



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

March 3, 2020

Ms. Caroline A. Kelley  
Attorney for the City of Bastrop  
Russell Rodriguez Hyde Bullock, LLP  
1633 Williams Drive, Building 2, Suite 200  
Georgetown, Texas 78628

OR2020-06560

Dear Ms. Kelley:

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# 814260 (Ref. No. BAS-PIR-WHITE).

The City of Bastrop (the "city"), which you represent, received two requests from the same requestor for 12 categories of information pertaining to a specified project. You claim the submitted information is excepted from disclosure under sections 552.103, 552.106, 552.107, 552.111, 552.136, and 552.137 of the Government Code and privileged under Federal Rule of Civil Procedure 26 and Texas Rule of Civil Procedure 192.5.<sup>1</sup> You also state release of the submitted information may implicate the proprietary interests of Forestar (USA) Real Estate Group, Inc., and TF Hunters Crossing, LP. Accordingly, you state, and provide documentation showing, you notified these interested third parties of the 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 body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have considered the submitted arguments and reviewed the submitted representative sample of information.<sup>2</sup> We have also received and considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that interested

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<sup>1</sup> Although you also raise 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 Record Decision Nos. 677 (2002), 676 at 1-2 (2002).

<sup>2</sup> We 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.

party may submit written comments regarding why information should or should not be released).

Initially, we must address the requestor's assertion the city failed to comply with section 552.301 of the Government Code in requesting this decision. Section 552.301 of the Government Code describes the procedural obligations placed on a governmental body that receives a written request for information it wishes to withhold. Pursuant to section 552.301(b), the governmental body must ask for the attorney general's decision and state the exceptions that apply within ten business days after receiving the request. *See id.* § 552.301(a), (b). You state, and provide documentation showing, the city received the first request for information on November 18, 2019. You state, and provide documentation showing, the city sought clarification of the information requested on December 4, 2019, and received a response from the requestor on December 5, 2019. *See Gov't Code* § 552.222 (providing 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); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed). Thus, December 5, 2019, is the date on which the city is deemed to have received the first request. Accordingly, the city's ten-business-day deadline for requesting a ruling from this office was December 19, 2019. The envelope in which the city provided the information required by section 552.301(b) was postmarked December 18, 2019. *See id.* § 552.301(a)(1) (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Therefore, we find the city complied with the procedural requirements of section 552.301 of the Government Code in requesting this decision.

Next, we address the requestor's assertion the city failed to comply with section 552.221(d) of the Government Code. *See id.* § 552.221(d) (providing that if officer of public information cannot produce information for inspection or duplication within 10 business days after date information is requested, the officer shall certify that fact in writing to requestor and set date and hour within reasonable time when information will be available for inspection or duplication). We note that while section 552.302 provides failure to comply with section 552.301 results in the presumption that the requested information is subject to required public disclosure and must be released, the Act contains no comparable provision for a violation of section 552.221(d). *See id.* § 552.302. Accordingly, we will consider the city's arguments against disclosure of the submitted information.

The submitted information contains agendas of public meetings and the minutes from those meetings. Notices of a governmental body's public meetings and the minutes from public meetings are specifically made public under provisions of the Open Meetings Act, chapter 551 of the Government Code. *See id.* §§ 551.022 (minutes of open meeting are public records and shall be available for public inspection and copying upon request), .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). As a general rule, 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 submitted public meeting agendas and minutes must be released pursuant to sections 551.022 and 552.041 of the Government Code.

We further note the remaining information contains copies of city ordinances. As ordinances are binding on members of the public, they are matters of public record and may not be withheld from disclosure under the Act. *See* Open Records Decision Nos. 551 at 2 3 (1990) (laws or ordinances are open records), 221 at 1 (1979) (official records of governmental body's public proceedings are among most open of records). Therefore, the submitted ordinances must be released.

Next, we note portions of the remaining information are 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:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

...

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

...

