



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 1, 2009

Ms. Jenny Gravley
Taylor, Olson, Adkins, Sralla, Elam
For the City of Haltom
6000 Western Place, Suite 200
Fort Worth, Texas 76107

OR2009-07447

Dear Ms. Gravley:

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# 344559.

The City of Haltom City (the "city"), which you represent, received a request for the following categories of information relating to a city contract for sewer line improvements at a mobile home park: (1) information regarding the preparation of the contract; (2) information relating to the bidding and letting of the contract; (3) information regarding the actual work performed on the contract by a named contractor; and (4) information regarding the work necessary to finalize the project, including information relating to three named city employees. You state the city will provide some of the responsive information to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.117, 552.130, 552.136, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that one of the submitted documents, which we have marked, is not responsive to the instant request as it pertains to an individual who is not involved in the matter at issue. The city need not release non-responsive information in response to this request, and this ruling will not address that information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W. 2d 266 (Tex. Civ. App. – San Antonio 1978, writ dism'd).

The submitted information includes copies of resolutions adopted by the city. Because laws and ordinances are binding on members of the public, they are matters of public record and may not be withheld from disclosure under the Act. *See* Open Records Decision No. 551 at 2-3 (1990) (laws or ordinances are open records). The resolutions we have marked are analogous to ordinances and, as such, must be released.

Next, we note that some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides that:

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by section 552.108;

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body;

...

(5) all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate;

...

(15) information regarded as open to the public under an agency's policies; [and]

...

(18) a settlement agreement to which a governmental body is a party.

Gov't Code §§ 552.022(a)(1), (3), (5), (15), (18). In this instance, the submitted information includes completed reports and performance evaluations subject to section 552.022(a)(1). The city must release this information subject to section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 or is expressly confidential under other law. The submitted information also includes contracts, purchase orders, invoices, and an easement

subject to section 552.022(a)(3); completed cost estimates subject to section 552.022(a)(5); and a settlement agreement to which the city is a party subject to section 552.022(a)(18). The city must release the information that is subject to sections 552.022(a)(3), (5), and (18) unless it is expressly confidential under other law. The submitted information also contains a copy of a city job description, which is usually open to the public as part of a job posting and subject to section 552.022(a)(15). If the city regards the submitted job description as open to the public, then the city must release this information unless it is expressly confidential under other law. You claim that the information at issue is excepted from disclosure under section 552.103 of the Government Code. However, section 552.103 is a discretionary exception that protects a governmental body's interests and, thus, is not "other law" for purposes of section 552.022. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally). Accordingly, the information subject to sections 552.022(a)(1), (3), (5), (15), and (18) may not be withheld on the basis of section 552.103. However, because sections 552.117, 552.130, and 552.137 of the Government Code are other law, we will consider your arguments under these exceptions. In addition, we will address your arguments under sections 552.103 and 552.107 for the remaining information that is not subject to section 552.022.

We will first address your argument under section 552.103 of the Government Code for the information not subject to section 552.022. Section 552.103 provides in relevant part as follows:

(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 that the governmental body received the request for information, and (2) the information at issue is related to that litigation. *See 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). See ORD 551.

To establish that litigation is reasonably anticipated, a governmental body must provide this office “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” See Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body’s receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. See Open Records Decision No. 555 (1990); see Open Records Decision No. 518 at 5 (1989) (litigation must be “realistically contemplated”). In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party filed a complaint with the Equal Employment Opportunity Commission, see Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, see Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, see Open Records Decision No. 288 (1981). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. See Open Records Decision No. 331 (1982). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. See Open Records Decision No. 361 (1983).

You argue the city reasonably anticipates litigation. You inform us, and have submitted documentation showing, that prior to the date the city received the instant request for information, the city has been involved in unsuccessful settlement negotiations with the requestor regarding the amount owed on the city project at issue. You further state, and provide documentation showing, that prior to the date the city received the instant request for information, the city received a letter from the requestor’s attorney making a demand for payment and threatening to sue the city if the dispute is not resolved. You inform us that the information at issue is related to the anticipated litigation and that the submitted personnel files belong to three current and/or former employees who worked on the project and are potential fact witnesses in the anticipated litigation. Based on your representations and our review of the submitted documents, we determine that the city has established that litigation was reasonably anticipated on the date that it received the request for information. See ORD 346; ORD 555. Further, we determine that the information at issue is related to the anticipated litigation for the purposes of section 552.103. Therefore, we conclude that section 552.103 of the Government Code is generally applicable to the information at issue.

We note, however, that the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* ORD 551 at 4-5. Thus, if the opposing party has seen or had access to information relating to litigation, through discovery or otherwise, then there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). A portion of the submitted information, which we have marked, has been provided to or obtained from the potential opposing party in litigation. As such, the city may not withhold this information under section 552.103. We further note that the applicability of section 552.103(a) ends when the litigation has concluded or is no longer pending. *See* Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982). Accordingly, with the exception of information that has been seen by the potential opposing party, the city may withhold the remaining information at issue under section 552.103 of the Government Code. As you also raise section 552.107(1) for the information not excepted by section 552.103, we will address your argument under this exception.

Section 552.107(1) protects information that comes 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. *See* 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. *See In re Texas 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. *See* 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, 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. *See 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 consists of communications between the city, its representatives, and its attorneys made in furtherance of the rendition of legal services. You further state that the communications were made in confidence, and that the confidentiality of the information at issue has been maintained. However, as noted above, this information has been shared with non-privileged parties. Thus, this information does not constitute a communication only between or among clients, client representatives, lawyers, and lawyer representatives. *See* Tex. R. Evid. 503(b)(1). Accordingly, the city may not withhold the remaining information on the basis of section 552.107 of the Government Code.

You have marked the personal information of one of the city employees at issue in an offense report that is subject to section 552.022(a)(1). Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(1). The submitted information contains a copy of the employee's election form, in which the employee timely elected confidentiality for his social security number, home address, telephone number, and family member information. Thus, we agree that the city must withhold the information you have marked under section 552.117(a)(1).

Next, we note that the remaining information contains Texas motor vehicle record information subject to section 552.130 of the Government Code. Section 552.130 excepts from disclosure information that relates to "a motor vehicle operator's or driver's license or permit issued by an agency of this state." Gov't Code § 552.130(a)(1). Accordingly, the city must withhold the information we have marked pursuant to section 552.130 of the Government Code.

We also note that some of the remaining information contains e-mail addresses subject to section 552.137 of the Government Code. Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). These addresses are not a type specifically excluded by section 552.137. Further, you do not inform us that the city has received consent from the owners of these e-mail addresses for release of this information. Accordingly, the city must withhold the e-mail addresses we have marked under section 552.137, unless the owners of the addresses have affirmatively consented to their release. *See id.* § 552.137(b).

In summary, with the exception of the information subject to sections 552.022(a)(1), (3), (5), (15), and (18) of the Government Code and the information seen by the potential opposing

party in litigation, the city may withhold the submitted information under section 552.103 of the Government Code. The city must withhold the employee personal information you have marked under section 552.117 of the Government Code. The city must withhold the information we have marked under section 552.130 of the Government Code. The city must withhold the marked e-mail addresses under section 552.137 of the Government Code. The remaining information must be released.

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,



Pamela Wissemann
Assistant Attorney General
Open Records Division

PFW/sdk

Ref: ID# 344559

Enc. Submitted documents

c: Requestor
(w/o enclosures)