



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 19, 2011

Ms. Bridget Chapman
Assistant City Attorney
City of Georgetown
P.O. Box 409
Georgetown, Texas

OR2011-05442

Dear Ms. Chapman:

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# 414931.

The City of Georgetown (the "city") received a request for all materials and investigative files concerning the requestor's client maintained by the city, including all files maintained by the city's human resources director, manager, assistant manager, and members of the city's job audit committee. You have redacted social security numbers pursuant to section 552.147 of the Government Code.¹ You claim that the submitted information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code.² You state you have notified the individuals to whom the requested information relates

¹We note 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. *See* Gov't Code § 552.147. However, we note the requestor has a right of access to her client's social security number. *See generally id.* § 552.023(b) (governmental body may not deny access to person to whom information relates, or that person's representative, solely on grounds that information is considered confidential by privacy principles).

²Although you raise section 552.101 of the Government Code in conjunction with rule 503 of the Texas Rules of Evidence, we note section 552.101 does not encompass discovery privileges. *See* Open Records Decision No. 676 at 1-2 (2002), 575 at 2 (1990). Furthermore, although you raise the attorney-client privilege under rule 503 of the Texas Rules of Evidence for the information in Exhibit B, we note section 552.107 is the proper exception for your attorney-client privilege claim in this instance.

pursuant to section 552.304 of the Government Code.³ *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have considered the exceptions you claim and reviewed the submitted representative sample of information.⁴

Initially, 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:

....
(15) information regarded as open to the public under an agency's policies[.]

Id. § 552.022(a)(15). The submitted information in Exhibit C includes information regarding a job posting that the city made public that is subject to section 552.022(a)(15). Although the city seeks to withhold the information subject to section 552.022 under section 552.103 of the Government Code, this section is a discretionary exception and, as such, is not other law for purposes of section 552.022. *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); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 473 (1987) (governmental body may waive section 552.103). Therefore, this information, which we have marked, may not be withheld under section 552.103. However, we will address the city's argument under section 552.103 for the information not subject to section 552.022. We will also address the city's claim of section 552.107(1) for Exhibit B.

We will now address your argument under section 552.103 of the Government Code for Exhibit B and the information in Exhibit C that is not subject to section 552.022(a)(15). Section 552.103 provides in relevant part as follows:

³As of the date of this letter, we have not received any arguments from the named individuals regarding the information at issue.

⁴We 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.

(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 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 that 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 governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

To establish litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than 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. Open Records Decision No. 555 (1990); see 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. Open Records Decision No. 331 (1982). Further, 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. Open Records Decision No. 361 (1983). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. ORD 452 at 4.

You state, and provide documentation showing, that the requestor's client filed a grievance with the city and retained the requestor to represent him. You explain the grievance proceeding has concluded and that "[w]hile the [c]ity has diligently tried to resolve the issues raise by [the requestor], the city reasonably anticipates litigation surrounding these issues."

However, based upon your representations and our review, we find the city has failed to establish it reasonably anticipated litigation on the date this request was received. *See* ORD 361. Accordingly, the city may not withhold the information in Exhibit B or the remaining information in Exhibit C under section 552.103 of the Government Code.

We next address your claims under section 552.107(1) of the Government Code for the information in Exhibit B. Section 552.107 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* 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 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 state that Exhibit B constitutes communications between attorneys for the city and city personnel. You state that these communications were made in furtherance of the rendition of legal services to the city, and you inform this office that these communications have remained confidential. Based on your representations and our review, we agree that the e-

mails in Exhibit B constitute privileged attorney-client communications. Accordingly, the city may generally withhold these communications under section 552.107(1) of the Government Code. However, we note that some of the individual e-mails in the submitted e-mail chains consist of communications with a non-privileged party. Thus, to the extent these non-privileged e-mails, which we have marked, exist separate and apart from the submitted e-mail chains, the city may not withhold them pursuant to section 552.107(1) of the Government Code.

We note that portions of the submitted information may be subject to section 552.117(a)(1) of the Government Code.⁵ This section excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests this information be kept confidential pursuant to section 552.024 of the Government Code. *See* Gov't Code §§ 552.117(a)(1), .024(b). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time the governmental body receives the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. We have marked the information that may be subject to section 552.117. To the extent the individual whose information is at issue timely requested confidentiality for his personal information under section 552.024, the city must withhold the information we have marked under section 552.117(a)(1). To the extent the individual did not timely elect to withhold his personal information, then the city may not withhold the information we have marked under section 552.117(a)(1) of the Government Code.

We note the submitted information includes utility account numbers. Section 552.136 of the Government Code states that "[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136(b). An access device number is one that may be used to "(1) obtain money, goods, services, or another thing of value; or (2) initiate a transfer of funds other than a transfer originated solely by paper instrument." *Id.* § 552.136(a). Upon review, we find the submitted utility account numbers constitute access device numbers for purposes of section 552.136. Thus, the city must withhold the account numbers we have marked under section 552.136 of the Government Code.

We understand you have marked e-mail addresses within the remaining information under section 552.137 of the Government Code pursuant to Open Records Decision No. 684

⁵The 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).

(2009). ⁶Section 552.137 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). *Id.* § 552.137(a)-(c). We note this exception is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. You have marked e-mail addresses maintained by a governmental entity under section 552.137. These e-mail addresses, which we have marked for release, may not be withheld under section 552.137.⁷ However, some of the remaining information includes additional e-mail addresses subject to section 552.137. Thus, the city must withhold the e-mail addresses you have marked, and the additional e-mail addresses we have marked, under section 552.137, unless the city receives consent for their release.

In summary, the city may generally withhold the information we have marked under section 552.107(1) of the Government Code. However, to the extent the non-privileged e-mails we have marked in Exhibit B exist separate and apart from the otherwise privileged e-mail chains in which they are submitted, they may not be withheld under section 552.107(1) of the Government Code. To the extent the individual whose information is at issue timely elected to restrict access to his personal information, the city must withhold the information we have marked under section 552.117(a)(1) of the Government Code. The city must withhold the account numbers we have marked under section 552.136 of the Government Code. With the exception of the e-mail addresses we have marked for release, the city must withhold the e-mail addresses it has marked, in addition to the e-mail addresses we have marked, under section 552.137 of the Government Code. The remaining information must be released.⁸

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.

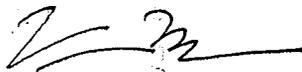
⁶We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

⁷Additionally, we note the requestor also has a right of access to her client's e-mail address. Gov't Code § 552.137(b).

⁸We note the information being released contains confidential information to which the requestor has a right of access. *See* Gov't Code § 552.023 (person or person's authorized representative has special right of access to information that relates to the person and that is protected from disclosure by laws intended to protect person's privacy interests). 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,



Vanessa Burgess
Assistant Attorney General
Open Records Division

VB/em

Ref: ID# 414931

Enc. Submitted documents

c: Requestor
(w/o enclosures)