



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 18, 2019

Mr. David T. Ritter
Counsel for the City of McKinney
Brown & Hofmeister, L. L. P.
740 East Campbell Road, Suite 800
Richardson, Texas 75081

OR2019-16419

Dear Mr. Ritter:

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# 771391 (City ID# G10767).

The City of McKinney (the "city"), which you represent, received a request for information pertaining to specified properties.¹ You state the city will release some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.108, 552.111, and 552.137 of the Government Code. We

¹You state the city sought and received clarification of the request for information. *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). You further state the city sent the requestor an estimate of charges pursuant to section 552.2615 of the Government Code. *See* Gov't Code § 552.2615. The estimate of charges required the requestor to provide a deposit for payment of anticipated costs under section 552.263 of the Government Code. *See id.* § 552.263(a). You inform us the city received the required deposit on March 27, 2019. *See id.* § 552.263(e) (if governmental body requires deposit or bond for anticipated costs pursuant to section 552.263, request for information is considered to have been received on date governmental body receives bond or deposit).

have considered the exceptions you claim and reviewed the submitted representative sample of information.²

Initially, you state some of the submitted information, which you indicated, is not responsive to the present request. This ruling does not address the public availability of the non-responsive information, and the city need not release it in response to this request.

Next, we note the responsive information includes an attorney fee bill that is subject to section 552.022(a)(16) of the Government Code. Section 552.022(a)(16) provides for required public disclosure of “information that is in a bill for attorney’s fees and that is not privileged under the attorney-client privilege” unless the information is expressly confidential under the Act or other law. Gov’t Code § 552.022(a)(16). You seek to withhold this information under section 552.107 of the Government Code. However, this section is discretionary and does not make information confidential under the Act. *See Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under Gov’t Code § 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions).* As such, the city may not withhold any portion of the submitted fee bill, which we marked, under section 552.107 of the Government Code. However, the Texas Supreme Court has held 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 assertion of the attorney-client privilege under rule 503 of the Texas Rules of Evidence for the submitted attorney fee bill. Further, we will address your argument under section 552.107 of the Government Code for the information not subject to section 552.022(a)(16) of the Government Code.

Section 552.108(a) of the Government Code excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) 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), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state the information you marked relates to an ongoing criminal investigation and prosecution, and release of that information would interfere with the investigation and prosecution of the case. Based upon this representation, we conclude the release of the information you marked would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th

²We assume that 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 that those records contain substantially different types of information than that submitted to this office.

Dist.] 1975) (court delineates law enforcement interests that are present in active cases), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Thus, section 552.108(a)(1) is applicable to the information you marked. Therefore, the city may withhold the information you marked under section 552.108(a)(1) of the Government Code.³

Section 552.103 of the Government Code provides 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.

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).

You state two ordinance violations were pending in the McKinney Municipal Court when the city received the instant request for information. You state the information you marked is related to the pending lawsuits. Based on your representations, the submitted documentation, and our review of the submitted information, we find litigation was pending when the city received this request for information, and the information you marked is related

³As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

to the pending litigation for the purposes of section 552.103. Therefore, the city may withhold the information you marked under section 552.103(a) of the Government Code.⁴

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing parties in the pending litigation is not excepted from 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. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Section 552.101 of the Government Code excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This exception encompasses the informer’s privilege, which has long been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). The informer’s privilege protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided the subject of the information does not already know the informer’s identity. *See* Open Records Decision No. 208 at 1-2 (1978). The informer’s privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to “administrative officials having a duty of inspection or of law enforcement within their particular spheres.” Open Records Decision No. 279 at 1-2 (1981) (citing 8 John H. Wigmore, *Evidence in Trials at Common Law*, § 2374, at 767 (J. McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. *See* Open Records Decision Nos. 582 at 2 (1990), 515 at 4 (1988).

