



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

March 8, 2010

Mr. Gary Henrichson  
Assistant City Attorney  
City of McAllen  
P.O. Box 220  
McAllen, Texas 78705-0220

OR2010-03363

Dear Mr. Henrichson:

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# 372027. (City of McAllen Request Nos. W001729-120809 through W001739-120809).

The City of McAllen (the "city") received a request for all written communications between the city manager and six named individuals during a specified time period, a named city attorney and five named individuals during a specified time period, and the city's fire chief and two named individuals during a specified time period.<sup>1</sup> You state the city will redact Texas driver's license numbers and Texas license plate number under section 552.130 of the Government Code and credit card numbers, charge card numbers, insurance policy numbers, bank account numbers, and bank routing numbers under section 552.136 of the Government Code pursuant to Open Records Decision No. 684 (2009).<sup>2</sup> You also state that you will

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<sup>1</sup>We note the city asked for and received clarification regarding this request. *See* Gov't Code § 552.222(b) (providing that if request for information is unclear, governmental body may ask requestor to clarify the request); *see also* Open Records Decision No. 31 (1974) (when presented with broad requests for information rather than for specific records, governmental body may advise requestor of types of information available so that request may be properly narrowed).

<sup>2</sup>This office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies, which authorizes withholding of ten categories of information, including Texas driver's license numbers and Texas license plate numbers under section 552.130 of the Government Code and credit card numbers, charge card numbers, insurance policy numbers, bank account numbers, and bank routing numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

redact home telephone numbers, home addresses, and family member information subject to section 552.117 of the Government Code under section 552.024 of the Government Code.<sup>3</sup> In addition, you state you will redact social security numbers pursuant to section 552.147(b) of the Government Code.<sup>4</sup> You claim that the requested information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.104, 552.105, 552.106, 552.107, 552.111, and 552.131 of the Government Code.<sup>5</sup> We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>6</sup>

Initially, we note some of the submitted information is not responsive to the instant request as it is not communications between the named individuals. We have marked the non-responsive information. This ruling does not address the public availability of any information that is not responsive to the request and the city is not required to release that information in response to the request.<sup>7</sup>

Next, you raise section 552.101 of the Government Code in conjunction with section 143.1214 of the Local Government Code. We note that subchapter G of chapter 143, which includes section 143.1214, generally applies only to municipalities with a population of 1.5 million or more. *See* Local Gov't Code § 143.101(a). As the city is not a municipality with a population of 1.5 million or more, section 143.1214 is inapplicable. Therefore, none of the information at issue may be withheld under section 552.101 on the basis of section 143.1214.

Section 552.102(a) of the Government Code excepts from public disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of

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<sup>3</sup>*See* Gov't Code § 552.024(c)(2) (if employee or official or former employee or official chooses not to allow public access to his or her personal information, the governmental body may redact the information without the necessity of requesting a decision from this office).

<sup>4</sup>Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act. Gov't Code § 552.147(b).

<sup>5</sup>Although you also raise Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5, we note that, in this instance, the proper exceptions to raise when asserting the attorney-client and attorney work product privileges for information not subject to section 552.022 are sections 552.107 and 552.111. *See* Open Records Decision Nos. 677 (2002), 676 at 6 (2002). We also note that although you raise section 552.139 of the Government Code, you make no arguments to support this exception. Therefore, we assume you have withdrawn your claim that section 552.139 applies to the submitted information.

<sup>6</sup>We assume 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.

<sup>7</sup>As we are able to make this determination, we need not address your arguments against disclosure of this information.

personal privacy[.]” Gov’t Code § 552.102(a). Section 552.102 is applicable to information that relates to public officials and employees. *See* Open Records Decision No. 327 at 2 (1982) (anything relating to employee’s employment and its terms constitutes information relevant to person’s employment relationship and is part of employee’s personnel file). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref’d n.r.e.), the court ruled the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), for information claimed to be protected under the doctrine of common law privacy as incorporated by section 552.101. *See Hubert*, 652 S.W.2d at 550; *Indus. Found.*, 540 S.W.2d at 683-85.

