



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 29, 2010

Ms. Evelyn W. Njuguna
Assistant City Attorney
City of Houston Legal Department
P.O. Box 368
Houston, Texas 77001-0368

OR2010-06209

Dear Ms. Njuguna:

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# 377446 (ORR# 16723).

The City of Houston (the "city") received a request for (1) four categories of information related to employee promotions, re-classifications, and status changes; (2) e-mails from three named individuals during a specified time period; and (3) names, salaries, and salary histories of Assistant Facilities Managers. You claim a portion of the submitted information is not subject to the Act. You claim the remaining information is excepted from disclosure under sections 552.103, 552.107, and 552.139 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, we note a portion of the submitted information is not responsive to the instant request for information because it was created after the date the city received the request or does not fall within the categories of requested 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.

The Act is applicable to "public information." *See* Gov't Code § 552.021. Section 552.002 of the Act provides, "public information" consists of "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it." *Id.* § 552.002(a).

¹We 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 those records contain substantially different types of information than that submitted to this office.

You inform us Exhibit 11 is not subject to the Act because it relates to a city employee's personal matters and does not relate to any official business transactions or dealings for the city. After reviewing the information at issue, we agree the information at issue does not constitute "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business" by or for the city. *See id.* § 552.021; *see also* Open Records Decision No. 635 (1995) (statutory predecessor not applicable to personal information unrelated to official business and created or maintained by state employee involving *de minimis* use of state resources). Therefore, we conclude the information in Exhibit 11 is not subject to the Act and need not be released in response to this request.

Next, we note the city failed to raise its claim under section 552.139 of the Government Code or submit written comments stating why the exception applies within the statutory time periods prescribed by section 552.301(b) and (e) of the Government Code. *See* Gov't Code § 552.301(b), (e)(1)(A). Generally, a governmental body's failure to comply with section 552.301 results in the waiver of its claims under the exceptions at issue, unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); *see also* Open Records Decision No. 630 (1994). A compelling reason to withhold information exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). Because section 552.139 of the Government Code can provide a compelling reason to withhold information, we will consider your claim under this section, as well as your timely-raised claims under sections 552.103 and 552.107 of the Government Code.

Next, we note portions of the remaining information are subject to section 552.022 of the Government Code. This section provides, in pertinent 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:

...

(2) the name, sex, ethnicity, salary, title, and dates of employment of each employee and officer of a governmental body[.]

Gov't Code. § 552.022(a)(2). In this instance, portions of Exhibits 2, 3, 5, and 8 reveal the names, sex, ethnicities, salaries, titles, and dates of employment of city employees. This information, which we have marked, is subject to section 552.022(a)(2) of the Government Code, and must be released unless it is confidential under other law. You argue this information is excepted from disclosure by section 552.103 of the Government

Code. Section 552.103 is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See id.* § 552.007; *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 Gov't Code § 552.103); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.103 is not other law that makes information confidential for the purposes of subsection 552.022(a)(2). Therefore, the city may not withhold the marked information in Exhibits 2, 3, 5, and 8 under section 552.103 of the Government Code. As you raise no additional exceptions to disclosure of the marked information, it must be released.

You claim section 552.107 of the Government Code with respect to the information submitted as Exhibits 6 and 7. 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 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 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 state the information submitted as Exhibits 6 and 7 consists of communications involving city attorneys, legal staff, and employees in their capacities as clients. You state

these communications were made in furtherance of the rendition of professional legal services to the city. You state these communications were confidential, and you do not indicate the city has waived the confidentiality of the information at issue. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the remaining information in Exhibit 6 and the information we have marked in Exhibit 7. Accordingly, the city may withhold the remaining information in Exhibit 6 and the information we have marked in Exhibit 7 under section 552.107 of the Government Code. However, upon review, we find a portion of the information you seek to withhold in Exhibit 7 has been shared with an individual you have not demonstrated is a privileged party. Therefore, we conclude you have failed to establish how the remaining information in Exhibit 7 constitutes communications between or among city employees and attorneys for the purposes of section 552.107. Thus, the city may not withhold the remaining information in Exhibit 7 under section 552.107.

