



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

October 12, 2011

Ms. Elaine Nicholson  
Assistant City Attorney  
City of Austin  
P.O. Box 1088  
Austin, Texas 78767-8828

OR2011-14828

Dear Ms. Nicholson:

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# 433071.

The City of Austin (the "city") received three requests from the same requestor for all information concerning the Northern Walnut Creek Bike Trail construction project, all documents pertaining to the city's public service agreement with Larson, Burns and Smith on the Walnut Creek Bike Trail construction project, and all information pertaining to the submissions to the city for certification as Women-Owned Business Enterprises, Minority-Owned Business Enterprises and Disadvantaged Business Enterprises.<sup>1</sup> We note the city has redacted information subject to section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).<sup>2</sup> We also note the city has marked some submitted information for release. You claim that the remaining submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107 and 552.128 of the Government Code. You also state release of the requested information may implicate the proprietary

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<sup>1</sup>You inform us the city received the requests on July 12, 2011. You state the city provided the requestor with an estimate of charges and requested payment regarding both requests on July 18, 2011. *See* Gov't Code §§ 552.2615, .263(a). You further inform us the city received the requestor's deposit on July 27, 2011; thus, that is the date on which the city is deemed to have received the requests. *Id.* § 552.263(e).

<sup>2</sup>Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold ten categories of information without the necessity of requesting an attorney general decision, including an e-mail address of a member of the public under section 552.137 of the Government Code.

interests of third parties.<sup>3</sup> You inform us the interested third parties were notified of this request for information and of their right to submit arguments as to why the requested information should not be released. *See* Gov't Code §552.305 (permitting interested third parties to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in certain circumstances). We have considered the submitted arguments and reviewed the submitted representative sample of information.<sup>4</sup>

Initially, we note some of the information you have submitted is not responsive to the request. The city received the request for information on July 27, 2011. Therefore, any information created after the date the city received the request is not responsive. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1–2 (1990), 452 at 3 (1986), 362 at 2 (1983). Our ruling does not address the public availability of the non-responsive information, which you have marked, and the city is not required to release information that is not responsive to the request.

The city raises section 552.103 of the Government Code, which 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 is pending or

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<sup>3</sup>The third parties notified pursuant to section 552.305 are: Jaster-Quintanilla San Antonio, Inc., Axiom Engineers, Holt Engineering, All Points Inspection Services, McGray and McGray Surveyors, Frank Lam and Associates, and Austin Permit Services.

<sup>4</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 those records contain substantially different types of information than those submitted to this office.

reasonably anticipated on the date the governmental body 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).

The question of 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 that 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 concluded a governmental body's receipt of a claim letter it represents to be in compliance with the notice requirements of the Texas Tort Claims Act ("TTCA"), chapter 101 of the Civil Practice and Remedies Code, or an applicable municipal ordinance, is sufficient to establish litigation is reasonably anticipated. *See* Open Records Decision No. 638 at 4 (1996). If that representation is not made, the receipt of a claim letter is a factor we will consider in determining, from the totality of the circumstances presented, whether the governmental body has established litigation is reasonably anticipated. *Id.* Concrete evidence that litigation is reasonably anticipated also may include 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.<sup>5</sup> *See* 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 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). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish litigation is reasonably anticipated. *See* Open Records Decision No. 361 (1983).

You explain the city and the requestor are parties to a construction contract involving the subject of this request. You state, and provide documentation showing, the requestor's company has submitted a claim for damages against the city for alleged delays in the construction process. You do not represent the claim letter complies with the notice requirements of the TTCA. However, you state the claim has not been resolved, and the city anticipates litigation concerning this contract. You state the information at issue directly relates to the anticipated litigation. Based on these representations, our review of the information, and the totality of the circumstances, we find the city reasonably anticipated litigation on the date it received the request. We further find the information at issue relates

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<sup>5</sup>This office also 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).

to the anticipated litigation. Accordingly, the city may withhold the responsive information you have marked under section 552.103 of the Government Code.