You state the information you marked reveals the identities of complainants who reported possible violations of state law and city ordinances that carry criminal penalties to the city’s police and code enforcement departments, which are both authorized to enforce the laws and ordinances at issue. There is no indication the subjects of the complaints know the complainants’ identities. Based on your representations and our review, we conclude the information you marked identifies the complainants; thus, the city may withhold the information you marked under section 552.101 of the Government Code in conjunction with the common-law informer’s privilege.⁵

⁴As we are able to make this determination, we need not address your remaining arguments against the disclosure of this information.

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

Texas Rule of Evidence 503 enacts the attorney-client privilege. Rule 503(b)(1) provides the following:

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 not intended to be disclosed to third persons other than those to whom disclosure is made to further the rendition of professional legal services to the client or reasonably necessary to transmit 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. *See* ORD 676. Upon a demonstration of all three factors, the entire communication is confidential under rule 503 provided the client has not waived the privilege or the communication 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 submitted attorney fee bill must be withheld in its entirety under rule 503. However, section 552.022(a)(16) of the Government Code provides information "that is *in* a bill for attorney's fees" is not excepted from required disclosure unless it is confidential

under other law or privileged under the attorney-client privilege. *See* Gov't Code § 552.022(a)(16) (emphasis added). This provision, by its express language, does not permit the entirety of an attorney fee bill to be withheld. *See also* Open Records Decision Nos. 676 (attorney fee bill cannot be withheld in entirety on basis it contains or is attorney-client communication pursuant to language in section 552.022(a)(16)), 589 (1991) (information in attorney fee bill excepted only to extent information reveals client confidences or attorney's legal advice). Thus, the city may not withhold the entirety of the submitted fee bill under Texas Rule of Evidence 503.

You assert some of the information subject to section 552.022(a)(16) consists of privileged attorney-client communications between attorneys for the city, city employees, and city officials made for the purpose of rendering professional legal services to the city. You state these communications were intended to be and have remained confidential. Based upon your representations and our review, we find you established some of the information at issue, which we marked, constitutes attorney-client communications under rule 503. Accordingly, the city may withhold the information we marked under rule 503 of the Texas Rules of Evidence. However, we find you failed to demonstrate the remaining information at issue consists of privileged attorney-client communications. Therefore, the city may not withhold any of the remaining information under rule 503 of the Texas Rules of Evidence.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. 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. 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*, 922 S.W.2d at 923.

You state the information you marked consists of communications between an attorney for the city, city employees, and city officials made for the purpose of providing legal services to the city. You state the communications were intended to be and have remained confidential. Based on your representations and our review, we find the information at issue consists of privileged attorney-client communications. Thus, the city may withhold the information you marked that is not subject to section 552.022 under section 552.107(1) of the Government Code.

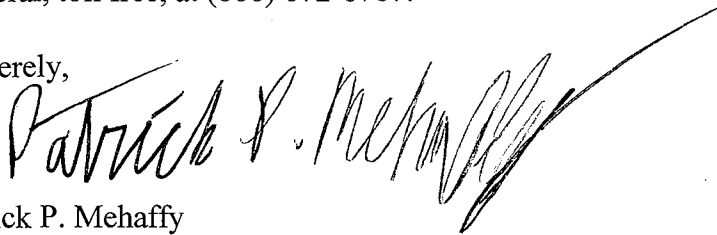
In summary, the city may withhold the information you marked under section 552.108(a)(1) of the Government Code. The city may withhold the information you marked under section 552.103(a) of the Government Code. The city may withhold the information you marked under section 552.101 in conjunction with the common-law informer's privilege. The city may withhold the information we marked under Texas Rule of Evidence 503. The city may withhold the information you marked that is not subject to section 552.022(a)(16) of the

Government Code under section 552.107 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,



Patrick P. Mehaffy
Assistant Attorney General
Open Records Division

PPM/be

Ref: ID# 771391

Enc. Submitted documents

c: Requestor
(w/o enclosures)