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ATTORNEY GENERAL OF TEXAS

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OR2017-20936

Dear Mr. Allen:

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# 675075.

Port Freeport and the Board of Pilot Commissioners for Port Freeport (collectively, the "board"), which you represent, received a request for twelve categories of information pertaining to pilotage fees and services. The board represents it does not have some of the requested information.¹ The board claims the submitted information is exempted from disclosure under sections 552.103 and 552.107 of the Government Code.² We have considered the claimed exceptions and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

¹The Act does not require a governmental body to disclose information that did not exist when the request for information was received. *See generally Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed).

²Although we understand the board to raise sections 552.108 and 552.111 of the Government Code and Texas Rule of Civil Procedure 192.5, it has not submitted arguments explaining how the submitted information is exempted from release on any of these grounds. Therefore, we presume the board no longer asserts these grounds to withhold the information at issue. *See* Gov't Code §§ 552.301, .302. The board also raises section 552.022 of the Government Code; however, this section is not an exception to disclosure under the Act. In addition, although the board also raises 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* Open Records Decision Nos. 677 (2002), 676 at 6 (2002).

Initially, we note some of the submitted information is not responsive to the request for information because it was created after the board received the request. This ruling does not address the public availability of any information that is not responsive to the request, and the board is not required to release this information in response to this request.

We also note the submitted information contains notices, agendas, and minutes from public meetings. The agendas 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 §§ 551.041 (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). 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 board must release the submitted notices, agendas, and minutes from public meetings pursuant to section 551.022 of the Government Code.

We must next address the requestor's contention that the board did not comply with the procedural requirements of the Act. Pursuant to section 552.301(d) of the Government Code, a governmental body must provide a requestor with (1) a written statement the governmental body wishes to withhold the requested information and has asked for a decision from the attorney general, and (2) a copy of the governmental body's written communication to the attorney general within ten business days of receiving the request for information. Gov't Code § 552.301(d). Section 552.301(e-1) of the Government Code requires a governmental body that submits written comments to the attorney general under section (e)(1)(A) to send a copy of those comments to the person who requested the information from the governmental body within fifteen business days of receiving the request for information. *Id.* § 552.301(e-1). Upon review, we find the board's brief to this office, in which the board requests a decision from this office and provides arguments in support of its claimed exceptions to disclosure, was timely submitted, and the requestor acknowledges he received a copy of this brief. Accordingly, we conclude the board complied with the requirements of subsections 552.301(d) and 552.301(e-1) of the Government Code. Therefore, we must address the board's arguments to withhold the information at issue under the Act.

Nevertheless, we note the board may have previously released to the public some of the responsive information that it seeks to withhold under section 552.103. Section 552.007 of the Government Code provides if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law. *See id.* § 552.007; Open Records Decision Nos. 518 at 3 (1989), 400 at 2 (1983). Section 552.103 of the Government Code is discretionary and does 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 No. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Thus, to the extent the information responsive to the instant request was previously released

to the public, the board may not now withhold the information under section 552.103 of the Government Code. To the extent the information responsive to the instant request was not previously released, we will address the board's arguments to withhold it.

Section 552.103 of the Government Code provides, in 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.

