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ATTORNEY GENERAL OF TEXAS

October 18, 2022

Ms. Dionne Barner
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701-2483

OR2022-32017

Dear Ms. Barner:

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# 978491 (ORR# R016037-071822).

The Texas Department of Transportation (the "department") received a request for information pertaining to a specified project from a state time period.¹ You state you have made some information available to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit written comments regarding why information should or should not be released).

Initially, we note some of the submitted information, which we have marked, is not responsive to the present request because it is outside the date range specified by the requestor. This ruling does not address the public availability of the non-responsive

¹ You state the department 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).

information, which we have marked, and the department need not release it in response to this request.²

Next, we note some of the responsive information at issue was the subject of a previous request for a ruling, as a result of which this office issued Open Records Letter No. 2022-31261 (2022). We have no indication the law, facts, or circumstances on which the prior ruling was based have changed. Thus, the department must continue to rely on Open Records Letter No. 2022-31261 as a previous determination and withhold or release the information at issue in accordance with that ruling.³ *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). However, we will consider your arguments for the responsive information not subject to the previous ruling.

Next, we note some of the remaining responsive information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

[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; [.]

Gov't Code § 552.022(a)(1). The information at issue includes a completed report that is subject to section 552.022(a)(1). The department must release the completed report, which we have marked, pursuant to section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or made confidential under the Act or other law. *See id.* The department seeks to withhold the information subject to section 552.022(a)(1) under sections 552.101, 552.103, and 552.107 of the Government Code. However, sections 552.103 and 552.107 are discretionary in nature 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 6 (2002) (attorney-client privilege under section 552.107 may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the department may not withhold the information subject to section 552.022, which we have marked, under section 552.103 or section 552.107 of the Government Code. However, the Texas Supreme Court has held the Texas Rules of Evidence are “other law” that make information expressly confidential for the purposes of section 552.022. *In re*

² As we are able to make this determination, we need not address your arguments against disclosure of this information.

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

City of Georgetown, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will consider your assertion of the attorney-client privilege under Texas Rule of Evidence 503. Additionally, because section 552.101 of the Government Code makes information confidential under the Act, we will consider the applicability of section 552.101 for the information at issue. We will also consider the department's arguments under sections 552.103 and 552.107 for the information not subject to section 552.022.

Section 552.103 of the Government Code provides in relevant part 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 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. *See 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 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. 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 that 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. 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 that litigation is reasonably anticipated. Open Records Decision No. 361

(1983). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. ORD 452 at 4.

This office has long held that for the purposes of section 552.103, “litigation” includes “contested cases” conducted in a quasi-judicial forum. *See* Open Records Decision Nos. 474 (1987), 368 (1983), 336 (1982), 301 (1982). In determining whether an administrative proceeding is conducted in a quasi-judicial forum, some of the factors this office considers are whether the administrative proceeding provides for discovery, evidence to be heard, factual questions to be resolved, the making of a record, and whether the proceeding is an adjudicative forum of first jurisdiction with appellate review of the resulting decision without a re-adjudication of fact questions. *See* Open Records Decision No. 588 (1991).

You assert the department reasonably anticipated litigation when it received the request because, prior to the date of the request, a department contractor alleged the department was in breach of the department’s agreement with this contractor. We note the vendor states it “reserves all rights and defenses” as it relates to this dispute. You state this dispute is anticipated to result in quasi-judicial and judicial dispute resolution procedures, which include referral to the State Office of Administrative Hearings, appeal to the District Court in Travis County, and proceedings before a Disputes Board pursuant to section 201.112 of the Transportation Code. *See* Transp. Code § 201.112 (providing Texas Transportation Commission may establish procedures for the informal resolution of claim arising out of certain types of contracts). Upon review, we conclude, for purposes of section 552.103, you have established the department reasonably anticipated litigation when it received the request for information. We also find you have established the responsive information you marked is related to the anticipated litigation for purposes of section 552.103(a). Therefore, the department may generally withhold the responsive information you marked not subject to section 552.022 of the Government Code under section 552.103 of the Government Code.⁴

We note, however, the opposing party has seen or had access to some of the information at issue. The purpose of section 552.103 of the Government Code is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to the litigation to obtain such information through discovery procedures. *See* ORD 551 at 4 5. Thus, once the opposing party to the anticipated litigation has seen or had access to information that is related to the litigation, there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Accordingly, the department may not withhold the information seen by the opposing party, which we have marked, under section 552.103. However, the department may withhold the remaining information at issue under section 552.103 of the Government Code. We note the applicability of section 552.103 ends once the related litigation concludes. *See* Attorney General Opinion MW 575 (1982); Open Records Decision No. 350 (1982).