The types of information considered intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Indus. Found.*, 540 S.W.2d at 683. This office has also found that personal financial information not relating to a financial transaction between an individual and a governmental body is excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 600 (1992), 545 (1990). However, information pertaining to the work conduct and job performance of public employees is of legitimate public interest and therefore generally not protected from disclosure under common law privacy. *See* Open Records Decision Nos. 470 at 4 (1987) (public has legitimate interest in having access to information concerning performances of governmental employees), 423 at 2 (1984) (explaining that because of greater legitimate public interest in disclosure of information regarding public employees, employee privacy under section 552.102 is confined to information that reveals “intimate details of a highly personal nature”). Upon review, we find that the responsive information is not highly intimate or embarrassing or is of legitimate public concern. Accordingly, the city may not withhold any portion of the responsive information under section 552.102 of the Government Code.

Section 552.107(1) of the Government Code 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* 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. *See* 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 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. *See* TEX. R. EVID. 503(b)(1)(A)-(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 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 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 that communications with third party consultants with which a governmental body shares a privity of interest are protected. Open Records Decision Nos. 464 (1987), 429 (1985).

You explain that portions of the responsive information are confidential communications made between city attorneys and city employees. You indicate that these communications were made for the purpose of facilitating the rendition of professional legal services to the department. You also represent that the confidentiality of these communications has been maintained. Based on your representations and our review, we conclude that section 552.107 is applicable to the information we have marked. Accordingly, the city may withhold the information we have marked under section 552.107 of the Government Code.<sup>8</sup>

Section 552.103 of the Government Code provides in 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

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<sup>8</sup>As our ruling is dispositive for this information, we need not address your remaining arguments against its 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 city 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 is pending or reasonably anticipated on the date the department 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). The city must meet both prongs of this test for information to be excepted under section 552.103(a).

You state that, prior to the city's receipt of the present request for information, the city was a party to six pending civil cases, including *Manuel Trigo Jr. v. City of McAllan*, cause # C-2184-01-G. You state that the some of the remaining information is related to these pending lawsuits. Based on your representations and our review of the submitted information, we conclude that litigation was pending when the city received the present request. We also agree that the some of the remaining information is related to the litigation for purposes of section 552.103. Therefore, the city may withhold the information we have marked under section 552.103(a) of the Government Code.<sup>9</sup>

We note, however, that once information has been obtained by all parties to the pending 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). Thus, information that has either been obtained from or provided to the opposing party in the pending 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 when the litigation has concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

Next, you claim some of the remaining information is excepted from disclosure under section 552.111 of the Government Code. Section 552.111 excepts from disclosure "an interagency or intra-agency memorandum or letter that would not be available by law to a party in litigation with the agency." Gov't Code § 552.111. This exception 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); ORD 677 at 4-8. Rule 192.5 defines work product as

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<sup>9</sup>As our ruling is dispositive for this information, we need not address your remaining arguments against its disclosure.

(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 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 the information was made or developed in anticipation of litigation, we must be satisfied

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.

You generally claim portions of the remaining information disclose attorney work product. However, you make no arguments to support this position. *See* Gov't Code § 552.301(e). Further, you do not state, and we are unable to determine, any portion of the information at issue was created for trial or in anticipation for litigation. Accordingly, the city may not withhold any of the remaining information under the work product privilege of section 552.111 of the Government Code.

In summary, the city may withhold the information we have marked under section 552.107 of the Government Code. The city may also withhold the information we have marked under section 552.103(a) of the Government Code. The remaining responsive 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](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,



Tamara Wilcox  
Assistant Attorney General  
Open Records Division

TW/dls

Ref: ID# 372027

Enc. Submitted documents

c: Requestor  
(w/o enclosures)