



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 17, 1996

Ms. Barbara E. Roberts
City Attorney
City of Galveston
P.O. Box 779
Galveston, Texas 77553-0779

OR96-2415

Dear Ms. Roberts:

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# 37119.

The City of Galveston (the "city") received a request from the Galveston City Manager for a copy of a legal opinion prepared for the city by outside counsel relating to the legality of certain expenditures of public funds. You inform us that, in response to the District Attorney's request, the city has provided a copy of the legal opinion to the District Attorney to determine if any criminal laws have been broken. You assert the opinion is excepted from disclosure to members of the public, including the City Manager, under sections 552.103 and 552.107 of the Government Code.

Initially, we note that the Open Records Act prohibits selective disclosure of information. Gov. Code § 552.007. Thus, once a governmental body voluntarily releases information to the public, it may not withhold the information from other requestors. *See* Open Records Decision No. 400 (1983). However, this office has previously recognized the existence of a public policy in Texas that encourages the free flow of information between governmental agencies and has held that information may be transferred between agencies without such release constituting a release of the information to the public. *See* Open Records Decisions Nos. 567 (1990), 561 (1990). The city's release of the requested information to the District Attorney is an inter-governmental transfer and does not constitute a release to the public for purposes of section 552.007. Thus, we will consider your arguments for withholding the information under sections 552.103 and 552.107.

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the governing body is or may be a party. The city has the burden

of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *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 (1990) at 4. The city must meet both prongs of this test for information to be excepted under section 552.103(a).

Litigation cannot be regarded as "reasonably anticipated" unless there is concrete evidence showing that the claim that litigation may ensue is more than mere conjecture. Open Records Decision Nos. 452 (1986), 331 (1982), 328 (1982). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision Nos. 452 (1986), 350 (1982).

You state that should the City Council terminate the City Manager's employment, the City Manager might bring suit against the city based on the circumstances of such termination. You further assert the potential for litigation exists based on the City Manager's characterization of statements made to the press by the Mayor as "damaging" to the City Manager. Finally, you state the city's private counsel, Mr. Helfand, has been contacted by a local attorney who claims he is representing the City Manager with respect to issues raised in Mr. Helfand's legal opinion.

It is well established that where a requestor has publicly stated on more than one occasion an intent to sue, these threats alone do not trigger section 552.103. Open Records Decision No. 331 (1982). *See also* Open Records Decision No. 351 (1982), Open Records Decision No. 452 (1986). This office has concluded that litigation is reasonably anticipated when an attorney makes a written demand for disputed payments and promises further legal action if they are not forthcoming, and when a requestor hires an attorney who threatens to sue a governmental entity. Open Records Decision Nos. 555 (1990), 551 (1990). However, the fact that an individual has hired an attorney or that a request for information was made by an attorney does not, without more, demonstrate that litigation is reasonably anticipated. Open Records Decision No. 361 (1983) at 2. We conclude the city has not established that litigation is reasonably anticipated in this case, and thus the requested information may not be withheld under section 552.103.¹

We next address your argument under section 552.107. Section 552.107(1) excepts from disclosure communications that reveal client confidences or an attorney's legal opinion or advice. Open Records Decision Nos. 589 (1991) at 1, 574 (1990) at 3, 462 (1987) at 9-11. We agree that the legal opinion from attorney Helfand to the city constitutes an attorney's legal advice for purposes of 552.107. Under Texas law, however, the protections afforded by the attorney-client privilege are

¹In Open Records Decision No. 638 (1996), this office ruled that a governmental body must notify this office of a change in the circumstances of the litigation underlying a section 552.103(a) claim as soon as possible after receiving notice of that change. For example, when a governmental body contends that requested information relates to reasonably anticipated litigation and a lawsuit is later filed, the governmental body must then notify this office as soon as possible that litigation is now pending. As of November 18, 1996, we have received no notice that any of the litigation you anticipated has ensued.

waived by the voluntary disclosure of the information to a third party, unless the disclosure of privileged information is itself privileged. *Jordan v. Court of Appeals for the Fourteenth Supreme Judicial District*, 701 S.W.2d 644, 649 (Tex. 1985); see Tex. R. Civ. Evid. 511; Tex. R. Crim. Evid. 511. Because the city voluntarily disclosed the requested legal opinion to the District Attorney, a third party, we must consider whether this disclosure was itself privileged for purposes of section 552.107.

The protection for the attorney-client privilege under 552.107 extends to "privileged information" under rule 1.05 of the State Bar Rules. See Open Records Decision No. 574 (1990) (construing predecessor provision). Rule 1.05 defines "privileged information" as information of a client protected by the lawyer-client privilege of Rule 503 of the Texas Rules of Civil Evidence, Rule 503 of the Texas Rules of Criminal Evidence, or Rule 501 of the Federal Rules of Evidence. Under the Texas rules, the privilege extends to various combinations of four communicants: the client, the client's representative, the lawyer and the lawyer's representative. You state "Mr. Helfand provides legal advice only to City Council and not to any other City official or employee." Because nothing in the file otherwise indicates the District Attorney is a client of Mr. Helfand, the disclosure of the opinion to the District Attorney does not fall within any of the situations set out in either Texas rule 503, and thus, it was not a privileged disclosure. The city thereby waived the privilege by releasing the opinion to the District Attorney. See Tex. R. Civ. Evid. 511; Tex. R. Crim. Evid. 511. Because the privilege was waived under Texas law, you may not withhold the requested information under 552.107.

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 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/ch

Ref.: ID# 37119

Enclosures: Submitted documents

cc: Mr. Douglas W. Matthews
City Manager - City of Galveston
19 South Shore Drive
Galveston, Texas 77551
(w/o enclosures)