ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 25, 2010

Mr. William W. Krueger, III
Martin, Disiere, Jefferson & Wisdom L.L.P.
Attorney for City of Caldwell
900 Jackson Street, Suite 710
Dallas, Texas 75202

OR2010-02878

Dear Mr. Krueger:

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# 371509.

The City of Caldwell (the "city"), which you represent, received three requests from the same requestor for information pertaining to the requestor, including his personnel file and correspondence related to him, as well as certified copies of the official public postings of any notices and announcements of city council meetings held over a specified time period. You claim the requested 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 representative sample of information.[2]

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[1]Although you raise section 552.101 of the Government Code in conjunction with Rule 503 of the Texas Rules of Evidence and Rule 192.5 of the Texas Rules of Civil Procedure, this office has concluded section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Thus, we will not address your claim that the submitted information is confidential under section 552.101 in conjunction with either of these rules. We note the proper exceptions to raise when asserting the attorney-client privilege and the attorney work product privilege in this instance are sections 552.107 and 552.111 of the Government Code, respectively. *See* Open Records Decision Nos. 677 (2002), 676 at 6.

[2]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.

Initially, we note Exhibit E consists of agendas of public 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, plane, and subject of each meeting). Although you assert this information is excepted under sections 552.103, 552.107, and 552.111 of the Government Code, as a general rule, the exceptions to disclosure found in the Act do not apply to information that other statutes make public. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Accordingly, the submitted agendas in Exhibit E must be released in accordance with the Open Meetings Act.

Next, we note some of the remaining information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

> (a) [T]he 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.

Gov't Code § 552.022(a)(1). We note Exhibit F contains a completed evaluation that is expressly public under section 552.022(a)(1). The city must release this information, which we have marked, pursuant to section 552.022 unless it is excepted from disclosure under section 552.108 of the Government Code or is expressly made confidential under other law. *See id.* You claim this information is subject to section 552.103 of the Government Code. Section 552.103 is a discretionary exception to disclosure that protects the governmental body's interests and is therefore not "other law" that makes information expressly confidential for purposes of section 552.022(a). *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Consequently, the city may not withhold any of the information we have marked under section 552.022(a)(1) pursuant to section 552.103 of the Government Code. As you raise no other exceptions against the disclosure of this information, it must be released.

We note the remaining information contains medical records pertaining to the requestor. 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. This section encompasses information protected by other statutes, such as the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. *See* Occ. Code § 151.001-165.160. Section 159.002 of the MPA provides, in relevant part:

> (a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.
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> (b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.
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> (c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Id. § 159.002(a)-(c). Information subject to the MPA includes both medical records and information obtained from those records. *See id.* §§ 159.002, .004; Open Records Decision No. 598 (1991). This office has concluded that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). Medical records must be released upon the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) the reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004,.005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). We have marked medical records that the city may only release in accordance with the MPA.

You claim the remaining information is subject to section 552.103 of the Government Code, which 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.
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> . . .
>
> (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). 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* Open Records Decision No. 551 at 4-5 (1990). 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. *Thomas v. Cornyn*, 71 S.W.3d 473, 487 (Tex. App.—Austin 2002, no pet.); *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.); ORD 551 at 4. A governmental body must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a).

You state, and have provided documentation showing, that prior to the city's receipt of the request, the requestor filed a lawsuit styled *Lilly v. The City of Caldwell, Texas*, Civil Action No. A-09-CA-766, which is pending in the United States District Court for the Western District of Texas, Austin Division. Therefore, we agree that litigation was pending on the date the city received the present request for information. Further, you state the pending litigation pertains to the requestor's termination as Chief of Police, and that the requested information relates to the pending litigation. Based on your representations and our review, we agree that the remaining information relates to the pending litigation. Accordingly, the city may generally withhold the remaining information pursuant to section 552.103.

We note that the purpose of this exception 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, when the opposing party has seen or had access to information relating to anticipated litigation, through discovery or otherwise, there is no interest in withholding that information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). In this instance, the requestor has already seen or had access to much of the information at issue. However, we note the requestor has only seen or had access to portions of the information at issue in the usual scope of his employment by the city. Such information is not considered to have been obtained by the opposing party to litigation. Accordingly, the information we have marked for release may not be withheld from the requestor under section 552.103. However, the city may withhold under section 552.103 any information that has not been seen by the opposing party and the information the requestor only saw or had access to in the usual scope of his employment by the city. We note that the applicability of this exception ends once the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Next, with regards to the information that the opposing party has seen or had access to, we address your arguments under sections 552.107 and 552.111 of the Government Code. Section 552.107(1) of the Government Code 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. *See* ORD 676 at 6-7. 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. *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. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no pet.). 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).

We note, however, the information at issue is not excepted under section 552.103 because the opposing party to the pending litigation has seen it. Therefore, we find that any information that has been seen by the opposing party to the pending litigation does not consist of privileged attorney-client communications; thus, the city may not withhold any information seen by an opposing party under section 552.107.

Section 552.111 encompasses the attorney work product privilege found at rule 192.5 of the Texas Rules of Civil Procedure. *See* TEX. R. CIV. P. 192.5; *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 attorney work product as consisting of

> (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 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. *See id.*; 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

> (a) 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 b) 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.

As noted above, the remaining information consists of information that was seen by the opposing party to litigation. We conclude that because the opposing party to litigation has seen the information at issue, the work product privilege under section 552.111 has been waived. Thus, the city may not withhold any of the information at issue under section 552.111.

In summary, the submitted agendas in Exhibit E must be released in accordance with the Open Meetings Act. We have marked medical records that the city may only release in accordance with the MPA. With the exception of the information we have marked for release and the information subject to section 552.022(a)(1) of the Government Code, the city may withhold the remaining information under section 552.103 of the Government Code.[3]

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.

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[3]We note that the information being released contains confidential information to which the requestor has a right of access. Thus, if the city receives another request for this particular information from a different requestor, then the city should again seek a decision from this office.

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, toll free, at (888) 672-6787.

Sincerely,

Adam Leiber
Assistant Attorney General
Open Records Division

ACL/rl

Ref: ID# 371509

Enc. Submitted documents

c: Requestor
(w/o enclosures)