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OR2022-36022

Dear Ms. Stanford:

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# 981608.

The Comal County Water Control and Improvement District No. 6 (the "district"), which you represent, received a request for eight categories of information pertaining to a specified project. The district claims the submitted information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code and privileged under Texas Rule of Evidence 503. We have considered the submitted arguments and reviewed the submitted information.

Initially, section 552.301(e)(1)(D) of the Government Code states a governmental body asking for an attorney general decision must, within fifteen business days of receiving a request, provide the attorney general with "a copy of the specific information requested, *or submit representative samples of information if a voluminous amount of information was requested.*" Gov't Code § 552.301(e)(1)(D) (emphasis added). Although the district states it has submitted a representative sample of the requested information, we note the district has submitted a voluminous amount of information consisting of over 3,500 pages rather than a representative sample. We have identified and reviewed a representative sample of the voluminous information submitted.¹

¹ To the extent the district identifies confidential information subject to a provision not addressed in this ruling, the district should contact the Open Government Hotline.

Next, we note some of the submitted information, which we have marked, is not responsive to the instant request for information because it was created after the date the district received the instant request for information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983). This ruling does not address the public availability of any information that is not responsive to the request and the district is not required to release such information in response to this request.

Next, we must address the district's procedural obligations under the Act. 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 Gov't Code* § 552.301(a), (b). The district states, and submits documentation demonstrating, it received the request for information on September 1, 2022. We understand the district was closed on September 5, 2022. This office does not count the date the request was received or holidays for the purpose of calculating a governmental body's deadlines under the Act. Thus, the district's ten-business-day deadline was September 16, 2022. While the district raised section 552.103 of the Government Code within the ten-business-day time period as required by section 552.301(b), it did not raise sections 552.107 and 552.111 until September 13, 2022, after that deadline had passed. *See id.* §§ 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail), .309(a) (requirement to submit information within specified time period under the Act is met in timely fashion if it is submitted through attorney general's designated electronic filing system within that period). Consequently, we find the district failed to comply with section 552.301(b) with respect to its claims under sections 552.107 and 552.111.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless there is a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ). We will consider the district's timely raised claim under section 552.103 of the Government Code for the responsive information. Further, because section 552.107 can provide a compelling reason to overcome the presumption of openness, we will address the district's argument under this section for the responsive information. However, we find the district has failed to establish a compelling reason to address its remaining claimed exception.

Next, we note the responsive information includes minutes and agendas of public meetings. The minutes and agendas of a governmental body's public meetings are specifically made public under provisions of the Open Meetings Act, chapter 551 of the Government Code. *See Gov't Code* §§ 551.022 (minutes and tape recordings of open meeting are public records and shall be available for public inspection and copying on request to governmental body's chief administrative officer or officer's designee), 041 (governmental body shall

give written notice of date, hour, place, and subject of each meeting). As a general rule, the exceptions to disclosure found in the Act, such as sections 552.103 and 552.107, 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 district must release the minutes and agendas of the public meetings pursuant to section 551.022 of the Government Code.

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:

...

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

Gov't Code § 552.022(a)(3). The remaining responsive information includes information in an account, contract, or voucher relating to the receipt or expenditure of funds by the district that is subject to section 552.022(a)(3). This information must be released unless it is made confidential under the Act or other law. *See id.* The district seeks to withhold the information at issue under sections 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 section 552.103); *see also* Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the district 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 and Texas Rules of Civil Procedure are “other law” within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). We will therefore consider the district’s assertion of the attorney-client privilege under rule 503 of the Texas Rules of Evidence. We will also consider the district’s arguments under section 552.103 and section 552.107 for the remaining responsive information not subject to section 552.022.

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

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 Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

The district asserts the information at issue was communicated between the district's outside counsel, district officials, and other privileged parties, and was made for the purpose of facilitating the rendition of professional legal services to the district. The district states the information was intended to be, and has remained, confidential. Based on these representations and our review, we find the district has demonstrated the applicability of the attorney-client privilege to the some of the information at issue, which we have marked. Accordingly, the district may withhold the information we have marked under Texas Rule of Evidence 503. However, upon review, we note the remaining information at issue has been shared with individuals with whom the district has not demonstrated it shares a privileged relationship. Thus, we find the district has failed to demonstrate the remaining information at issue consists of privileged attorney-client communications for the purposes of Texas Rule of Evidence 503, and the district may not withhold any portion of the remaining responsive information on that basis.

Section 552.107(1) protects information that comes within the attorney-client privilege. The elements of the privilege under section 552.107 are the same as those discussed 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*, 922 S.W.2d at 923.

As noted above, the district states the information at issue was communicated between the district's outside counsel, district officials, and other privileged parties, and was made for the purpose of facilitating the rendition of professional legal services to the district. The district also states the communications were intended to be, and have remained, confidential. Based on these representations and our review, we find the district has demonstrated the applicability of the attorney-client privilege to some of the information at issue. Thus, the district may generally withhold the information we have marked under section 552.107(1) of the Government Code.² We note, however, one of the e-mail strings at issue includes an e-mail sent to non-privileged parties. Furthermore, if the e-mail sent to the non-privileged parties is removed from the otherwise privileged e-mail string in which it appears and stands alone, it is responsive to the request for information. Therefore, if the non-privileged e-mail, which we have marked, is maintained by the district separate and apart from the otherwise privileged e-mail string in which it appears, then the district may not withhold the non-privileged e-mail under section 552.107(1) of the Government Code. Further, we find the remaining information at issue was sent to, or received from, individuals with whom the district has not demonstrated it shares a privileged relationship. Therefore, we find the district has failed to demonstrate this information constitutes privileged attorney-client communications for the purposes of section 552.107(1). Accordingly, the district may not withhold any portion of the remaining responsive information under section 552.107 of the Government Code.

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.

² As our ruling is dispositive, we need not address the remaining argument against disclosure of this 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* ORD 452 at 4. 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. ORD 555; *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.

The district asserts it anticipated litigation prior to the date it received the instant request because the district is involved in a payment and contract dispute involving certain contractors relating to the project at issue. Based upon these representations, our review of the information at issue, and the totality of the circumstances, we find the district has established it reasonably anticipated litigation on the date the district received the request for information. The district also states, and we agree, the information at issue is related to the anticipated litigation for purposes of section 552.103. Accordingly, the district may withhold the information we have marked under section 552.103 of the Government Code.

However, we note the opposing parties have seen or had access to some of the remaining 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). Therefore, the district may not withhold any portion of the remaining responsive information, which the opposing parties have seen or had access to, under section 552.103 of the Government Code. We note 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 at 3 (1982).

In summary, the district must release the minutes and agendas of the public meetings pursuant to section 551.022 of the Government Code. The district may withhold the information we have marked under Texas Rule of Evidence 503. The district may generally withhold the information we have marked under section 552.107(1) of the Government Code; however, if the non-privileged e-mail we have marked is maintained by the district separate and apart from the otherwise privileged e-mail string in which it appears, then the district may not withhold the non-privileged e-mail under section 552.107(1) of the Government Code. The district may withhold the information we have marked under section 552.103 of the Government Code. The district 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,

Alexandra C. Burks
Assistant Attorney General
Open Records Division

ACB/mo

Ref: ID# 981608

Enc. Submitted documents

c: Requestor
(w/o enclosures)