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

Gov't Code § 552.022(a)(1), (3), (18). Some of the remaining information, which we have marked, consists of a completed report subject to section 552.022(a)(1). The district must release the completed report pursuant to section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or expressly made confidential under the Act or other law. *See id.* § 552.022(a)(1). The remaining information also includes information in a contract relating to the expenditure of funds by a governmental body subject to section 552.022(a)(3) and a settlement agreement that is subject to section 552.022(a)(18). The information subject to sections 552.022(a)(3) and 552.022(a)(18), which we have marked, must be released unless it is made confidential under the Act or other law. *See id.* § 552.022(a)(3), (18). Although you raise section 552.103 of the Government Code for the entirety of the submitted information, 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); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, none of the information subject to sections 552.022, which we have marked, may be withheld under section 552.103. However, the Texas Supreme Court has held the Texas Rules of Civil Procedure are “other law” that make information expressly confidential for the purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will consider your argument under Texas Rules of Civil Procedure 192.5 for the information you have marked. Additionally, because section 552.136 of the Government Code makes information confidential under the Act, we will consider your argument under this section for the information subject to section 552.022. We will also consider your arguments for the information not subject to section 552.022.

Texas Rule of Civil Procedure 192.5 encompasses the attorney work product privilege. Rule 192.5 defines work product as

- (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or
- (2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5(a). A governmental body seeking to withhold information under this exception bears the burden of demonstrating the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. *Id.* 192.5; ORD 677 at 6-8. In order for this office to conclude the information was made or developed in anticipation of litigation, we must be satisfied that

- a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

*Nat'l Tank Co. v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A “substantial chance” of litigation does not mean a statistical probability, but rather “that litigation is more than merely an abstract possibility or unwarranted fear.” *Id.* at 204; ORD 677 at 7.

You assert some of the information subject to section 552.022 constitutes attorney work product protected by rule 192.5 of the Texas Rules of Civil Procedure. You state the information at issue was prepared in anticipation of litigation. You further indicate the information at issue reflects attorneys' and attorney's representatives' mental impressions,

opinions, conclusion, or legal theories. Therefore, the city may withhold the information we have marked under rule 192.5 of the Texas Rules of Civil Procedure.

Section 552.136(b) of the Government Code provides, “[n]otwithstanding any other provision of [the Act], 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); *see id.* § 552.136(a) (defining “access device”). Accordingly, the city must withhold the information we have marked under section 552.136 of the Government Code. However, we find you have not demonstrated any of the remaining information at issue consists of a credit card, debit card, or charge card number, or is an access device number used to obtain money, goods, services, or any item of value, or used to initiate the transfer of funds. *See id.* §§ 552.136(a), .301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies). Therefore, we find you have failed to demonstrate the applicability of section 552.136 of the Government Code to the remaining information you have marked, and the city may not withhold it on this ground.

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).

The city states, and provides documentation showing, a lawsuit styled *Smith et al v. The City of Bastrop et al*, Civil Action No. 1:19-cv-01054, was pending against the city in the United States District Court for the Western District of Texas, Austin Division, when it received the instant requests for information. You state the information at issue is related

to the pending lawsuit. Based on your representations, the submitted documentation, and our review of the remaining information, we find litigation was pending when the city received this request for information, and the information at issue is related to the pending litigation for the purposes of section 552.103. Therefore, the city may withhold the information not subject to section 552.022 of the Government Code under section 552.103(a) of the Government Code.<sup>3</sup>

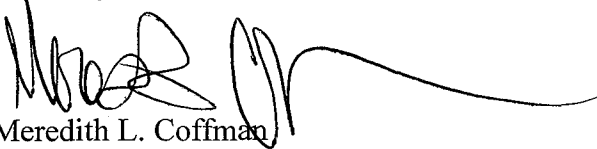
Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided 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).

In summary, the submitted public meeting agendas and minutes must be released pursuant to sections 551.022 and 552.041 of the Government Code. The submitted ordinances must also be released. The city may withhold the information we have marked under rule 192.5 of the Texas Rules of Civil Procedure. The city must withhold the information we have marked under section 552.136 of the Government Code. The city may withhold the information not subject to section 552.022 of the Government Code under section 552.103(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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,



Meredith L. Coffman  
Assistant Attorney General  
Open Records Division

MLC/rm

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

Ms. Caroline A. Kelley - Page 7

Ref: ID# 814260

Enc. Submitted documents

c: Requestor  
(w/o enclosures)