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ATTORNEY GENERAL OF TEXAS

January 14, 2019

Mr. Leonard V. Schneider
Counsel for the City of Huntsville
Liles Parker, PLLC
2261 Northpark Drive, Suite 445
Kingwood, Texas 77339

OR2019-01062

Dear Mr. Schneider:

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# 745717.

The City of Huntsville (the "city"), which you represent, received a request for eight categories of information pertaining to sewage backup during a period of time, including communications between city employees and specified entities pertaining to a specified incident.¹ You state the city will release some information to the requestor. You claim some of the submitted information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted representative sample of information.³

¹We note the city received clarification of one of the categories of information requested. See Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); *City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date request is clarified or narrowed). As you have not submitted a copy of the clarified request for information, we take our description from your brief.

²Although you also raise sections 552.001 and 552.007 of the Government Code, we note these sections are not exceptions to disclosure under the Act. See Gov't Code §§ 552.001, .007.

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.

Initially, we note the submitted documents contain information that is subject to section 552.022 of the Government Code. Section 552.022 provides, in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

...

(18) a settlement agreement to which a governmental body is a party.

Gov't Code § 552.022(a)(18). The submitted information contains a settlement agreement, to which the city is a party, subject to section 552.022(a)(18) of the Government Code. Although you raise section 552.103 of the Government Code for the information at issue, this section is a discretionary exception to disclosure 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 Gov't Code § 552.103); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). As such, section 552.103 does not expressly prohibit the release of information to the public nor does it make information confidential under the Act. Therefore, the city may not withhold the submitted settlement agreement subject to 552.022 of the Government Code, which we have marked, under section 552.103 of the Government Code. As you raise no further exceptions to disclosure for this information, the city must release it. However, we will consider your arguments for the information not subject to section 552.022.

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 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 section 552.103(a) is applicable 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 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 parts of this test for information to be excepted from disclosure under section 552.103(a). See ORD 551 at 4.

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). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body’s receipt of a letter, prior to its receipt of a request for information, containing a specific threat to sue the governmental body from an attorney for a potential opposing party.⁴ Open Records Decision No. 555 (1990); see Open Records Decision No. 518 at 5 (1989) (litigation must be “realistically contemplated”). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. ORD 452 at 4.

You assert the city anticipated litigation involving the requestor prior to the receipt of the present request for information. You state, and provide documentation demonstrating, the requestor filed a notice of claim against the city pursuant to section 14.06 of the city’s charter, which was subsequently denied. Further, you state, and provide documentation showing, prior to the city’s receipt of the instant request for information, the city received a response from the requestor threatening to file a lawsuit against the city and individual city employees. Based on your representations, our review of the information, and the totality of the circumstances, we find the city reasonably anticipated litigation on the date it received the present request for information. We further find the information at issue relates to the anticipated litigation. Accordingly, the city may withhold the information you indicated not subject to section 552.022 under section 552.103 of the Government Code.⁵

We note the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information related to litigation through the discovery process. See ORD 551 at 4-5. Thus, any information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from

⁴In addition, this office has concluded that 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, 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).

⁵As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

In summary, the city must release the settlement agreement we marked pursuant to section 552.022(a)(18) of the Government Code. The city may withhold the remaining information you indicated under section 552.103 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,



Blake Brennan
Attorney
Open Records Division

BB/eb

Ref: ID# 745717

Enc. Submitted documents

c: Requestor
(w/o enclosures)