



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 29, 1995

Ms. Lan P. Nguyen
Assistant City Attorney
City of Houston
P.O. Box 1562
Houston, Texas 77251-1562

OR95-1612

Dear Ms. Nguyen:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 32451.

The City of Houston (the "city") received several open records requests for documents pertaining to reports of fire code violations at the "Astrodome, Astroarena, Astrohall and any other Astrodomain facilities." You state that the city has released to the requestors much of the requested information. You seek to withhold certain other documents pursuant to sections 552.103(a), 552.107(1), and 552.111 of the Government Code.

You contend the document designated as "Exhibit 3" constitutes a privileged attorney-client communication that comes under the protection of section 552.107(1) of the Government Code. In instances where an attorney represents a governmental entity, the attorney-client privilege protects only an attorney's legal advice and confidential attorney-client communications. Open Records Decision No. 574 (1990). Accordingly, these two classes of information are the only information contained in Exhibit 3 that the city may withhold pursuant to the attorney-client privilege. After reviewing Exhibit 3, this office agrees that all the information you have marked as coming under the attorney-client privilege may be withheld from the public pursuant to section 552.107(1).¹

You contend that the records you have designated as Exhibit 4, all of the remaining documents the city wishes to withhold, are excepted from required public disclosure by section 552.103(a). To secure the protection of section 552.103(a),

¹Because we resolve this aspect of your request under section 552.107(1), we need not address the extent to which section 552.111 would otherwise apply to this document.

a governmental body must demonstrate that the requested information relates to pending or reasonably anticipated litigation to which the governmental body is a party. Open Records Decision No. 588 (1991) at 1. The mere chance of litigation will not trigger section 552.103(a). Open Records Decision No. 452 (1986) at 4 (and authorities cited therein). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.*

You contend section 552.103(a) applies in this instance because

The City, through the Public Integrity Review Group (PIRG), an investigative arm of the Houston Police Department responsible for investigating into allegations of acts of impropriety of City employees in discharge of their official duties, is currently conducting an investigation into complaints made by a City employee regarding dismissals of citations related to ordinance violations at the Astrodome and related Astrodome facilities. The City is of the opinion that an administrative proceeding for disciplinary actions against a City employee resulting from PIRG's investigation is to be considered anticipated litigation within the meaning of section 552.103(a).

As this office observed in Open Records Decision No. 301 (1982) at 1-2,

[t]he Open Records Act does not define "litigation." However, the [statutory predecessor to section 552.103(a)] was designed to protect the interests of the state in adversary proceedings or in negotiations leading to the settlement thereof, and we have no doubt that "litigation" encompasses proceedings conducted in quasi-judicial forums as well as strictly judicial ones. "Litigation" has been defined by the dictionary to include "a controversy involving adverse parties *before an executive governmental agency having quasi-judicial powers and employing quasi-judicial procedures.*" Webster's Third International Dictionary at 1322. See San Antonio Public Service Company v. Long, 72 S.W.2d 696 (Tex. Civ. App.--San Antonio 1934, no writ). See also V.T.C.S. art. 6252-13a, §14 (procedures for contested cases under the Administrative Procedure and Texas Register Act). [Emphasis added.]

In this instance you have not demonstrated that the city's "administrative proceeding for disciplinary actions" against city employees constitutes a hearing before an "executive governmental agency having quasi-judicial powers and employing quasi-judicial procedures." You therefore have not in this regard met your burden in establishing that the contents of Exhibit 4 pertain to "litigation" to which the city would be a party.

You also suggest that because the PIRG's investigation may uncover violations of the Penal Code that the PIRG would refer to the district attorney for prosecution, these records may also pertain to future criminal litigation. As noted above, to invoke the protection of section 552.103(a), there must be a showing of *concrete* evidence that litigation regarding a particular matter is reasonably anticipated. The facts you have presented to this office suggest no such likelihood.² See *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.) (outlining process of criminal justice does not establish likelihood of criminal litigation in connection with particular matter).

Consequently, because you have failed to meet your burden in establishing the threshold issue of whether the requested information pertains to litigation to which the city would be a party, this office need not consider whether the information at issue "relates" to any such litigation. You have raised no other exceptions to required public disclosure with regard to the requested documents. The city therefore must release Exhibit 4 in its entirety.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Loretta R. DeHay
Assistant Attorney General
Open Government Section

LRD/RWP/rho

Ref.: ID# 32451

Enclosures: Submitted documents

cc: Mr. Wayne Dolcefino
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(w/o enclosures)

²We further note that you have provided this office with no additional briefing from the prosecuting attorney as to why the information at issue should be withheld from the public to protect his own litigation interests.

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