



November 2, 2001

Ms. Amy L. Sims
Assistant City Attorney
City of Lubbock
P.O. Box 2000
Lubbock, Texas 79457

OR2001-5037

Dear Ms. Sims:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 154313.

The City of Lubbock (the "city") received a request for "[w]ritten communication to city staff from the city attorney or city manager regarding release of information to the media." You claim that the requested 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 information.

To secure the protection of section 552.103, 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). Additionally, the governmental body must demonstrate that the litigation was pending or reasonably anticipated as of the day it received the records request. Gov't Code § 552.103(c). The mere chance of litigation will not trigger section 552.103(a). Open Records Decision No. 452 at 4 (1986). 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.*

In Open Records Decision No. 638 (1996), this office determined how a governmental body must establish reasonably anticipated litigation when relying solely on a claim letter. We stated that the governmental body must 1) show that it has received a claim letter from an allegedly injured party or his attorney and 2) state that the letter complies with the notice of claim provisions of the Texas Tort Claims Act, chapter 101 of the Civil Practice and Remedies Code, or applicable municipal statute or ordinance.

You have submitted to this office for our review correspondence that you characterize as a notice of claim letter addressed to the city regarding the incident that is related to the current records request. Furthermore, you have represented to this office that the notice of claim satisfies the notice provisions of the Texas Tort Claims Act. Because the city received the notice of claim prior to receiving the current records request, we conclude that you have demonstrated that the city reasonably anticipated litigation regarding this matter on the day it received the records request. We further conclude that the records at issue "relate" to that litigation for purposes of section 552.103 of the Government Code. We therefore conclude that the city may withhold the information we have marked at this time pursuant to section 552.103.

In reaching this conclusion, however, we assume that the opposing parties to the litigation have not previously had access to the information at issue; absent special circumstances, once information has been obtained by all parties to the litigation, through discovery or otherwise, no section 552.103 interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). We also note that the applicability of section 552.103 ends once the litigation or likelihood thereof has concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

You also contend that some of the submitted documents are excepted from disclosure under section 552.107. Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. Open Records Decision No. 574 at 5 (1990). Section 552.107(1) does not except purely factual information from disclosure. *Id.* Section 552.107(1) does not except from disclosure factual recounting of events or the documentation of calls made, meetings attended, and memos sent. *Id.* at 5.

When invoking this exception in its request to the attorney general for a ruling under section 552.301, the governmental body bears the burden of explaining how the particular information requested constitutes either a client confidence or a communication of legal advice or opinion protected under section 552.107(1).¹ In addition, the governmental body should appropriately mark the copy of the requested information submitted to the attorney general to identify which portions constitute client confidences and which contain legal advice.² When it is not apparent on the face of the document, the governmental body should indicate whether the communication is to or from an attorney, a client, or a representative of either. Based upon your representations and our review of the submitted records, we find

¹See, e.g., Open Records Decision No. 589 (1991).

²*Id.*

that a portion of the submitted information constitutes either client confidences or communications of legal advice or opinion protected under section 552.107(1). Therefore, we conclude that the information which we have marked is excepted from disclosure under section 552.107.

The submitted information contains e-mail addresses obtained from the public. The Seventy-seventh Legislature recently added section 552.137 to chapter 552 of the Government Code. This new exception makes certain e-mail addresses confidential.³ Senate Bill 694, as passed May 14, 2001, signed by the Governor May 26, 2001, and made effective immediately, provides in relevant part:

Sec. 552.137. CONFIDENTIALITY OF CERTAIN E-MAIL ADDRESSES.

- (a) 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 this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Act of May 14, 2001, 77th Leg., R.S., S.B. 694, § 1 (to be codified at Gov't Code § 552.137). You do not inform us that a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. The city must, therefore, withhold the marked e-mail addresses under section 552.137. The remainder of the submitted information must be released to the requestor.

In summary, the city may withhold the marked information pursuant to sections 552.103 and 552.107. The marked e-mail addresses must be withheld under section 552.137. The remainder of the submitted information must be released to the requestor.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the

³House Bill 2589, which also makes certain e-mail addresses confidential, took effect on September 1, 2001. See Act of May 22, 2001, 77th Leg., R.S., H.B. 2589, § 5 (to be codified at Gov't Code § 552.136). The language of section 552.136, as added by House Bill 2589, is identical to that of section 552.137.

governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/seg

Ref: ID# 154313

Enc. Submitted documents

c: Mr. Jeff Klotzman
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(w/o enclosures)