



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 3, 2011

Ms. Jessica C. Eales
Assistant City Attorney
City of Houston
P.O. Box 368
Houston, Texas 77001-0368

OR2011-03068

Dear Ms. Eales:

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# 410486 (GC No. 18034).

The City of Houston (the "city") received a request for eleven categories of information relating to a specified request for proposal, contract awarded under the request, and specified federal grant.¹ You claim that the requested information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

We note some of the information at issue within Exhibit 2C is subject to section 552.022 of the Government Code, which 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:

¹You inform our office the requestor later narrowed his request to exclude information previously provided to the requestor by the city.

²This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling does not reach, and therefore does not authorize, the withholding of any other requested information to the extent that the other information is substantially different than that submitted to this office. See Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

....

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

Gov't Code § 552.022(a)(3). Exhibit 2C contains account information marked as paid that falls within the purview of section 552.022(a)(3). This information must be released unless it is expressly confidential under other law. *See id.* Although you raise section 552.103 of the Government Code for Exhibit 2C, this section is discretionary in nature and thus may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 439, 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). As such, section 552.103 does not constitute other law that makes information expressly confidential for the purposes of section 552.022. Therefore, the city may not withhold the account information under section 552.103. As you raise no further exceptions against the disclosure of this information, it must be released.

You claim that the information at issue is protected under section 552.103 of the Government Code. 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 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 that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate that (1) litigation is pending or reasonably anticipated on the date the governmental body receives the request for information, and (2) the information at issue is related to the pending or anticipated 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). The governmental body must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a). *See* ORD 551 at 4.

In order to demonstrate that litigation is reasonably anticipated, the governmental body must provide this office "concrete evidence showing that the claim that litigation might ensue is more than a mere conjecture." 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.³ Open Records Decision No. 555 (1990); *see also* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). 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). We also note that 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).

In this case, you state the requestor is the attorney for an unsuccessful bidder for the proposal and contract awarded at issue. You explain, and provide supporting documentation representing, the requestor previously submitted to the city a letter protesting the award, and then later submitted a letter protesting the award to the Department of Justice (the "DOJ"), who supplied the federal grant for the project at issue. The supporting documentation provides the DOJ responded to the requestor stating, pursuant to the federal regulations providing the procedures for protesting an award, the requestor must first exhaust its administrative remedies before pursuing a protest with the DOJ. However, you do not inform our office that, at the time of the request, the requestor had taken any concrete steps toward the initiation of litigation regarding this matter. Consequently, you have failed to demonstrate the city reasonably anticipated litigation when it received the present request for information. As such, we conclude that the city may not withhold any of the information at issue under section 552.103 of the Government Code.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. Gov't Code § 552.107(1). 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. 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

³In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: 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).

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). 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 to only communications between or among clients, client representatives, lawyers, and lawyer representatives. 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 to only 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. *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).

You state the information in Exhibits 2A and 2B constitutes communications amongst city attorneys, city employees, and outside legal counsel for the city that were made for the purpose of providing legal services to the city. You state the communications were intended to be confidential and have remained confidential. However, we note some of the e-mail strings in Exhibit 2A include communications with non-privileged parties. If the communications with these non-privileged parties exist separate and apart from the e-mail strings in which they appear, then the city may not withhold the communications we have marked under section 552.107(1). We determine the city may withhold the remaining information in Exhibits 2A and 2B under section 552.107(1) of the Government Code.

We next address the e-mails we have marked in Exhibit 2A that may not be withheld under section 552.107 if they exist separate and apart from the e-mail strings in which they appear. Section 552.111 excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” *See Gov’t Code* § 552.111. This section 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); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines work product as:

(1) [M]aterial 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). 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. *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.

Upon review, we find you have failed to demonstrate how these communications with non-privileged parties constitute attorney work product for the purposes of section 552.111. As such, the city may not withhold the information at issue as attorney work product under section 552.111 of the Government Code.

We note portions of the remaining information are subject to section 552.117 of the Government Code.⁴ Section 552.117 of the Government Code 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. Gov't Code § 552.117(a)(1). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, a governmental body must withhold

⁴The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

information under section 552.117 on behalf of current or former officials or employees only if these individuals made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Section 552.117 is also applicable to personal pager and cellular telephone numbers, provided the cellular telephone service or pager service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (statutory predecessor to section 552.117 of the Government Code not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). Accordingly, if the employee whose cellular telephone number we have marked in Exhibit 2C timely elected to keep her personal information confidential pursuant to section 552.024 and pays for the cellular telephone service with personal funds, the city must withhold the employee cellular telephone number we have marked. The city may not withhold this information under section 552.117 if the employee did not make a timely election to keep the information confidential

Section 552.117(a)(2) of the Government Code excepts from public disclosure the same information of a peace officer, regardless of whether the peace officer made an election under section 552.024 or section 552.1175 of the Government Code to keep such information confidential. Gov't Code § 552.117(a)(2). Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. Section 552.117(a)(2) protects a peace officer's personal cellular telephone number if the officer pays for the cellular telephone service with his personal funds. Open Records Decision No. 670 at 6 (2001); *cf.* ORD 506. Accordingly, the city must withhold the city's police officer's cellular telephone number we have marked in Exhibit 2C under section 552.117(a)(2) of the Government Code.⁵ The city must withhold the marked cellular telephone number of the officer only if the officer pays for the cellular telephone service with personal funds.

We note the remaining information in Exhibit 2C contains e-mail addresses of members of the public. Section 552.137 of the Government Code 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). Gov't Code § 552.137(a)-(c). The e-mail addresses we have marked are not one of the types specifically excluded by section 552.137(c). Accordingly, the city must withhold the e-mail addresses we have marked under section 552.137 of the Government Code unless the owners of the addresses have affirmatively consented to their release under section 552.137(b).⁶

⁵We note the previous determination issued in Open Records Decision No. 670 (2001) authorizes all governmental bodies to withhold the current and former home addresses and telephone numbers, personal cellular telephone and pager numbers, social security numbers, and family member information of peace officers under section 552.117(a)(2) of the Government Code without the necessity of requesting an attorney general decision.

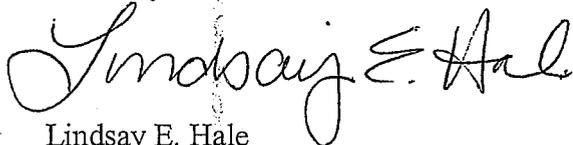
⁶We note this office issued Open Records Decision 684 (2009), a previous determination authorizing all governmental bodies to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137, without the necessity of requesting an attorney general decision.

In summary: (1) the city may withhold the information in Exhibits 2A and 2B under section 552.107 of the Government Code; however, to the extent the non-privileged e-mails we have marked exist separate and apart, they may not be withheld under section 552.107; (2) to the extent the city employee whose cellular telephone number we have marked timely-elected confidentiality under section 552.024 and pays for the cellular service with personal funds, the city must withhold the cellular telephone number under section 552.117(a)(1) of the Government Code; (3) the city must withhold the peace officer's cellular telephone number we have marked under section 552.117(a)(2) of the Government Code if the peace officer pays for the cellular service with personal funds; and (4) the city must withhold the e-mail addresses of members of the public we have marked under section 552.137 of the Government Code. The city must release the remaining information at issue.

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,



Lindsay E. Hale
Assistant Attorney General
Open Records Division

LEH/em

Ref: ID# 410486

Enc. Submitted documents

c: Requestor
(w/o enclosures)