



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 26, 2015

Mr. Michael J. Cosentino
City Attorney
City of San Marcos
630 East Hopkins
San Marcos, Texas 78666

OR2015-17820

Dear Mr. Cosentino:

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# 577117.

The City of San Marcos (the "city") received several requests from the same requestor for: (1) a list of certain closed meetings, to include the names of certain attendees; (2) the closed agendas for certain closed meetings; (3) all communications to or from the Office of the City Clerk, the Office of the City Attorney, and the Office of the City Manager during a specified time period relating to city charter amendment petitions; (4) any existing policy manuals effective during a specified time period; (5) all communications to or from any city council member or city staff during a specified time period relating to specified subject matter; and (6) the certified agenda for a specified closed meeting. You claim the submitted information is excepted 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 the city has submitted only certain e-mail communications and attachments. The city has not submitted information pertaining to the requested policy manuals or the list

¹Although the city raises section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503, we note section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Further, although you raise Texas Rule of Evidence 503, we note the proper exception to raise when asserting the attorney-client privilege for information not subject to section 552.022 of the Government Code is section 552.107 of the Government Code. *See* ORD 676 at 1-2.

of certain closed meetings. Although you state the city has submitted a representative sample of the requested information, we find the submitted information is not representative of all the types of information to which the requestor seeks access. Please be advised, this open records letter ruling applies only to the types of information you have submitted for our review. This ruling does not authorize the city to withhold any information that is substantially different from the types of information you submitted to this office. *See Gov't Code § 552.302* (where request for attorney general decision does not comply with requirements of *Gov't Code § 552.301*, information at issue is presumed to be public). Accordingly, to the extent any information responsive to the request for policy manuals or the list of certain closed meetings existed on the date the city received the request, we assume the city has released it. If the city has not released any such information, it must do so at this time. *See id.* §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes no exceptions apply to requested information, it must release information as soon as possible).

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *Gov't Code § 552.101*. This section encompasses information protected by other statutes, such as section 551.104 of the Open Meetings Act, chapter 551 of the Government Code. Section 551.104 provides, in part, that “[t]he certified agenda or tape of a closed meeting is available for public inspection and copying only under a court order issued under Subsection (b)(3).” *Id.* § 551.104(c). We note the city is not required to submit a certified agenda or tape recording of a closed meeting to this office for review. *See* Open Records Decision No. 495 at 4 (1988) (attorney general lacks authority to review certified agendas or tapes of executive sessions to determine whether a governmental body may withhold such information from disclosure under statutory predecessor to section 552.101). Such information cannot be released to a member of the public in response to an open records request. *See* Attorney General Opinion JM-995 at 5-6 (1988) (public disclosure of certified agenda of closed meeting may be accomplished only under procedures provided in Open Meetings Act). Section 551.146 of the Open Meetings Act makes it a criminal offense to disclose a certified agenda or tape recording of a lawfully closed meeting to a member of the public. *See Gov't Code § 551.146(a)-(b)*; *see also* ORD 495 at 4. You state the requestor seeks access to certain certified agendas of closed meetings of the city council. Based on your representation, we conclude the city must withhold the information at issue under section 552.101 of the Government Code in conjunction with section 551.104(c) of the Government Code.²

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

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

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 section 552.103(a) 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, 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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). *See* ORD 551 at 4.

Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To establish litigation is reasonably anticipated, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *Id.* Concrete evidence to support a claim 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. *See* Open Records Decision No. 555 (1990); *see also* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, or when an individual threatened to sue on several occasions and hired an attorney. *See* Open Records Decision Nos. 346 (1982), 288 (1981). On the other hand, this office has determined 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 litigation is reasonably anticipated. *See* Open Records Decision No. 361 (1983).

You inform us, and provide documentation showing, an attorney sent a letter to the city prior to the city's receipt of the requests for information received on June 10, 2015,³ in which the attorney demands the city council to perform its "non-discretionary" duties with regards to a certain charter amendment petition. However, we find that letter and the city's related representations do not demonstrate any party had taken concrete steps toward filing litigation when the city received the requests for information at issue. Although the city states it later received another letter in which the same attorney threatened suit against the city, the city did not receive that letter until June 16, 2015, after the requests at issue were received. Thus, we find you have not demonstrated that the city reasonably anticipated litigation when it received the requests for information at issue. Accordingly, the city may not withhold any of the submitted information under section 552.103 of the Government Code.

Section 552.107(1) of the Government Code 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. 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

³We note the information the city must withhold under section 552.101 of the Government Code in conjunction with section 551.104(c) of the Government Code includes the entirety of the information responsive to the request the city received on June 19, 2015; thus, we need not address whether the city reasonably anticipated litigation in regards to that request.

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).

The city states the information at issue consists of communications involving the city attorney and city staff. The city states the communications were made in confidence for the purpose of facilitating the rendition of professional legal services to the city and these communications have remained confidential. Upon review, we find the city has demonstrated the applicability of the attorney-client privilege to the information you have marked. Therefore, the city may generally withhold the information you have marked under section 552.107(1) of the Government Code. However, we note one of the e-mail strings at issue includes an e-mail sent to a non-privileged party. Furthermore, if this e-mail is removed from the e-mail string and stands alone, it is responsive to one of the requests for information. Therefore, if the city maintains this non-privileged e-mail, which we have marked, separate and apart from the otherwise privileged e-mail string in which it appears, then the city may not withhold this non-privileged e-mail under section 552.107(1) of the Government Code.

Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c).⁴ *See Gov’t Code* § 552.137(a)-(c). The e-mail address we have marked is not excluded by subsection (c), and you do not indicate the owner has consented to release of her e-mail address. Accordingly, the city must withhold the e-mail address we have marked under section 552.137 of the Government Code.

In summary, the city must withhold the requested certified agendas of closed meetings of the city council under section 552.101 of the Government Code in conjunction with section 551.104(c) of the Government Code. The city may generally withhold the information you have marked under section 552.107(1) of the Government Code. However, if the city maintains this non-privileged e-mail, which we have marked, separate and apart from the otherwise privileged e-mail string in which it appears, then the city may not withhold this non-privileged e-mail under section 552.107(1) of the Government Code. The city must withhold the e-mail address we have marked under section 552.137 of the Government Code. The city must 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.

⁴The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body. *See Open Records Decision No. 481 (1987), 480 (1987), 470 (1987).*

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,

A handwritten signature in black ink, appearing to read "Lee Seidlits", with a stylized flourish at the end.

Lee Seidlits
Assistant Attorney General
Open Records Division

CLS/som

Ref: ID# 577117

Enc. Submitted documents

c: Requestor
(w/o enclosures)