In reaching this conclusion, we assume the opposing party has not seen or had access to any of the information in question. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* ORD 551 at 4–5. If the opposing party has seen or had access to information relating to the anticipated litigation, through discovery or otherwise, there is no interest in withholding that information from public disclosure and the city may not do so under section 552.103 of the Government Code. *See* Open Records Decision Nos. 349 (1982), 320 (1982). We also note the applicability of section 552.103 ends once the litigation concludes or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

The city also raises Section 552.107(1) of the Government Code, which 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 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 Texas 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 only to communications between or among clients, client representatives, lawyers, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *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. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no pet.). 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 e-mail communications you wish to withhold consist of confidential communications amongst the City Manager's office, city attorneys, the City Auditor's office, and city personnel in the Contract and Land Management, Parks and Recreation, and Public Works Departments. You have identified the parties to the communications. You explain these communications were made for the rendition of legal services, were intended to be confidential, and they have remained confidential. Upon review, we find the information we have marked is protected by the attorney-client privilege, and the city may withhold it under section 552.107 of the Government Code. However, we find portions of the information you seek to withhold under section 552.107 are communications with an individual you have not demonstrated is a privileged party. Therefore, we conclude you have failed to establish how the remaining information at issue 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 at issue under section 552.107 of the Government Code.

The city also raises section 552.128 for the remaining submitted information, which provides:

(a) Information submitted by a potential vendor or contractor to a governmental body in connection with an application for certification as a historically underutilized or disadvantaged business under a local, state, or federal certification program is excepted from the requirements of Section 552.021, except as provided by this section.

(b) Notwithstanding Section 552.007 and except as provided by Subsection (c), the information may be disclosed only:

(1) to a state or local governmental entity in this state, and the state or local governmental entity may use the information only:

(A) for purposes related to verifying an applicant's status as a historically underutilized or disadvantaged business; or

(B) for the purpose of conducting a study of a public purchasing program established under state law for historically underutilized or disadvantaged businesses; or

(2) with the express written permission of the applicant or the applicant's agent.

(c) Information submitted by a vendor or contractor or a potential vendor or contractor to a governmental body in connection with a specific proposed contractual relationship, a specific contract, or an application to be placed on a bidders list, including information that may also have been submitted in connection with an application for certification as a historically underutilized

or disadvantaged business, is subject to required disclosure, excepted from required disclosure, or confidential in accordance with other law.

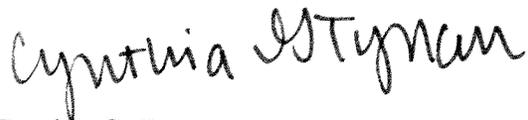
Gov't Code § 552.128. The city explains the remaining requested information was submitted to the city as part of an application for certification as a historically underutilized or disadvantaged business under a local, state, or federal certification program. Additionally, the city explains its Small and Minority Business Resources Office assists small, minority-owned and women-owned businesses pursue contracting opportunities with the city, and maintains the information at issue. The city states the requestor is not a state or local governmental entity, and the applicants or applicants' agents have not given written permission to release their information. Further, the city explains, and we agree, that subsection 552.128(c) does not apply in this instance. We therefore conclude the city must withhold the information we have marked under section 552.128 of the Government Code.<sup>6</sup>

In summary, the city may withhold the information it has marked under section 552.103 of the Government Code, unless the opposing party has seen or had access to the particular information at issue. The city may withhold the information we have marked under section 552.107 of the Government Code. The city must withhold the information we have marked under section 552.128 of the Government Code.

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,



Cynthia G. Tynan  
Assistant Attorney General  
Open Records Division

CGT/em

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<sup>6</sup>As our ruling is dispositive, we need not address the remaining submitted arguments against disclosure.

Ref: ID# 433071

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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