



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

December 13, 2002

Mr. Leonard V. Schneider
Ross, Banks, May, Cron & Cavin, P.C.
2 Riverway, Suite 700
Houston, Texas 77056-1918

OR2002-7143

Dear Mr. Schneider:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 173621.

The City of Mont Belvieu (the "city"), which you represent, received a request for "memorandums or communications between city attorney Grady Randle and the [city] regarding the Eagle Pointe Gulf [sic] Club and Recreation Complex, Strong Sports Management and/or for Evergreen Alliance since 2000." You claim that the requested 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. We have also considered comments made on the requestor's behalf. Gov't Code §552.304.

Initially, we note that the city also contends that portions of the submitted information are excepted from disclosure pursuant to Rule 503 of the Texas Rules of Evidence and Rules 192.3 and 192.5 of the Texas Rules of Civil Procedure. This office generally does not address discovery and evidentiary rules that may or may not be applicable to information submitted by a governmental body. See Open Records Decision No. 416 (1984). Recently, the Texas Supreme Court ruled that the Texas Rules of Civil Procedure and the Texas Rules of Evidence are "other law" that make information confidential for the purposes of section 552.022 of the Government Code. *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). However, since the submitted records do not fall into one of the categories of information made expressly public by section 552.022 of the Government Code, we do not address your arguments under these provisions.

You contend that the submitted information is excepted from disclosure under section 552.107.¹ Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. Open Records Decision No. 574 at 5 (1990). Based on our review of the information at issue, we conclude that a portion of the submitted information reveals legal advice or opinion or confidential communications and is therefore excepted from disclosure under section 552.107(1) of the Government Code. See Open Records Decision No. 676 (2002) (privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives). We have marked the information that the city may withhold under section 552.107.

You claim that section 552.103 of the Government Code excepts from disclosure the remaining records. Section 552.103 provides 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.

¹ Although you also argue that information is protected under the attorney-client privilege pursuant to section 552.101 of the Government Code, which excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," the attorney-client privilege is recognized under section 552.107. See Open Records Decision No. 574 (1990). Thus, we address your attorney-client privilege argument under section 552.107.

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, no pet.); *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 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983).

After careful review of your arguments and the submitted documents, we find that you have failed to show that litigation was pending or reasonably anticipated on the date that the city received the request for information. Thus, the information contained in pages 16-26 of the submitted records may not be withheld from disclosure under section 552.103(a).

You also argue that the remaining submitted information is excepted from public disclosure under section 552.111 of the Government Code as attorney work product. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." The information at issue, however, consists of communications from the city attorney to opposing counsel and an arbitrator, not interagency or intraagency communications. Thus, section 552.111 is inapplicable to this information. *See* Open Records Decision Nos. 561 at 9 (1990).

The submitted information also contains e-mail addresses obtained from the public. Section 552.137 makes certain e-mail addresses confidential.² Section 552.137 provides:

(a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code §552.137. You do not inform us that a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. The city must, therefore, withhold e-mail addresses of members of the public under section 552.137.

In summary, we have marked the information that the city may withhold under section 552.107 of the Government Code. The city must withhold e-mail addresses of members of the public under section 552.137. The remaining submitted information must be released to the requestor.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

²The language of section 552.136, as added by House Bill 2589, is identical to that of section 552.137.

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Cindy Nettles
Assistant Attorney General
Open Records Division

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CN/jh

Ref: ID# 173621

Enc. Submitted documents

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