



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

January 17, 2018

Mr. Cristian Rosas-Grillet
Assistant City Attorney
City of Laredo
P.O. Box 579
Laredo, Texas 78042-0579

OR2018-01090

Dear Mr. Rosas-Grillet:

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# 691715 (PIR Nos. W008453-110117 and W008545-112017).

The City of Laredo (the "city") received two requests from different requestors for information related to specified sales. You state you have released some information to the requestor. You state the city will withhold certain information under section 552.136(c) of the Government Code.¹ You claim the submitted information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code.² Additionally, you state, and provide documentation showing, you notified Consolidated Towne East Holding, Ltd. ("CTEH") and Gardere Wynne Sewell LLP ("Gardere") of the second request for information and of their right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental

¹Section 552.136 of the Government Code permits a governmental body to withhold the information described in section 552.136(b) without the necessity of seeking a decision from this office. *See* Gov't Code § 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). *See id.* § 552.136(d), (e).

²We note that, although you raise sections 552.101 and 552.111 of the Government Code, you make no arguments to support these exceptions. Therefore, we assume you have withdrawn your claim these sections apply to the submitted information. *See* Gov't Code §§ 552.301, .302.

body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received comments from Gardere, which represents CTEH. We have considered the submitted arguments and reviewed the submitted representative sample of information.³ We have also received comments from the first requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note Gardere argues against disclosure of information not submitted to this office for review. This ruling does not address information beyond what the city has submitted to us for our review. *See id.* § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit a copy of specific information requested). Accordingly, this ruling is limited to the information the city submitted as responsive to the request for information.

Next, we address the first requestor's contention the city failed to comply with section 552.301(e-1) of the Government Code in requesting a ruling from this office. Pursuant to section 552.301(e-1), a governmental body that submits written comments to the attorney general under section 552.301(e)(1)(A) must, within fifteen business days of receiving the request for information, send a copy of those comments to the person who requested the information from the governmental body. *See id.* § 552.301(e-1). The first requestor claims the city failed to provide her with sufficient information regarding its claim under 552.107 of the Government Code. However, upon review, we find the requestor failed to demonstrate the city did not comply with section 552.301(e-1) with regard to its argument in support of section 552.107 of the Government Code. Therefore, we will address your arguments under this exception.

Next, we note some of the submitted 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:

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

³We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

Id. § 552.022(a)(3). The submitted information includes information subject to section 552.022(a)(3) of the Government Code, which we have marked. Thus, the information at issue 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(1) of the Government Code. However, sections 552.103 and 552.107(1) are discretionary 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 section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, the city may not withhold any portion of the information subject to section 552.022 of the Government Code, which we have marked, under section 552.103 or section 552.107(1). 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 claim of the attorney-client privilege under rule 503 of the Texas Rules of Evidence for the information subject to section 552.022 of the Government Code. We will also address the submitted arguments for the information not subject to section 552.022 of the Government Code.

Texas Rule of Evidence 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 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. 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 assert the information subject to section 552.022 of the Government Code you have marked, which is attached to an e-mail communication, is a privileged attorney-client communication involving city attorneys, employees, and officials. You state the communication was made for the purpose of facilitating the rendition of professional legal services to the city and this communication has remained confidential. Based on this representation and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Therefore, the city may generally withhold the attachments at issue under rule 503 of the Texas Rules of Evidence. However, we note one of the otherwise privileged attachments was received from or sent to a non-privileged party. Furthermore, if the attachment received from or sent to the non-privileged party is removed from the otherwise privileged e-mail to which it is attached and stands alone, it is responsive to the requests for information. Therefore, if the city maintains the non-privileged attachment, which we have marked, separate and apart from the otherwise privileged e-mail to which it is attached, then it may not withhold the non-privileged attachment under rule 503.

Next, we address your argument under section 552.107 for the information not subject to section 552.022 of the Government Code. Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *See Gov't Code* § 552.107(1). The elements of the privilege under section 552.107(1) are the same as those discussed above for rule 503 of the Texas Rules of Evidence. 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. 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 state the information you have marked under section 552.107 that is not subject to section 552.022 of the Government Code consists of communications involving city attorneys, employees, and officials. You state the communications were made for the purpose of facilitating the rendition of professional legal services to the city and these communications have remained confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the city may withhold the information you have marked that is not subject to section 552.022 under section 552.107(1) of the Government Code.⁴

You assert the remaining information is subject to section 552.103 of the Government Code. Section 552.103 of the Government Code provides, in 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 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 the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing (1) litigation was 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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

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." *See* Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See 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

⁴As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

governmental body from an attorney for a potential opposing party.⁵ 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). 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. Open Records Decision No. 361 (1983).

You contend the city reasonably anticipated litigation pertaining to the remaining information. You state the information pertains to a dispute regarding the city’s requirement that CTEH apply for voluntary annexation as a condition precedent of receiving living unit equivalents. You state, concurrently with the receipt of the first request, the city received a letter from counsel for CTEH disputing the city’s annexation requirement. You state, and provide documentation demonstrating, the letter at issue requests the city (1) direct the city’s utilities department to complete the approval of CTEH’s re-platting and (2) preserve the documents subject to the instant request. However, upon review, we find you have not demonstrated any party had taken concrete steps toward filing litigation when the city received the instant requests for information. Thus, we conclude you have failed to demonstrate the city reasonably anticipated litigation when it received the requests for information. Therefore, the city may not withhold any portion of the remaining information under section 552.103(a) of the Government Code.

Section 552.104(a) of the Government Code excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104(a). In considering whether a private third party may assert this exception, the supreme court reasoned because section 552.305(a) of the Government Code includes section 552.104 as an example of an exception that involves a third party’s property interest, a private third party may invoke this exception. *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015). The “test under section 552.104 is whether knowing another bidder’s [or competitor’s information] would be an advantage, not whether it would be a decisive advantage.” *Id.* at 841. Gardere states CTEH has competitors. Gardere also states release of the information at issue would provide a competitive advantage to CTECH’s competitors. After review of the information at issue and consideration of the arguments, we find Gardere has established the release of the information it has marked would give advantage to a competitor or bidder.

⁵In addition, this office has concluded 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).

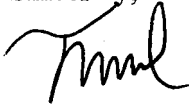
Thus, we conclude the city may withhold the information we have marked under section 552.104(a) of the Government Code.⁶

In summary, the city may withhold the information subject to section 552.022 of the Government Code you have marked under Texas Rule of Evidence 503; however, if the city maintains the non-privileged attachment we have marked separate and apart from the otherwise privileged e-mail to which it is attached, then the city must release the non-privileged attachment. The city may withhold the information you have marked that is not subject to section 552.022 under section 552.107(1) of the Government Code. The city may withhold the information we have marked under section 552.104(a) 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.

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,



Tim Neal
Assistant Attorney General
Open Records Division

TN/tdw

Ref: ID# 691715

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)

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