552.103 of the Government Code 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 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,

¹This ruling is dispositive of the remaining arguments against disclosure.

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. We note contested cases conducted under the Administrative Procedure Act, chapter 2001 of the Government Code (the "APA"), are considered litigation under section 552.103. Open Records Decision No. 588 at 7 (1991).

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.* You state before the city received the request for information, the named firefighter filed a worker's compensation claim with the city for on-the-job injuries he sustained. You explain the claim is currently open and a portion of that claim was denied. You further explain the firefighter has a right to challenge that determination in a contested hearing. We note such contested cases are generally governed by the APA. *See* Labor Code § 410.153. You also state if the named firefighter is not satisfied with the outcome of the contested hearing, he may file a lawsuit in district court. You have demonstrated the requested information directly relates to the disputed claim. Based on these representations and our review, we agree the city reasonably anticipated litigation prior to its receipt of the request, and the information at issue relates to the anticipated litigation. Accordingly, the city may withhold the remaining information under section 552.103 of the Government Code.

We note, 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, any information obtained from or provided to all other parties in the anticipated 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).

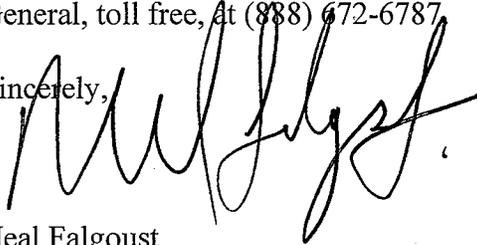
In summary, the city may withhold the information subject to section 552.022(a)(1) under rule 503 of the Texas Rules of Evidence. The city may withhold the remaining information under section 552.103 of the Government Code. As our rulings are dispositive, we need not address your remaining arguments against disclosure.

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/>

[ori_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 'Neal Falgoust', written over the word 'Sincerely,'.

Neal Falgoust
Assistant Attorney General
Open Records Division

NF/eb

Ref: ID# 585239

Enc. Submitted documents

c: Requestor
(w/o enclosures)