Texas Rule of Evidence 503(b)(1) provides as follows:

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

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 state the information subject to section 552.022 of the Government Code is attached to a privileged attorney-client communication between attorneys for the department and department employees and representatives in their capacities as clients. You explain the information was communicated for the purpose of the rendition of legal services to the department and that the communication has remained confidential. Based on these representations and our review, we find you have established the attorney-client privilege is generally applicable to the information subject to section 552.022. However, we note the information at issue consists of an attachment seen by the opposing party, who is not a privileged party. Furthermore, if this attachment is removed from the e-mail to which it is attached and stands alone, it is responsive to the request for information. Therefore, if the

non-privileged attachment subject to section 552.022, which we have marked, is maintained by the department separate and apart from the otherwise privileged e-mail to which it is attached, then the department may not withhold this attachment under rule 503. Conversely, if the non-privileged attachment subject to section 552.022 of the Government Code, which we have marked, does not exist separate and apart from the e-mail to which it is attached, the department may withhold this information under Texas Rule of Evidence 503.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses information protected by other statutes, such as section 418.181 of the Government Code, which was added to chapter 418 of the Government Code as part of the Texas Homeland Security Act. Section 418.181 provides,

Those documents or portions of documents in the possession of a governmental entity are confidential if they identify the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism.

Id. § 418.181. The fact information may generally be related to a governmental body’s security concerns or to a security system does not make the information *per se* confidential under section 418.181. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). Furthermore, the mere recitation by a governmental body of a statute’s key terms is not sufficient to demonstrate the applicability of a claimed provision. As with any confidentiality provision, a governmental body asserting section 418.181 must adequately explain how the responsive information falls within the scope of the statute. *See* Gov’t Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

You argue the information subject to section 552.022 is confidential under section 418.181 of the Government Code. You state the information at issue relates to details of Harbor Bridge (the “bridge”), which carries lanes of US Route 181 and Texas State Highway 35. You argue, and we agree, the bridge is critical infrastructure for purposes of section 418.181. *See generally id.* § 421.001(2) (defining “critical infrastructure” to include “all public or private assets, systems, and functions vital to the security, governance, public health and safety, economy, or morale of the state or the nation”). You state release of the information at issue would reveal vulnerabilities of specific components of the bridge. Based on these representations and our review of the information at issue, we find you have demonstrated the release of some of the information at issue would identify the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism. Thus, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code. However, we find you have not demonstrated the remaining information at issue identifies the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism. Consequently, the department may not withhold any of the remaining information at issue under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code.

Next, we address your argument under section 552.107 of the Government Code for the remaining responsive information not subject to section 552.022. Section 552.107(1) protects information coming within the attorney-client privilege. 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. *See* 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 assert the remaining responsive information not subject to section 552.022 is attached to communications between department employees, attorneys for the department, and other privileged parties that were made for the purpose of providing legal advice to the department. You also assert these communications were made in confidence and have maintained their confidentiality. 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 department may generally withhold the remaining responsive e-mails at issue under section 552.107(1) of the Government Code.⁵ We note, however, some of the e-mail strings at issue include attachments sent to or received from non-privileged parties. Furthermore, if the attachments sent to or received from non-privileged parties are removed from the e-mail strings and stand alone, they are responsive to the request for information. Therefore, if these non-privileged attachments, which we have marked, are maintained by the department separate and apart from the otherwise privileged e-mail strings in which they appear, then the department may not withhold these non-privileged attachments under section 552.107(1) of the Government Code.

In summary, the department must continue to rely on Open Records Letter No. 2022-31261 as a previous determination and withhold or release the information at issue in accordance with that ruling. With the exception of the information seen by the opposing party, which we have marked, the department may withhold the remaining responsive information you marked under section 552.103 of the Government Code. The department may generally withhold the information subject to section 552.022 under Texas Rule of Evidence 503; however, if the non-privileged attachment subject to section 552.022 of the Government Code, which we have marked, is maintained by the department separate and apart from the otherwise privileged e-mail to which it is attached, then the department may not withhold this attachment under Texas Rule of Evidence 503. In that instance, the department must generally release the non-privileged attachment pursuant to section 552.022 of the Government Code, but must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code. The department may generally withhold the remaining responsive e-mails you marked under section 552.107(1) of the Government Code; however, if the non-privileged attachments we have marked are maintained by the department separate and apart from the

⁵ As our ruling on this information is dispositive, we need not address your remaining arguments against its disclosure.

otherwise privileged e-mail strings in which they appear, then the department may not withhold these non-privileged attachments under section 552.107(1) of the Government Code. The department must release the remaining responsive 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,

Erin Groff
Attorney
Open Records Division

EMG/

Ref: ID# 978491

Enc. Submitted documents

c: Requestor
(w/o enclosures)