



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 8, 2011

Ms. Cheryl K. Byles
Assistant City Attorney
City of Fort Worth
1000 Throckmorton Street, 3rd Floor
Fort Worth, Texas 76102

OR2011-03226

Dear Ms. Byles:

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# 410821 (Fort Worth PIR No. W005617).

The City of Fort Worth (the "city") received a request for information related to a named individual. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.111, 552.117, and 552.137 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

¹Although you also raise Rule 503 of the Texas Rules of Evidence, section 552.107 is the appropriate exception to raise for the information you have submitted, which is not subject to section 552.022 of the Government Code. *See* Open Records Decision No. 676 (2002).

²We 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 that the submitted information includes a certified notice for a city meeting. Notices of a governmental body's public meetings are specifically made public under provisions of 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, place, and subject of each meeting), .043 (notice of meeting of governmental body must be posted in place readily accessible to general public for at least 72 hours before scheduled time of meeting). 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). Therefore, the meeting notice, which we have marked, must be released.

Next, we note some of the submitted information is made expressly public under section 552.022 of the Government Code, which provides in relevant part as follows:

(a) Without limiting the amount or kind of information that is public information under this chapter, 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; [and]

...

(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)(1), (3). In this instance, the submitted information includes completed evaluations subject to section 552.022(a)(1) and invoices and a voucher relating to the expenditure of public funds by the city that are subject to section 552.022(a)(3). The city may only withhold the information subject to section 552.022(a)(1) if it is excepted from disclosure under section 552.108 of the Government Code or is expressly made confidential under other law. The city may only withhold the information subject to section 552.022(a)(3) if it is confidential under other law. Although you raise sections 552.103, 552.107, and 552.111 of the Government Code for this information, these sections are discretionary exceptions to disclosure that protect 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 section 552.103); Open Records Decision Nos. 677 at 10 (2002) (attorney work product privilege under section 552.111 may be waived), 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (discretionary exceptions generally). As such, sections 552.103, 552.107, and 552.111 are not "other law" that make information confidential for the purposes of section 552.022. Therefore, the city may not withhold any of the information subject to section 552.022,

which we have indicated, under section 552.103, 552.107, or 552.111 of the Government Code. As you raise no further exceptions to disclosure of this information, it must be released. However, we will consider your arguments under these sections for the remaining information not subject to section 552.022. Additionally, we will consider your arguments under sections 552.101, 552.117, and 552.137 for the submitted information.

As it is potentially the most encompassing exception, we address your claim under section 552.103 of the Government Code for the information not subject to section 552.022. Section 552.103 provides:

(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). The governmental body has the burden of providing relevant facts and documents to show 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 of the receipt of the request for information and (2) the information at issue is related to the pending or anticipated 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 governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

This office has long held that for the purposes of section 552.103, "litigation" includes "contested cases" conducted in a quasi-judicial forum. See Open Records Decision Nos. 474 (1987), 368 (1983), 336 (1982), 301 (1982). Likewise, "contested cases" conducted under the Texas Administrative Procedure Act, chapter 2001 of the Government Code, constitute "litigation" for purposes of section 552.103. See Open Records Decision Nos. 588 (1991) (concerning former State Board of Insurance proceeding), 301 (concerning hearing before Public Utilities Commission). In determining whether an administrative proceeding is conducted in a quasi-judicial forum, this office has focused on the following factors: (1) whether the dispute is, for all practical purposes, litigated in an administrative proceeding

where (a) discovery takes place, (b) evidence is heard, (c) factual questions are resolved, and (d) a record is made; and (2) whether the proceeding is an adjudicative forum of first jurisdiction, *i.e.*, whether judicial review of the proceeding in district court is an appellate review and not the forum for resolving a controversy on the basis of evidence. *See* ORD 588.

You state that the present request is related to the city's termination of the employment of the named individual. You explain the individual at issue appealed her termination with the Employee Relations Division of the Human Resources Department and then with the Disciplinary Review Board. You state the individual alleges the city discriminated against her in violation of the Americans with Disabilities Act. You explain that the city's administrative appeals process is adversarial in nature and includes the right of both sides to present evidence and cross-examine witnesses, and permits the employee to have legal representation. We understand the grievant must complete the grievance process before a lawsuit can be filed against the city for an employment complaint. Based on your representations and our review, we find you have demonstrated the city's appeals process is conducted in a quasi-judicial forum and thus constitutes litigation for purposes of section 552.103. Additionally, the submitted information reflects the appeals process was pending on the date the city received the request for information. Furthermore, upon review of the submitted information, we find the information relates to the pending litigation. Accordingly, the remaining information may generally be withheld under section 552.103 of the Government Code.

We note, however, some of the remaining information consists of e-mail communications with the opposing party and her representative, the requestor. Thus, the opposing party has seen or had access to this information. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to that litigation to obtain it through discovery procedures. *See* ORD 551 at 4-5. Thus, if the opposing party has seen or had access to information relating to pending litigation through discovery or otherwise, there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Therefore, to the extent the opposing party or her representative has seen or had access to the information at issue, the city may not withhold it under section 552.103 of the Government Code. However, the city may withhold the remaining information not subject to section 552.022 pursuant to section 552.103 of the Government Code.³

You also raise section 552.101 of the Government Code in conjunction with common-law privacy, section 552.107 of the Government Code, and section 552.117 of the Government Code for portions of the information that may not be withheld under section 552.103. Section 552.101 of the Government Code excepts from disclosure "information considered

³As our ruling for this information is dispositive, we do not address your remaining arguments against its disclosure.

to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses the common-law right of privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be demonstrated. *Id.* at 681-82. This office has found certain kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. See Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). We note, however, the information you have marked pertains to the individual represented by the requestor. Section 552.023(a) of the Government Code states that a person or a person’s authorized representative has a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and is protected from public disclosure by laws intended to protect that person’s privacy interests. See Gov’t Code § 552.023(a). Thus, the city may not withhold the information you have marked under section 552.101 in conjunction with common-law privacy.

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).

You have marked one of the submitted e-mail communications with the requestor under section 552.107. Although you state this communication was created and maintained in the course of providing legal services to the city, this communication is not privileged because the requestor is not a privileged party. Therefore, none of the remaining information may be withheld under section 552.107(1) of the Government Code.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and 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 id.* § 552.117(a)(1). We note that section 552.117 protects personal privacy. As noted above, the requestor has a right of access under section 552.023 to his client's private information. *See id.* § 552.023(a). Thus, the city may not withhold the marked telephone number from the requestor.

In summary, the city must release the certified meeting notice we have marked. With the exception of the information subject to section 552.022 of the Government Code and the information that the opposing party or her representative has seen or had access to, the city may withhold the submitted information under section 552.103 of the Government Code. The remaining information must be released.⁴

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

⁴We note the requestor has a special right of access to some of the information being released. If the city receives another request for this same information from a different requestor, the city should again seek a decision from this office.

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,

A handwritten signature in black ink, appearing to read "Andrea L. Caldwell". The signature is fluid and cursive, with the first name being the most prominent.

Andrea L. Caldwell
Assistant Attorney General
Open Records Division

ALC/dls

Ref: ID# 410821

Enc. Submitted documents

c: Requestor
(w/o enclosures)