



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 18, 2013

Mr. Louis T. Rosenberg
Attorney for the City of Floresville
Law Offices of Louis T. Rosenberg, P.C.
322 Martinez Street
San Antonio, Texas 78205

OR2013-10258

Dear Mr. Rosenberg:

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# 490593.

The City of Floresville (the "city"), which you represent, received a request for all documentation pertaining to a specified demand letter regarding a proposed sports complex. You claim the submitted information is exempted from disclosure under sections 552.103 and 552.107 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that in a letter dated April 12, 2013, you inform this office that, pursuant to city council action on April 11, 2013 in accordance with city ordinance § 30.04, the city has authorized for disclosure to the public the cover letter from William T. Avila to Louis T. Rosenberg dated February 6, 2013, and page 9 of the invoice from Fulbright and Jaworski to the city dated January 31, 2013. Therefore, we understand the city is withdrawing its request with respect to the documents for which the city council authorized release. Accordingly, this ruling does not address the public availability of this information.

¹Although you raise section 552.101 of the Government Code, you make no arguments to support this exception. Therefore, we assume you have withdrawn your claim under this section. See Gov't Code §§ 552.301, .302.

We note most of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a)(16) provides for the required public disclosure of “information that is in a bill for attorney’s fees and that is not privileged under the attorney-client privilege” unless it is “made confidential under [the Act] or other law[.]” Gov’t Code § 552.022(a)(16). The submitted information contains attorney fee bills subject to section 552.022(a)(16). Thus, this information must be released unless it is made confidential under the Act or other law. *See id.* You seek to withhold the information at issue under sections 552.103 and 552.107 of the Government Code. However, sections 552.103 and 552.107 are discretionary exceptions and 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 Gov’t Code § 552.103); *see also* Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under Gov’t Code § 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the submitted fee bills may not be withheld under section 552.103 or section 552.107 of the Government Code. The Texas Supreme Court has held, however, the Texas Rules of Evidence are “other law” within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Accordingly, we will address your attorney-client privilege claim under rule 503 of the Texas Rules of Evidence for the submitted fee bills.

Rule 503(b)(1) provides as follows:

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

(A) between the client or a representative of the client and the client’s lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer’s representative;

(C) by the client or a representative of the client, or the client’s lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is “confidential” if it is 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).

Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show 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 the communication is confidential by explaining it was not intended to be disclosed to third persons and it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You contend the attorney fee bills provided by the bond counsel are exempt from disclosure requirements. You note the letter to which the bills were attached is marked “attorney[-]client privilege.” However, section 552.022(a)(16) of the Government Code provides information “that is *in* a bill for attorney’s fees” is not excepted from required disclosure unless it is confidential under other law or privileged under the attorney-client privilege. *See* Gov’t Code § 552.022(a)(16) (emphasis added). This provision, by its express language, does not permit the entirety of an attorney fee bill to be withheld. *See also* Open Records Decisions Nos. 676 (attorney fee bill cannot be withheld in entirety on basis it contains or is attorney-client communication pursuant to language in section 552.022(a)(16)), 589 (1991) (information in attorney fee bill excepted only to extent information reveals client confidences or attorney’s legal advice). Accordingly, the city may not withhold the entirety of the submitted fee bills under Texas Rule of Evidence 503. We additionally note that the information at issue documents fees charged by the bond counsel, which the city never agreed to incur, and that the bond counsel has made a legal claim against the city and is a potential opposing party in litigation you contend the city reasonably anticipates. You thus have not explained, or otherwise demonstrated, how the bond counsel is a privileged party in this instance. Accordingly, upon review, we find you have failed to demonstrate how the information subject to section 552.022(a)(16) contains privileged attorney-client communications, and the city may not withhold this information under rule 503 of the Texas Rules of Evidence. As you raise no other exceptions to disclosure, the information subject to section 552.022 must be released.

We will now address your arguments for the information not subject to section 552.022. Section 552.103, which provides, in relevant part, the following:

- (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 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.² 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).

²In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. 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), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

You argue that litigation is reasonably anticipated in this instance because the city received a letter from the bond counsel "indicating a demand for payment" of fees the city never agreed to incur. We note the letter does not contain any language stating or threatening that the bond counsel will pursue litigation against the city. *Cf.* Open Records Decision Nos. 638 at 3 (mere fact that individual alleged damages does not serve to establish that litigation is reasonably anticipated), 551 at 1 (litigation reasonably anticipated when attorney's letter demanded damages and stated that attorney was authorized to file suit if damages were not paid), 452 at 5 (litigation reasonably anticipated when attorney made written demand for disputed payments and stated further legal action would be necessary unless payments were forthcoming). Furthermore, you make no representations that the bond counsel has taken any concrete steps toward litigation or that it will pursue litigation in this matter. Thus, we conclude the city has failed to demonstrate that litigation was reasonably anticipated on the date it received the request for information. Additionally, even if litigation was anticipated, we note the opposing party to any such litigation has seen the information at issue. Accordingly, the city may not withhold the submitted information under section 552.103 of the Government Code.

The city also raises section 552.107(1) of the Government Code for the submitted responsive information not subject to section 552.022(a)(16). Section 552.107(1) protects information that comes within the attorney-client privilege. The elements of the privilege under section 552.107(1) are the same as those discussed for rule 503 above. 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* ORD 676 at 6-7. 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 seek to withhold a memorandum from the bond counsel addressed to a third party. You have not explained, or otherwise demonstrated, how the bond counsel and the third party are privileged parties in this instance. Upon review, we find you have failed to demonstrate how the information at issue consists of communications between privileged parties or communications made for the purpose of facilitating the rendition of professional legal services to the city. Accordingly, the remaining information may not be withheld under section 552.107 of the Government Code.

In summary, the city must release the attorney fee bills pursuant to section 552.022(a)(16) of the Government Code. The city must also release the remaining information.

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,



Britni Fabian
Assistant Attorney General
Open Records Division

BF/dls

Ref: ID# 490593

Enc. Submitted documents

c: Requestor
(w/o enclosures)