



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 1, 2011

Mr. Paul M. Gonzalez
For City of Kyle
Law Offices of Davidson & Troilo, P.C.
7550 West IH-10, Suite 800
San Antonio, Texas 78229

OR2011-12738

Dear Mr. Gonzalez:

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# 428721.

The City of Kyle (the "city"), which you represent, received a request for seven categories of information related to the city's traffic ticketing process, as well as information related to the arrest of the requestor's client. You state the city does not maintain information responsive to categories 1, 2, 3, 4, and 7.¹ You claim that the submitted information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments from the requestor. See Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, we note the submitted documents include information that is subject to section 552.022 of the Government Code, which provides in pertinent part:

¹In responding to a request for information under the Act, a governmental body is not required to disclose information that did not exist at the time the request was received. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990).

²Although you claim some of the submitted information is also subject to rule 503 of the Texas Rules of Evidence, we note the proper exception to raise in this instance is section 552.107(1) of the Government Code. Further, although you also raise section 552.101 of the Government Code in conjunction with section 552.107 of the Government Code, this office has concluded that section 552.101 does not encompass other exceptions in the Act. See Open Record Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990).

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body;

...

(17) information that is also contained in a public court record[.]

Id. § 552.022(a)(1), (3), (17). Exhibit B-1 consists of a completed investigation that is subject to section 552.022(a)(1). The remaining submitted information also includes information pertaining to the receipt or expenditure of funds by the city that is subject to section 552.022(a)(3) and court-filed documents that are subject to section 552.022(a)(17). Although the city raises sections 552.103 and 552.111 of the Government Code for these documents, these sections are discretionary exceptions that protect a governmental body's interests and may be waived. *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. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 (1999) (governmental body may waive section 552.103), 470 at 7 (1987) (statutory predecessor to section 552.111 may be waived). As such, sections 552.103 and 552.111 are not "other law" for purposes of section 552.022. Therefore, the city may not withhold the information subject to section 552.022 under section 552.103 or section 552.111. However, because sections 552.130 and 552.136 can provide compelling reasons to withhold information, we will consider the applicability of these exceptions to the information subject to section 552.022 of the Government Code.³

Section 552.103 of the Government Code provides, in relevant 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

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

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 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* Open Records Decision No. 551 at 4-5 (1990). A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception applies in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the requested information is related to that litigation. *See Univ. of Tex. Law Sch. v. Tex. 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 governmental body must meet both parts of this test for information to be excepted under section 552.103(a). *See* ORD 551 at 4.

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, 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. 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). This office has also concluded a governmental body's receipt of a claim letter it represents to be in compliance with the notice requirements of the Texas Tort Claims Act (the "TTCA"), chapter 101 of the Civil Practice and Remedies Code, is sufficient to establish litigation is reasonably anticipated.

You argue the city reasonably anticipated litigation at the time the city received the instant request. You state the requestor is an attorney for the individual involved in the incident at

issue and the requestor's "experience in pursuing civil rights claims in court further supports the [c]ity's reasonable expectation of litigation." You further state the requestor has filed a claim for wrongful arrest of his client that "has not been settled." You state the requestor has filed a claim with the city and provide the city with a copy of this claim. We note, however, the submitted letter is a notice of representation and not a claim letter under the TTCA. As noted above, neither a verbal threat of litigation nor the fact that a potential opposing party has hired an attorney establish that litigation is reasonably anticipated. You have not otherwise demonstrated that any party had taken any concrete steps towards litigation on the date the request was received. *See* ORD 331. Thus, we find you have failed to demonstrate the city reasonably anticipated litigation when the request for information was received. *See* Gov't Code §§ 552.103(c) (governmental body must demonstrate that litigation was pending or reasonably anticipated on or before the date it received request for information), .301(e)(1) (requiring governmental body to explain applicability of raised exception). Accordingly, the city may not withhold the information not subject to section 552.022 under section 552.103 of the Government Code.

You assert Exhibit B-2 is excepted from disclosure under section 552.107(1) of the Government Code, which 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. ORD 676 at 6-7. First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating 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). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1). 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.*, meaning it was "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of 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, no pet.). 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 memorandum in Exhibit B-2 consists of a communication between and among city officials, city attorneys, and outside counsel for the city. You state this communication was made for the purpose of facilitating the rendition of legal services. You indicate this communication was made in confidence and has remained confidential. Based on your representations and our review, we find the information at issue consists of a privileged attorney-client communication. Accordingly, the city may withhold the information in Exhibit B-2 under section 552.107(1) of the Government Code.⁴

Section 552.130 provides in relevant part:

(a) Information is excepted from the requirements of Section 552.021 if the information relates to:

- (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state or another state or country;
- (2) a motor vehicle title or registration issued by an agency of this state or another state or country; or
- (3) a personal identification document issued by an agency of this state or another state or country or a local agency authorized to issue an identification document.

Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 4 (to be codified as an amendment to Gov't Code § 552.130). You must withhold the motor vehicle record information we have indicated on the submitted disk under section 552.130.

Section 552.136(b) of the Government Code states that "[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136(b). Therefore, the city must withhold the bank account numbers and bank routing numbers we have marked pursuant to section 552.136 of the Government Code.

In summary, the city may withhold the information in Exhibit B-2 under section 552.107(1) of the Government Code. The city must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code. The city must withhold the

⁴As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

bank account and bank routing numbers we have marked under section 552.136 of the Government Code.⁵ The remaining information must be released.⁶

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.oag.state.tx.us/open/index_orl.php, 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 must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,



Vanessa Burgess
Assistant Attorney General
Open Records Division

VB/dls

Ref: ID# 428721

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁵We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including Texas driver's license numbers and Texas license plate numbers under section 552.130 of the Government Code and bank account and bank routing numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

⁶We also note the information being released contains confidential information to which the requestor has a right of access. See Gov't Code § 552.023 (person has special right of access to information that relates to the person and that is protected from disclosure by laws intended to protect person's privacy interests). Thus, if the city receives another request for this particular information from a different requestor, then the city should again seek a decision from this office.