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ATTORNEY GENERAL OF TEXAS

April 13, 2016

Mr. Byron L. Brown
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OR2016-08255

Dear Mr. Brown:

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# 605464.

The City of Fulshear (the "city"), which you represent, received a request for all communications between city representatives and specified entities that relate to a specified development and specified plats over a specified time period, as well as all documents created by the city related to a specified law suit, and all documents created by the city in relation to renewal or non-renewal of the approval of specified plats. You claim the submitted information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note the submitted information contains notices, agendas, minutes, and attachments to minutes of public meetings held by the city. The notices, agendas, minutes, and attachments to minutes of a governmental body's public meetings are specifically made public under provisions of the Open Meetings Act, chapter 551 of the Government Code. *See Gov't Code §§ 551.022* (minutes and tape recordings of open meeting are public records and shall be available for public inspection and copying on request to governmental body's chief administrative officer or officer's designee), .041 (governmental body shall give written notice of date, hour, place, and subject of each meeting), .043 (notice of meeting of governmental body must be posted in place readily accessible to general public for at least 72 hours before scheduled time of meeting). Although you seek to withhold this information under section 552.103 of the Government Code, as a general rule, the exceptions to

disclosure found in the Act do not apply to information that other statutes make public. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Accordingly, the city must release the information we have marked pursuant to chapter 551 of the Government Code.

Next, we note some of the remaining information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

...

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

Gov't Code § 552.022(a)(17). The remaining information contains court-filed documents that are subject to section 552.022(a)(17). The city must release this information pursuant to section 552.022(a)(17), unless it is made confidential under the Act or other law. *See id.* You seek to withhold this information under sections 552.103 and 552.107 of the Government Code. However, these sections 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 section 552.103); Open Records Decision Nos. 676 at 10-11 (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 information at issue may not be withheld under these exceptions. However, the Texas Supreme Court has held the Texas Rules of Evidence are “other law” that make information expressly confidential for the purposes of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will consider your argument under rule 503 of the Texas Rules of Evidence for the information subject to section 552.022(a)(17) of the Government Code. We will also consider the applicability of the raised exceptions to the remaining information not subject to section 552.022 of the Government Code.

Texas Rule of Evidence 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 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. *See Open Records Decision No. 676 at 6-7 (2002)*. 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, orig. proceeding).

You state the information subject to section 552.022(a)(17) of the Government Code constitutes privileged communications between a city attorney and city officials and employees. You state the communications at issue were made in furtherance of the rendition of professional legal services to the city. You state the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the attachment we have marked. Accordingly, the city may withhold the information we have marked under rule 503 of the Texas Rules of Evidence.¹

Section 552.107(1) of the Government Code 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. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the

¹As our ruling is dispositive for this information, we need not consider your remaining argument against its disclosure.

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*, 922 S.W.2d at 923 (privilege extends to entire communication, including facts contained therein).

You claim some of the remaining information not subject to section 552.022(a)(17) is protected by section 552.107(1) of the Government Code. You inform us the information at issue consists of communications between a city attorney and city officials and employees. You state the communications at issue were made in furtherance of the rendition of professional legal services to the city. You state the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege the information at issue. Thus, the city may generally withhold the information we have marked under section 552.107(1) of the Government Code. However, as you acknowledge, the information at issue contains communications sent to or received from a non-privileged party. Furthermore, if the information at issue stands alone from the e-mail strings of which it is a part, it is separately responsive to the request for information. Therefore, if the information at issue, which we have marked, is maintained by the city separate and apart from the otherwise privileged e-mail strings in which it appears, then the city may not withhold such information under section 552.107(1) of the Government Code.

Section 552.103 of the Government Code provides in relevant part 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.

Gov't Code § 552.103(a), (c). The 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,

writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a).

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, an attorney for a potential opposing party making a demand for payment and asserting an intent to sue if such payments are not made. Open Records Decision Nos. 555 at 3 (1990), 346 (1982). However, an individual publicly threatening to bring suit against a governmental body, but who does not actually take objective steps toward filing suit, is not concrete evidence that litigation is reasonably anticipated. *See* Open Records Decision No. 331 at 1-2 (1982).

The city states, prior to the instant request for information, a lawsuit styled *JDC/Firethorne, Ltd. v. Fort Bend County, et al.*, No. 15-DCV-221725, was filed in the 268th Judicial District Court of Fort Bend County, Texas. Although the city has not been named as a party to the pending litigation, the city states it anticipates being named as a party to the pending litigation because, in other pleadings, counsel for the plaintiff describes the city's alleged involvement in the matter. Furthermore, the city states, and provides documentation demonstrating, counsel for the plaintiff in the pending litigation "has communicated . . . the plaintiff's intent to make the [c]ity a party to the [pending lawsuit] unless the [c]ity complies with certain demands." Specifically, you state, and provide documentation demonstrating, the plaintiff "seeks a writ of mandamus to compel Fort Bend County [(the "county")] . . . to approve certain plats for [the] plaintiff's development" and that the plaintiff's petition alleges that the defendants in the pending lawsuit "improperly enlisted the [c]ity . . . to hold submitted . . . plats." Additionally, the submitted documentation reflects the plaintiff sent a Request for Preservation of Documents to the city, requesting the city to preserve certain documents reflecting communications between the city and the county. Upon review, we find the city reasonably anticipated litigation when it received the request for information. We also find the city has established the remaining information is related to the anticipated litigation for purposes of section 552.103(a). Therefore, we agree section 552.103(a) is applicable to the remaining information.

However, once information has been obtained by all parties to the anticipated litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *See* 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). We note the opposing party to the anticipated litigation has seen or had access to some of the remaining information, including the information we have marked as non-privileged for purposes of section 552.107 of the Government Code. Therefore, the city may not withhold this information under section 552.103(a). However, we agree the city may withhold the

remaining information, which we have marked, under section 552.103(a).² We note the applicability of section 552.103(a) ends once the litigation has concluded. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision No. 350 (1982).

In summary, the city must release information we have marked pursuant to chapter 551 of the Government Code. The city may withhold the information we have marked under rule 503 of the Texas Rules of Evidence. The city may generally withhold the information we have marked under section 552.107(1) of the Government Code; however if the city maintains the non-privileged e-mails we have marked separate and apart from the otherwise privileged e-mail strings in which they appear, they must be released. The city may withhold the information we have marked under section 552.103(a). The city must release the remaining information that has been seen by the opposing party to the anticipated litigation.

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,



Joseph Behnke
Assistant Attorney General
Open Records Division

JB/som

Ref: ID# 605464

Enc. Submitted documents

c: Requestor
(w/o enclosures)

²As our ruling is dispositive for this information, we need not consider your remaining argument against its disclosure.