ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 4, 2009

Mr. Christopher Gregg
Gregg & Gregg. P.C.
16055 Space Center Boulevard, Suite 150
Houston, Texas 77062

OR2009-01474

Dear Mr. Gregg:

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# 333942.

The City of League City (the "city"), which you represent, received a request for thirteen categories of information related to Cypress Bay, Glen Cove, MB Harbour, Texas Genco, the NRG canals, the former HL&P, and two specified individuals from January 1, 2005 to the present, excluding attorney-client communications or attorney work product. You claim the submitted information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code.[1] We have considered the exceptions you claim and reviewed the submitted information.[2] We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note the requestor excludes attorney-client communications between the city and its counsel and attorney work product of the counsel for the city from the request for

[1]You argue some of the submitted information is protected by the attorney-client privilege. We understand you to raise section 552.107 of the Government Code, as this is the proper exception for the substance of your argument.

[2]We assume that, to the extent any additional responsive information existed when the city received the request for information, the city has released it to the requestor. If not, then the city must do so immediately. *See id.* §§ 552.006, 552.301, 552.302; Open Records Decision No. 664 (2000).

information. Thus, any attorney-client communications between the city and its counsel or attorney work product of the counsel for the city within the submitted documents are not responsive to the present request. Our ruling does not address this non-responsive information, and the city need not release it in response to the request. Accordingly, we do not address your argument under section 552.107.

Next, we must address the requestor's assertion that the city did not meet its procedural obligations by failing to timely 1) request a decision from this office, 2) inform the requestor of the city's intent to withhold the information, and 3) submit the requisite information to this office. Section 552.301(b) provides the governmental body must ask for the attorney general's decision and claim its exceptions to disclosure no later than the tenth business day after the date of its receipt of the written request for information. *Id.* § 552.301(b). Section 552.301(d) states the agency must provide to the requestor within ten business days of receiving the written request a written statement that the agency wishes to withhold the requested information and has asked for a decision from this office and a copy of the agency's written communication to this office asking for a decision. *Id.* § 552.301(d). Lastly, section 552.301(e) requires the governmental body to submit to this office, no later than the fifteenth business day after the date of its receipt of the request, (1) written comments stating why the governmental body's claimed exceptions apply to the information that it seeks to withhold; (2) a copy of the request for information; (3) a signed statement of the date on which the governmental body received the request or evidence sufficient to establish that date; and (4) the specific information that the governmental body seeks to withhold or representative samples if the information is voluminous. *Id.* § 552.301(e)(1)(A)-(D). A governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the information is public and must be released. *Id.* § 552.302.

The city states it received the written request for information on November 6, 2008 and sought clarification of the request on November 18, 2008. *See id.* § 552.222 (providing governmental body may ask requestor to clarify request if information requested is unclear). Thus, the ten-business-day time period to request a decision from this office under section 552.301(b) was tolled on the date the city sought clarification of the request from the requestor. *See* Open Records Decision No. 663 at 5 (1999) (clarification does not trigger new ten-business-day time interval, but merely tolls ten-business-day deadline during clarification or narrowing process, which resumes upon receipt of clarified or narrowed response). The city received the requestor's clarification on November 19, 2008. Thus, the city's deadline to submit its request for a ruling was November 21, 2008, which is when the city requested a decision from our office. Further, the city's brief asking for an attorney general decision shows the city sent a copy of the brief to the requestor on the same day. Despite the requestor's assertion that the city failed to timely inform the requestor of its intent to withhold the information, the requestor did not state when she did receive the written statements required by section 552.301(d). This office is unable to resolve disputes of fact in the open records ruling process. Accordingly, we must rely upon the facts

presented to us by the governmental body requesting our opinion or upon those facts that are discernable from the documents submitted for our inspection. *See* Open Records Decision No. 522 at 4 (1990). Based on the submitted information, we find the city complied with subsections 552.301(b) and (d) in requesting this ruling. As for the timeliness of submission of the information required by section 552.301(e), the city submitted such information by the tenth business day deadline of November 21, 2008, which was well in advance of its fifteenth business day deadline. Thus, the city also complied with section 552.301(e).

Next, the requestor asserts the city failed to comply with section 552.221(d) of the Government Code, which provides:

> If an officer for public information cannot produce public information for inspection of duplication within 10 business days after the date the information is requested . . ., the officer shall certify that fact in writing to the requestor and set a date and hour within a reasonable time when the information will be available for inspection or duplication.

Gov't Code § 552.221(d). The requestor informs us she has not received such a written notification from the city. We note that while section 552.302 provides failure to comply with section 552.301 results in the presumption that the requested information is subject to required public disclosure and must be released, the Act contains no comparable provision for a violation of section 552.221(d). *See id.* § 552.302. Thus, even if the city failed to comply with section 552.221(d) as the requestor alleges, the city has not waived any of its discretionary exceptions. Accordingly, we will consider the city's section 552.103 assertion.

First, we note the submitted documents include agendas of city council meetings. The agendas of a governmental body's public meetings are specifically made public under the Open Meetings Act, chapter 551 of the Government Code. *See* Gov't Code §§ 551.041 (governmental body shall give written notice of date, hour, place, and subject of each meeting), 551.043 (notice of meeting of governmental body must be posted in place readily accessible to general public for at least 72 hours before scheduled time of meeting). As a general rule, the exceptions to disclosure found in the Act do not apply to information that is made public by other statutes. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Thus, the city may not withhold the agendas, which we have marked, under section 552.103 of the Government Code and must release this information to the requestor.

We now address your claim under section 552.103 of the Government Code for the remaining responsive information. Section 552.103 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 the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing (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 section 552.103(a).

You inform us prior to the city's receipt of the request for information, the city was named as a defendant in a lawsuit filed in the 212th Judicial District Court of Galveston County. We therefore agree litigation was pending when the city received the request. Furthermore, upon review, we conclude the remaining information is related to the pending litigation. *See* ORD 551 at 5 (attorney general will determine whether governmental body has reasonably established that information at issue is related to litigation). Accordingly, the city may withhold the remaining information under section 552.103 of the Government Code.

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). We note some of the information has been seen by all opposing parties. Thus, information that has either been obtained from or provided to the opposing parties in the litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the city must release the agendas of the city council meetings. Except for information seen by all opposing parties, the city may withhold the remainder under section 552.103.

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

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,

Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/eeg

Ref: ID# 333942

Enc. Marked documents

c: Requestor
(w/o enclosures)