KEN PAXTON
ATTORNEY GENERAL OF TEXAS

October 25, 2016

Ms. L. Carolyn Nivens
Paralegal
For the City of Seabrook
Ross, Banks, May, Cron & Cavin, P.C.
7700 San Felipe, Suite 550
Houston, Texas 77063

OR2016-23878

Dear Ms. Nivens:

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# 632151 (Seabrook Reference No. 3957-1-Bates).

The City of Seabrook (the "city"), which you represent, received two requests from the same requestor for (1) e-mails containing any of the specified terms during a specified time period and (2) dash camera audio and video recordings from a specified unit during a specified time period. You state the city will withhold motor vehicle record information pursuant to section 552.130(c) of the Government Code.[1] You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note some of the submitted information, which we have marked, is not responsive to the instant request for information because it does not contain any of the specified terms and does not consist of the audio or video recordings the requestor specified. This ruling does not address the public availability of any information that is not responsive

[1]Section 552.130(c) of the Government Code allows a governmental body to redact the information described in section 552.130(a) without the necessity of seeking a decision from the attorney general. *See* Gov't Code § 552.130(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). *See id.* § 552.130(d), (e).

to the request and the city is not required to release such information in response to this request.

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 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 in Exhibit A consists of communications involving attorneys for the city, city representatives, and other city employees and officials. The city states the communications were made 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 at issue. Thus, the city may generally withhold the information in Exhibit A under section 552.107(1) of the Government Code.[2] However, we note some of these e-mail

[2]As our ruling is dispositive, we need not address your remaining arguments against disclosure of some of this information.

strings include e-mails received from non-privileged parties. Furthermore, if these e-mails are removed from the e-mail strings and stand alone, they are responsive to the request for information. Therefore, to the extent the city maintains these non-privileged e-mails, which we have marked, separate and apart from the otherwise privileged e-mail strings in which they appear, the city may not withhold these non-privileged e-mails under section 552.107(1) of the Government Code. To the extent the non-privileged e-mails exist separate and apart from the otherwise privileged e-mail strings in which they appear, we will consider your remaining arguments under sections 552.103 and 552.108(a)(1) for that information.

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.
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> . . .
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> (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).

To establish 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 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). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* ORD 452 at 4.

The city states it reasonably anticipated litigation when it received the request for information because the requestor threatened to sue the city. However, upon review, we find the city has not demonstrated any party had taken concrete steps toward filing litigation when the city received the request for information. Thus, we conclude the city has failed to demonstrate it reasonably anticipated litigation when it received the request for information. Therefore, the city may not withhold the information at issue under section 552.103(a) of the Government Code.

Section 552.108(a)(1) of the Government Code excepts from disclosure information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime if release of the information would interfere with the detection, investigation, or prosecution of crime. Gov't Code § 552.108(a)(1). Generally, a governmental body claiming section 552.108(a)(1) must explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), 552.301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). However, section 552.108 is generally not applicable to an internal administrative investigation involving a law enforcement officer that did not result in a criminal investigation or prosecution. *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no pet.); Open Records Decision No. 562 at 10 (1990); *Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. App.—El Paso 1992, writ denied) (statutory predecessor not applicable to internal investigation that did not result in criminal investigation or prosecution); Open Records Decision No. 350 at 3-4 (1982). The city states the information at issue pertains to an open investigation initiated by complaints submitted by the requestor. However, we note the information at issue relates to an internal administrative investigation of complaints against an officer of the city's police department and the city has not explained how this information is related to any pending criminal investigation or prosecution. Additionally, the city has not provided any arguments explaining how and why release of this information would interfere with the detection, investigation, or prosecution of crime. Consequently, we find the city has failed to show the applicability of section 552.108(a)(1) of the Government Code for the information at issue, and the city may not withhold it on that ground.

Section 552.108(a)(2) of the Government Code excepts from disclosure information concerning an investigation that concluded in a result other than conviction or deferred adjudication. Gov't Code § 552.108(a)(2). A governmental body claiming section 552.108(a)(2) must demonstrate the information at issue relates to a criminal investigation that has concluded in a final result other than conviction or deferred adjudication. *See id.* §§ 552.108(a)(2), .301(e)(1)(A). The city states the information in Exhibit C pertains to a case that concluded in a result other than conviction or deferred adjudication. Therefore, we agree section 552.108(a)(2) is applicable to this information.

Thus, we find the city may withhold the information in Exhibit C under section 552.108(a)(2) of the Government Code.

In summary, the city may generally withhold the information in Exhibit A under section 552.107(1) of the Government Code. However, to the extent the city maintains the non-privileged e-mails, which we have marked, separate and apart from the otherwise privileged e-mail strings in which they appear, the city may not withhold the non-privileged e-mails under section 552.107(1) of the Government Code and must release them to the requestor. The city may withhold the information in Exhibit C under section 552.108(a)(2) of the Government Code.

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,

Cristian Rosas-Grillet
Assistant Attorney General
Open Records Division

CRG/bw

Ref: ID# 632151

Enc. Submitted documents

c: Requestor
(w/o enclosures)