



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

February 15, 2022

Mr. Samuel R. Jimison  
Assistant City Attorney  
City of Corpus Christi  
P.O. Box 9277  
Corpus Christi, Texas 78469-9277

OR2022-04448

Dear Mr. Jimison:

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# 930736 (CCPIA #1480).

The City of Corpus Christi (the "city") received a request for eleven categories of information pertaining to a specified lawsuit.<sup>1</sup> You claim the submitted information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>2</sup>

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

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<sup>1</sup> After receiving the request, 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 to requestor to provide a deposit for payment of anticipated costs under section 552.263 of the Government Code. *See id.* § 552.263(a). The city states it received the deposit on November 10, 2021. *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 that governmental body receives deposit or bond).

<sup>2</sup> We 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 that those records contain substantially different types of information than that submitted to this office.

employee of the state or 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 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). See ORD 551.

To establish litigation is reasonably anticipated, a governmental body must provide this office "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 litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. See Open Records Decision No. 555 (1990); see also 518 at 5 (litigation must be "realistically contemplated"). In addition, this office has concluded litigation was reasonable 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, or when an individual threatened to sue on several occasions and hired an attorney. See Open Records Decision Nos. 346 (1982), 288 (1981). 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. See Open Records Decision No. 361 (1983).

You contend the city was a party to a lawsuit styled *Garcia v. Doggett Heavy Machinery Services, L.L.C.*, Cause No. 2017CCV-6099403, in County Court Number 3 of Nueces County, Texas, and that case is still pending. However, you inform us, and submit documentation demonstrating, the claims brought against the city were dismissed with prejudice and the city was released as a party to the lawsuit prior to the receipt of the instant request for information. You do not inform us any party had taken any concrete steps to challenge the order dismissing the city from the suit on the date the city received the request

for information. Accordingly, we find you have failed to demonstrate the city was a party to pending or anticipated litigation at the time of the request. Therefore, the city may not withhold any of the submitted information under section 552.103(a) 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)*. 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. TEX. R. EVID. 503(b)(1). 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.*, 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).

You state the submitted information constitutes communications between attorneys for the city, city employees, and another privileged party that were made for the purpose of facilitating the rendition of professional legal services to the city. You further state the communications at issue were intended to be, and have remained, confidential. Based upon your representations and our review, we find the city has demonstrated the applicability of the attorney-client privilege to some of the information at issue. Accordingly, with the exception of the information we marked for release, the city may withhold the submitted information under section 552.107(1) of the Government Code. We note, however, some of the otherwise privileged e-mail strings include e-mails and attachments received from or sent to non-privileged parties. Furthermore, if the e-mails and attachments received from or sent to the non-privileged parties are removed from the otherwise privileged e-mail

strings in which they appear and stand alone, they are responsive to the request for information. Therefore, if the non-privileged e-mails and attachments, which we marked for release, are maintained by the city separate and apart from the otherwise privileged e-mail strings in which they appear, then the city may not withhold these non-privileged e-mails and attachments under section 552.107(1). Further, upon review, we find you have failed to demonstrate the remaining information we marked for release constitutes communications between privileged parties made in furtherance of the rendition of professional legal services to the city for the purposes of section 552.107(1) of the Government Code. Thus, the city may not withhold the information we marked for release on that basis.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.”<sup>3</sup> Gov’t Code § 552.101. Section 552.101 encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). Upon review, we find some of the information at issue satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the city must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.137 of the Government Code provides, “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act],” unless the owner of the e-mail address has affirmatively consented to its release or the e-mail address is specifically excluded by subsection (c). Gov’t Code § 552.137(a)-(c). Section 552.137 is not applicable to an institutional e-mail address, an Internet website address, the general e-mail address maintained by a governmental entity for one of its officials or employees, or a personal e-mail address belonging to a government employee or official used to conduct official governmental business. *See id.* § 552.137(c); *Austin Bulldog v. Leffingwell*, 490 S.W.3d 240 (Tex. App.—Austin 2016, no pet.) (holding personal e-mail addresses of government officials used to conduct official government business are not e-mail addresses of “members of the public” for purposes of Gov’t Code § 552.137(a)). We further note section 552.137 protects personal privacy and thus, the requestor has a right of access to his own e-mail address under section 552.137(b). Gov’t Code § 552.137(b). Accordingly, with the exception of the e-mail address pertaining to the requestor, to the extent the e-mail addresses within the remaining information belong to members of the public and are not excluded by subsection 552.137(c) of the Government Code, the city must withhold such e-mail addresses under section 552.137 of the Government Code, unless the individuals to

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<sup>3</sup> The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

whom the e-mail addresses belong affirmatively consent to their release. *See id.* However, to the extent an e-mail address within the remaining information is excluded by subsection 552.137(c) or belongs to a city employee or official, the city may not withhold that e-mail address under section 552.137 of the Government Code.

In summary, with the exception of the information we marked for release, the city may withhold the submitted information under section 552.107(1) of the Government Code; however, the city may not withhold the marked non-privileged e-mails and attachments if they are maintained separate and apart from the otherwise privileged e-mails strings in which they appear. The city must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. With the exception of the e-mail address pertaining to the requestor, to the extent the e-mail addresses within the remaining information belong to members of the public and are not excluded by subsection 552.137(c) of the Government Code, the city must withhold such e-mail addresses under section 552.137 of the Government Code, unless the individuals to whom the e-mail addresses belong affirmatively consent to their release. 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,

Kimbell Kesling  
Assistant Attorney General  
Open Records Division

KK/be

Ref: ID# 930736

Enc. Submitted documents

c: Requestor  
(w/o enclosures)