



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 24, 2005

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

OR2005-09622

Dear Ms. Sims:

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# 234937.

The City of Lubbock (the "city") received a request for the following: (1) information regarding actual or possible violations of the Act, the Open Meetings Act, or the city charter and actual or desired terminations of employees; (2) information regarding requests by any city council member to change the employment records of a named individual and the minutes of the Water Advisory Commission or any other meeting minutes; and (3) information "generated [by any city attorney] while acting in [a] capacity other than that of professional legal counsel" that pertain to a named individual, violations of the city charter, the Act, or the Open Meetings Act. You state that you have released some of the requested information, but you claim that the submitted information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (allowing interested party to submit comments indicating why requested information should or should not be released).

¹You also claim that the submitted information is excepted from disclosure under section 552.101 of the Government Code in conjunction with rule 503 of the Texas Rules of Evidence. However, as the submitted information is not subject to section 552.022 of the Government Code, rule 503 does not apply in this instance. *See* Open Records Decision No. 676 at 4 (2002). Moreover, rule 503 does not fall within the purview of section 552.101. *Id.* at 2.

You claim that the information submitted as Exhibit B is excepted from public disclosure under section 552.103 of the Government Code, which provides in relevant part:

(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 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 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. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *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 552.103(a). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

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.* Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986). This office has stated that a pending Equal Employment Opportunity Commission ("EEOC") complaint indicates litigation is reasonably anticipated. Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982).

You have submitted information to this office showing that, prior to the city's receipt of the request for information, the requestor's client filed complaints against the city with both the EEOC and the Civil Rights Division of the Texas Workforce Commission (the "commission"). The EEOC generally defers jurisdiction to the commission over complaints alleging employment discrimination. The commission operates as a federal deferral agency under section 2000e-5 of title 42 of the United States Code. We understand that the

complaints at issue are still pending. Based on your representations and our review of the submitted documents, we find you have demonstrated that litigation was reasonably anticipated when the city received the request for information. We also find that the information at issue relates to the anticipated litigation for purposes of section 552.103.

We note however, that a portion of one of the documents at issue reflects on its face that it was obtained from the individual who filed complaints against the city alleging employment discrimination. This individual is apparently the only opposing party in the anticipated litigation. Once information has been obtained by all parties to the litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). Therefore, to the extent that the information in Exhibit B has either been obtained from or provided to the opposing party in the anticipated litigation at issue, it is not excepted from disclosure under section 552.103(a). However, to the extent that the information in Exhibit B has not been obtained from or provided to the opposing party, it may be withheld under section 552.103(a).² Furthermore, the applicability of this exception under section 552.103 ends when the related litigation concludes. See Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

You claim that the information not excepted from disclosure under section 552.103 of the Government Code is excepted from disclosure under section 552.107(1) of the Government Code, which protects information coming within the attorney-client privilege. 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. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional

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

legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. 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 contend that the information at issue, which consists of a prior information request to the city by the requestor’s client, is excepted from disclosure under section 552.107(1). Upon review, however, we conclude that you failed to meet your burden of establishing that this information constitutes a privileged attorney-client communication. Consequently, this information may not be withheld pursuant to section 552.107(1).

You also claim section 552.111 of the Government Code for the information not excepted from disclosure under section 552.103 of the Government Code. Section 552.111 excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” This section encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines work product as

(1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or

(2) a communication made in anticipation of litigation or for trial between a party and the party’s representatives or among a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5(a). A governmental body seeking to withhold information under this exception bears the burden of demonstrating that the information was created or developed for trial or in anticipation of litigation by or for a party or a party’s representative. TEX. R. CIV. P. 192.5; ORD 677 at 6-8. In order for this office to conclude that the information was made or developed in anticipation of litigation, we must be satisfied that (1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and (2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such

litigation. *Nat'l Tank Co. v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A “substantial chance” of litigation does not mean a statistical probability, but rather “that litigation is more than merely an abstract possibility or unwarranted fear.” *Id.* at 204; ORD 677 at 7.

Based on our review of the city’s arguments and submitted information, we find that the city has not demonstrated that the information at issue was prepared for trial or in anticipation of litigation. Therefore, the city may not withhold this information under section 552.111 as attorney work product.

In summary, to the extent that the information in Exhibit B has not been obtained from or provided to the opposing party in the anticipated litigation, it may be withheld under section 552.103 of the Government Code. The remaining 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 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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Dep’t of Pub. 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 Office of the Attorney General 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,



Caroline E. Cho
Assistant Attorney General
Open Records Division

CEC/sdk

Ref: ID# 234937

Enc. Submitted documents

c: Mr. David R. Langston
MHB Attorneys at Law
P.O. Box 2585
Lubbock, Texas 79408-2585
(w/o enclosures)

Mr. Jim Hund
Hund & Harriger
4021 84th Street
Lubbock, Texas 79423
(w/o enclosures)