Id. § 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). In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party threatened to sue on several occasions and hired an attorney. *See* Open Records Decision No. 288 at 2 (1981). 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 requestor is a representative of the Brazos Pilots Association (the "BPA"). In accordance with subchapter D of chapter 68 of the Transportation Code, the board establishes the pilotage rates for each branch pilot member of the BPA. *See* Transp. Code § 68.062. Pursuant to section 68.063, a pilot may apply to the board to change the pilotage rate. *See id.* § 68.063. If a person who appears to have a legitimate interest in the pilotage rate change application objects to that application, the board will conduct a hearing. *See id.* § 68.064. A party who is aggrieved by the ultimate order of the board related to the rate-change application "may, after exhausting all administrative remedies, appeal the order to a court." *Id.* § 68.068(b). The board informs us it "is in the process of overseeing a contested administrative hearing, wherein the BPA is seeking a rate increase, which is being objected to by several parties." The board represents it reasonably anticipated litigation when it received the request for information because a party to this contested hearing may appeal the board's ultimate order to a court. *See id.* Upon review we find the board has failed to establish a party to the contested hearing at issue had taken any objective step toward filing litigation against the board when it received the request. Accordingly, we conclude the board has failed to establish by concrete evidence it reasonably anticipated litigation when it received the request for information. *See* Gov't Code § 552.103(c). Therefore, the board 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 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 board represents the information it has marked under section 552.107(1) consists of confidential communications between attorneys for and representatives of the board that were made in furtherance of the rendition of professional legal services. The board also asserts these communications were intended to be confidential and their confidentiality has been maintained. We note some of the information at issue consists of a communication with individuals whom the board has not identified or otherwise established are privileged parties. Thus, we conclude the board has failed to establish this information is excepted from disclosure under section 552.107(1). Nevertheless, we find the board has established the remaining information at issue constitutes privileged attorney-client communications. Consequently, the board may generally withhold this information, which we have marked, under section 552.107(1) of the Government Code. However, we note some of the e-mail strings at issue include e-mails and attachments received from or sent to non-privileged parties. Furthermore, if these e-mails and attachments, which we have marked, are removed from the e-mail strings and stand alone, they are responsive to the request for information. Therefore, if the board maintains the non-privileged e-mails and attachments we have marked separate and apart from the otherwise privileged e-mail strings in which they appear, then the board may not withhold this information under section 552.107(1) of the Government Code.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.”³ Gov’t Code § 552.101. Section 552.101 encompasses the doctrine of common-law privacy. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Under the common-law right of privacy, an individual has a right to be free from the publicizing of private affairs in which the public has no legitimate concern. *Id.* at 682. The Third Court of Appeals has concluded public citizens’ dates of birth are protected by common-law privacy pursuant to section 552.101. *See Paxton v. City of Dallas*, No. 03-13-00546-CV, 2015 WL 3394061, at *3 (Tex. App.—Austin May 22, 2015, pet. denied) (mem. op.). Thus, the board must withhold the date of birth we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.

The remaining information contains cellular telephone numbers of members of the board. Section 552.117(a)(1) of the Government Code excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who

³The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body. *See Open Records Decision Nos. 481 at 2 (1987), 480 at 5 (1987).*

request that this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). Section 552.117 also encompasses a personal cellular telephone number, provided a governmental body does not pay for the cellular telephone service. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Therefore, the board must withhold the cellular telephone numbers of board members in the remaining information under section 552.117(a)(1) if the board members at issue made timely elections to keep the information confidential and if the cellular telephone services were not provided at public expense.

Section 552.136(b) of the Government Code provides, "[n]otwithstanding any other provision of this chapter, 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). This office has determined an insurance policy number is an access device number for purposes of section 552.136. Open Records Decision No. 684 at 9 (2009). Thus, the board must withhold the insurance policy number we have marked under section 552.136 of the Government Code.

The remaining information contains e-mail addresses. 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). *Id.* § 552.137(a)-(c). The e-mail addresses at issue do not appear to be of a type specifically excluded by section 552.137(c), and the board does not inform us a member of the public has affirmatively consented to their release. Nevertheless, section 552.137 does not apply to the private e-mail addresses of government officials who use their private e-mail addresses to conduct official government business. *Austin Bulldog v. Leffingwell*, 490 S.W.3d 240 (Tex. App.— Austin 2016, no pet.). We are unable to determine whether the e-mail addresses at issue, which are located within e-mails communicating official business of the board, belong to a board official or employee. Thus, we rule conditionally. To the extent the e-mail addresses in the remaining information are the personal e-mail addresses of a board official or employee, then these e-mail addresses are not subject to section 552.137 and the board may not withhold them on that basis. *See id.* To the extent the e-mail addresses at issue are not the personal e-mail addresses of a board official or employee, then these e-mail addresses are subject to section 552.137 and the board must withhold them on that ground.

We note some of the materials at issue may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records

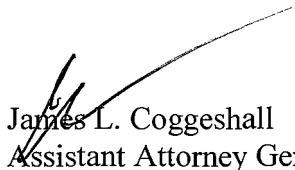
that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; see Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

To conclude, the board must release the submitted notices, agendas, and minutes from public meetings pursuant to section 551.022 of the Government Code. The board may withhold the information we have marked under section 552.107(1) of the Government Code; however, the board must release the non-privileged e-mails and attachments we have marked if the board maintains them separate and apart from the otherwise privileged e-mail strings in which they appear. The board must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy and under section 552.136 of the Government Code. The board must withhold the cellular telephone numbers of board members in the remaining information under section 552.117(a)(1) if the members at issue made timely elections to keep the information confidential and if the cellular telephone services were not provided at public expense. To the extent the e-mail addresses in the remaining information are not the personal e-mail addresses of a board official or employee, then these e-mail addresses are subject to section 552.137 and the board must withhold them on that ground. The board must release the remaining responsive information, but may only release any copyrighted information in accordance with copyright law.

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,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/bw

Ref: ID# 675075

Enc. Submitted documents

c: Requestor
(w/o enclosures)