You claim section 552.103 of the Government Code is applicable to the remaining information submitted as Exhibits 2, 3, 4, 5, and 8 that is not subject to section 552.022. 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 sufficient to establish the applicability of section 552.103 to the information it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) litigation was pending or reasonably anticipated on the date of its receipt of 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 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See Open Records Decision No. 551 at 4 (1990).*

Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See Open Records Decision No. 452 at 4 (1986).* To demonstrate litigation is reasonably

anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* This office has found a pending complaint with the Equal Opportunity Employment Commission ("EEOC") indicates litigation is reasonably anticipated. See Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982), 281 at 1 (1981).

You state, and provide documentation showing, prior to the city's receipt of the instant request, a city employee filed claims of race discrimination against the city with the EEOC. You state the complaint alleges the complainant was not promoted and his pay is not commensurate with his job duties. Additionally, you provide a statement from the attorney representing the city in connection with the discrimination claims, indicating the claims are still pending and stating the information at issue pertains to the substance of the discrimination claims. Based on your arguments and our review of the submitted information, we find the city reasonably anticipated litigation on the date this request was received, and the information at issue is related to the anticipated litigation. Therefore, we conclude the city may withhold under section 552.103 of the Government Code the remaining information in Exhibits 2, 3, 4, 5, and 8 that is not subject to section 552.022(a)(2).

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). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a). 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).

Next, you claim section 552.139 of the Government Code for portions of the remaining information in Exhibit 7. Section 552.139 provides:

(a) Information is excepted from [required public disclosure] if it is information that relates to computer network security, to restricted information under Section 2059.055 [of the Government Code], or to the design, operation, or defense of a computer network.

(b) The following information is confidential:

(1) a computer network vulnerability report; and

(2) any other assessment of the extent to which data processing operations, a computer, or a computer program, network, system, or software of a governmental body or of a contractor of a governmental body is vulnerable to unauthorized access or harm, including an assessment of the extent to which the governmental body's or

contractor's electronically stored information is vulnerable to alteration, damage, or erasure.

Gov't Code § 552.139. You state the information at issue consists of high-level assessments conducted by an outside entity for the city. You further state the assessments explain in detail certain information technology processes and organization, including highlights of the risks, exposures, status of internal controls, areas of improvements, and vulnerabilities of the information technology system. You also explain release of this information would expose the system to alteration, damage, erasure, or criminal activity. Based on your arguments and our review of the information at issue, we find the information at issue consists of assessments of the extent to which a city computer system is vulnerable to unauthorized access or harm. Accordingly, the city must withhold the information we have marked in Exhibit 7 under section 552.139 of the Government Code.

We note a portion of the remaining information in Exhibit 7 may be subject to section 552.117 of the Government Code.² Section 552.117(a)(1) excepts from disclosure the home address, home telephone number, social security number, and family member information of a current or former employee of a governmental body who requests this information be kept confidential under section 552.024. *See* Gov't Code § 552.117(a)(1). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Upon review, we find a portion of the remaining information is the personal information of a city employee. Therefore, to the extent the employee at issue timely elected to keep his personal information confidential, the city must withhold the information we have marked under section 552.117(a)(1) of the Government Code. Conversely, to the extent the employee at issue did not make a timely election under section 552.024, the city may not withhold the marked information under section 552.117(a)(1).

In summary, the information in Exhibit 11 is not subject to the Act and need not be released in response to this request. The city may withhold the remaining information in Exhibit 6 and the information we have marked in Exhibit 7 under section 552.107 of the Government Code. The city may withhold under section 552.103 of the Government Code the information in Exhibits 2, 3, 4, 5, and 8 that is not subject to section 552.022(a)(2). The city must withhold the information we have marked in Exhibit 7 under section 552.139 of the Government Code. To the extent the employee at issue timely elected to keep his personal information confidential, the city must also withhold the information we have marked in Exhibit 7 under section 552.117(a)(1) of the Government Code. The remaining information must be released.

²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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, toll free at (888) 672-6787.

Sincerely,



Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/jb

Ref: ID# 377446

Enc. Submitted documents

c: Requestor
(w/o enclosures)