ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 21, 2007

Mr. Rashaad V. Gambrell
Assistant City Attorney
City of Houston
P.O. Box 1562
Houston, Texas 77251-1562

OR2007-15329

Dear Mr. Gambrell:

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# 295202.

The City of Houston (the "city") received a request for information pertaining to past public information requests handled by the city Department of Housing and Community Development. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.136, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted sample of information.[1]

Initially, we note that Exhibit 3 contains information filed with the court. Section 552.022 of the Government Code provides in relevant part:

> (a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are

[1]We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

> public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:
>
> . . .
>
> (17) information that is also contained in the public court record[.]

Gov't Code § 552.022(a)(17). Section 552.022(a)(17) makes information filed with a court expressly public unless it contains information that is expressly confidential under other law. Although you assert that these documents are excepted from disclosure under section 552.107 of the Government Code, section 552.107 is a discretionary exception that protects a governmental body's interests and is therefore not "other law" for purposes of section 552.022(a)(17). *See* 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). Accordingly, we conclude that the city may not withhold any of the submitted information under section 552.107. However, the Texas Supreme Court has held that the Texas Rules of Evidence are "other law" that makes information expressly confidential for the purposes of section 552.022. Furthermore, although Rule 503 of the Texas Rules of Evidence, which protects information within the attorney-client privilege, constitutes "other law" for purposes of section 552.022, *see In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001), the privilege would be waived to the extent the otherwise privileged information is contained in a court filed document. *See* Tex. R. Evid. 511. As you raise no other exception to disclosure of this information it must be released to the requestor.

We now address your arguments for the remaining information. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses information made confidential by other statutes. The city argues that federal law requires it to keep confidential information that relates to recipients of Housing Opportunities for Persons with AIDS ("HOPWA") grant money. The stated purpose of HOPWA is "to provide States and localities with the resources and incentives to devise long-term comprehensive strategies for meeting the housing needs of persons with acquired immunodeficiency syndrome and families of such persons." 42 U.S.C. § 12901. Section 12905(e) of chapter 42 of the United States Code requires that the city "ensure the confidentiality of the name of any individual assisted with amounts from a grant under this chapter and any other information regarding individuals receiving such assistance." *Id.* § 12905(e); *see also* 24 C.F.R. § 574.440. We believe that the intent of this confidentiality

provision is to keep confidential information that would tend to identify individual patients with AIDS and thereby prevent housing discrimination against such individuals.[2]

The city asserts that Exhibit 2 identifies a specific individual who receives HOPWA funding.[3] The responsive information at issue consists of the name, apartment number, and telephone number of an individual receiving HOPWA funding as well as the name and address of the apartment complex in which the individual resides. We note that our office has been provided with a letter written in September 2005 by Ms. Katie S. Worsham, Director with the U.S. Department of Housing and Urban Development ("HUD"). HUD states that the "publication of an address receiving HOPWA assistance does not breech the confidentiality provision of 24 CFR 574.440 because that section only obligates HUD and grantees to keep names of clients confidential." The name and address of the apartment complex at issue here does not identify the name of an actual client with AIDS who receives assistance. Accordingly, based on HUD's representation and our review of the responsive information, we conclude that only the individual's name, telephone number, and apartment number are confidential under section 12905 of chapter 42 of the United States Code and must be withheld under section 552.101. Section 12905 of chapter 42 of the United States Code is not applicable to the remaining information.

Section 552.101 also encompasses common-law privacy, which protects information if (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). You assert that the name and address of the apartment complex at issue in Exhibit 2 is confidential under common-law privacy. However, we note that because the identifying information of the individual with HIV or AIDS is confidential under Section 12905 of chapter 42 of the United States Code and must be withheld under section 552.101, the apartment complex name and address does not identify an individual with a privacy interest in the information at issue. This information, therefore, is not confidential under common-law privacy, and may not be withheld under section 552.101 of the Government Code. As you raise no other exception to disclosure of this information it must be released to the requestor.

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[2]*See generally Housing Needs of Persons With Acquired Immune Deficiency Syndrome (AIDS): Hearings before the Subcomm. on Housing and Community Development of the House Banking, Finance, and Urban Affairs Comm.*, 101st Cong. (1990) (hearing devoted to housing problems of persons with AIDS, their causes, such as discrimination, and their remedies); *see also National Housing Policy Conference and Public Hearing: Hearings before the Subcomm. on Housing and Urban Affairs, Senate Banking, Housing, and Urban Affairs Comm. and the Subcomm. on Housing and Community Development, House Banking, Finance, and Urban Affairs Comm.*, 100th Cong. p. 154 (1988).

[3]We note that you have attached to Exhibit 2 a letter from the community endowment foundation which exhibits that the address at issue in Exhibit 2 pertains to a facility receiving HOWPA funding. This letter does not appear to be responsive, thus, we assume it is attached for informational purposes only.

Next you state that the remaining information in Exhibit 3 is excepted under section 552.107 of the Government Code. Section 552.107(1) 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 a capacity other than that of attorney). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1). 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 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).

In this case, the remaining information in Exhibit 3 consists of communications made for the purpose of facilitating the rendition of professional legal services. The communications were between clients, client representatives, lawyers, and lawyer representatives identified by the city, and the communications indicate that they were to be kept confidential among the intended parties. Finally, you state that the city has confirmed that the communications have remained confidential. Thus, you may withhold the remaining information in Exhibit 3 under section 552.107(1) of the Government Code.

Next, you assert that Exhibit 4 contains bank account information. Section 552.136 states that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136(b). The city must withhold the bank account and routing numbers that we have marked under section 552.136 of the

Government Code. However, because check numbers do not constitute access device numbers, section 552.136 is not applicable to the check number that we have marked for release, and thus, it must be released to the requestor.

Finally, you assert that Exhibit 5 contains an e-mail address that is excepted from disclosure under section 552.137 of the Government Code, which requires a governmental body to withhold the e-mail address of a member of the general public, unless the individual to whom the e-mail address belongs has affirmatively consented to its public disclosure. *See* Gov't Code § 552.137 (b). You do not inform us that the owner of the e-mail address has affirmatively consented to release. Therefore, the city must withhold the e-mail address you have highlighted under section 552.137.

In summary, the city must withhold the information we have marked in Exhibit 2 under section 552.101 of the Government Code in conjunction with section 12905(e) of chapter 42 of the United Stated Code. The city may withhold the remaining information in Exhibit 3 under section 552.107. The city must withhold the marked bank account information in Exhibit 4 under section 552.136. The city must withhold the highlighted e-mail address under section 552.137. The remaining information must be released.

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).

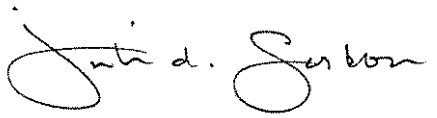
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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,



Justin D. Gordon
Assistant Attorney General
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JDG/jh

Ref: ID# 295202

Enc. Submitted documents

c: Mr. Darren Preacely
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(w/o enclosures)