



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

November 3, 2015

Mr. Daniel W. Ray
Counsel for the City of Greenville
Scott & Ray, P.L.L.C.
P.O. Box 1353
Greenville, Texas 75403-1353

OR2015-23058

Dear Mr. Ray:

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# 585813.

The City of Greenville (the "city"), which you represent, received a request for information pertaining to the city manager's salary and spending, the city manager's text messages sent or received during a specified period of time, and information regarding the city manager and certain complaints. You state you have released some information. You claim the submitted information is excepted from disclosure under sections 552.103, 552.107, and 552.131 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state or a political subdivision is or may be a party. The city has the burden of providing relevant facts and documents to show that 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, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas 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 city must meet both prongs of this test for information to be excepted under section 552.103(a).

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 litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* This

office has found a pending complaint with the Equal Employment Opportunity Commission (“EEOC”) indicates litigation is reasonably anticipated. See Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982), 281 at 1 (1981).

You state the documents in Exhibit C are excepted from disclosure under section 552.103 of the Government Code. You have submitted information which establishes, prior to the city’s receipt of the request for information, a former employee filed a discrimination complaint with the EEOC against the city. You state the EEOC issued a right-to-sue letter prior to the city’s receipt of the request for information and the submitted documentation reflects this letter was issued on September 17, 2014. However, we note the ninety-day period in which the complainant has a right to sue had expired when the city received the request. You have not informed us the former employee filed such a suit within the ninety-day time limit. Additionally, you have not informed us, and we are unable to determine, the ninety-day time period was ongoing on the date the city received the request. See Gov’t Code § 552.301 (e)(1)(A) (governmental body must provide comments explaining why exceptions raised should apply to information requested). Furthermore, you have not demonstrated any party had taken concrete steps toward filing litigation when the city received the request for information. Thus, we conclude the city has failed to demonstrate it reasonably anticipated litigation when it received the request for information. Therefore, the city may not withhold any portion of the requested information under section 552.103(a) of the Government Code.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. See *id.* § 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. 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).

You state the submitted e-mail and attachment consists of a communication involving an attorney for the city and the city manager in his capacity as client. You state the communication was made in furtherance of the rendition of professional legal services to the city. You state the communication was intended to be, and has 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. Accordingly, the city may withhold the submitted e-mail and attachment under section 552.107(1) of the Government Code.¹ However, we find you have failed to demonstrate any of the remaining information constitutes privileged communications made for the rendition of professional legal services. Accordingly, the city may not withhold any of the remaining information under section 552.107 of the Government Code.

The city asserts the submitted text message is excepted under section 552.131(a)(2) of the Government Code, which reads as follows:

(a) Information is excepted from [required public disclosure] if the information relates to economic development negotiations involving a governmental body and a business prospect that the governmental body seeks to have locate, stay, or expand in or near the territory of the governmental body and the information relates to:

...

(2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained.

Id. § 552.131(a)(2). Section 552.131(a) protects the proprietary interests of third parties that have provided information to governmental bodies, not the interests of governmental bodies themselves. There has been no demonstration by a third party that any of the information at

¹As our ruling is dispositive, we need not address your remaining arguments against disclosure for this information.

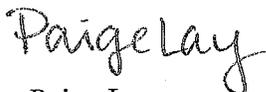
issue constitutes a trade secret or that release of any of the information at issue would cause a third party substantial competitive harm. *See* Open Records Decision Nos. 661 at 5-6 (1999), 552 at 5 (1990) (attorney general will accept private person's claim under section 552.110(a) of the Government Code if person establishes *prima facie* case for trade secret exception, and no one submits argument that rebuts claim as matter of law). Thus, the city may not withhold any of the information at issue under section 552.131(a) of the Government Code.

In summary, the city may withhold the submitted e-mail and attachment under section 552.107(1) of the Government Code. The remaining 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.

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,



Paige Lay
Assistant Attorney General
Open Records Division

PL/dls

Ref: ID# 585813

Enc. Submitted documents

cc: Requestor
(w/o enclosures)