



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 12, 2011

Mr. Benjamin Sampract
Assistant City Attorney
City of Fort Worth
1000 Throckmorton Street
Fort Worth, Texas 76102

OR2011-14840

Dear Mr. Sampract:

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# 433078 (ORR# W010554).

The City of Fort Worth (the "city") received a request for e-mails from January 1, 2011 through July 25, 2011 that were sent or received by a named employee. You state the city does not have some of the requested information.¹ You state the city redacted Texas motor vehicle record information under section 552.130 of the Government Code pursuant to Open Records Letter Nos. 2006-14726 (2006) and 2007-00198 (2007).² You also state the city

¹The Act does not require a governmental body to disclose information that did not exist when the request for information was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

²Open Records Letter No. 2006-14726 is a previous determination to the city authorizing it to withhold Texas driver's license numbers, Texas-issued state identification numbers, Texas license plate numbers, and Texas license years of motor vehicles under section 552.130 of the Government Code, without the necessity of requesting an attorney general decision. Open Records Letter No. 2007-00198 is a previous determination to the city authorizing it to withhold class designations, restrictions, expiration dates, license years for Texas-issued driver's licenses of living individuals, and vehicle identification numbers relating to a title or registration issued by an agency of the State of Texas in which a living individual owns an interest under section 552.130 of the Government Code, without the necessity of requesting an attorney general decision. However, as of September 1, 2011, section 552.130 allows a governmental body to redact the information described in subsections 552.130(a)(1) and (a)(3) without the necessity of seeking a decision from the attorney general. *See* Act of May 30, 2011, 82nd Leg., R.S., S.B. 602, § 22 (to be codified at Gov't Code § 552.130(c)). If a governmental body redacts such information, it must notify the requestor in accordance with

redacted social security numbers pursuant to section 552.147 of the Government Code.³ You inform us the city will release some of the requested information, but claim some of the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that some of the information you have submitted to us for review is not responsive to the request for information because it was created after the city received the request. 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 this information, which we have marked, in response to this request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. App.—San Antonio 1978, writ dismissed).

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This section excepts from disclosure information deemed confidential by statute, such as section 143.089 of the Local Government Code. You indicate the city is a civil service city under chapter 143 of the Local Government Code. Section 143.089 contemplates two different types of personnel files: a police officer’s civil service file that the civil service director is required to maintain, and an internal file that the police department may maintain for its own use. Local Gov’t Code § 143.089(a), (g). In cases in which a police department investigates a police officer’s misconduct and takes disciplinary action against an officer, it is required by section 143.089(a)(2) to place all investigatory records relating to the investigation and disciplinary action, including background documents such as complaints, witness statements, and documents of like nature from individuals who were not in a supervisory capacity, in the police officer’s civil service file maintained under section 143.089(a).⁴ *Abbott v. City of Corpus Christi*, 109 S.W.3d 113, 122 (Tex. App.—Austin 2003, no pet.). All investigatory materials in a case resulting in disciplinary action are “from the employing department” when they are held by or in possession of the department because of its investigation into a police officer’s misconduct, and the department must forward them to the civil service commission for placement in the civil service personnel file. *Id.* Such records are subject to release under the Act. *See* Local Gov’t Code

section 552.130(e). *See* Act of May 30, 2011, 82nd Leg., R.S., S.B. 602, § 22 (to be codified at Gov’t Code § 552.130(d), (e)). Thus, the statutory amendments to section 552.130 of the Government Code supercedes Open Records Letter Nos. 2006-14726 and 2007-00198. Therefore, the city may only redact information subject to subsections 552.130(a)(1) and (a)(3) in accordance with section 552.130, not Open Records Letter Nos. 2006-14726 (2006) and 2007-00198. The city may continue to redact information subject to section 552.130(a)(2) pursuant to Open Records Letter No. 2007-00198.

³Section 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.

⁴Chapter 143 prescribes the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. *See* Local Gov’t Code §§ 143.051-143.055.

§ 143.089(f); Open Records Decision No. 562 at 6 (1990). However, information maintained in a police department's internal file pursuant to section 143.089(g) is confidential and must not be released. *City of San Antonio v. Texas Attorney Gen.*, 851 S.W.2d 946, 949 (Tex. App.—Austin 1993, writ denied).

You seek to withhold e-mail communications to or from an Internal Affairs Division investigator under section 143.089. You inform us the investigator “often conducts investigations of misconduct against officers via email correspondence.” You also state

This request [for information] was not specific as to any area, so these emails were produced as responsive. However, there are hints and mentions of allegations against officers that have not resulted in discipline as outlined under 143.089(g). At this point these are “G” file communications.

You also state these “records are maintained in confidence by the department for its own use.” Accordingly, based on your representation that these communications are maintained in the police department's internal files concerning investigations of officers that did not result in disciplinary action against the officers at issue, we find this information is confidential pursuant to section 143.089(g) of the Local Government Code. Therefore, the city must withhold the information you have marked under section 552.101 in conjunction with section 143.089 of the Government Code.

Section 552.101 also encompasses the doctrine of common-law privacy, which protects information that (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). Prior decisions of this office have found financial information relating only to an individual ordinarily satisfies the first requirement of the test for common-law privacy but there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See* Open Records Decision Nos. 600 (1992), 545 (1990), 373 (1983). For example, information related to an individual's mortgage payments, assets, bills, and credit history is generally protected by the common-law right to privacy. *See* Open Records Decision Nos. 545, 523 (1989); *see also* ORD 600 (personal financial information includes choice of particular insurance carrier). The submitted documents contain personal financial information that is not of legitimate concern to the public. *See* Open Records Decision Nos. 620 (1993), 600. We agree the city must withhold the information you have marked under section 552.101 in conjunction with common-law privacy.

You assert some of the responsive information is excepted from disclosure under section 552.103 of the Government Code, which provides in part as follows:

(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 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 from disclosure 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). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *Id.* In Open Records Decision No. 638 (1996), this office stated a governmental body has met its burden of showing litigation is reasonably anticipated by representing it received a notice-of-claim letter that is in compliance with the Texas Tort Claims Act ("TTCA"), chapter 101 of the Civil Practices and Remedies Code.

The city states it received a notice-of-claim letter prior to receiving the request for information and the notice complies with the requirements of the TTCA. Thus, we find the city reasonably anticipated litigation when it received the request for information. Upon review, we also find you have established the responsive documents you seek to withhold under section 552.103 are related to the anticipated litigation for purposes of section 552.103(a). Therefore, we agree section 552.103 of the Government Code applies to the information you have marked under that section.

We note, however, the city seeks to withhold information that the requestor, as opposing party to the anticipated litigation, has already seen or had access to. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information that relates to the litigation through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). Thus, if the opposing party to anticipated litigation has already seen or had access to information that relates to the litigation, through discovery or otherwise, there is no interest in now withholding

such information under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Therefore, the submitted information you have marked under section 552.103 that the requestor has already seen or had access to is not excepted from disclosure under section 552.103, and the city must release it to the requestor. However, the city may withhold the remaining information you have marked under section 552.103.

Finally, you assert some of the submitted information is excepted from disclosure under section 552.107 of the Government Code. Section 552.107(1) protects information coming 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. 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. 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 only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1). 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.*, 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, orig. proceeding). 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 explain the information you have marked under section 552.107 constitutes a confidential communication between an attorney for and employees of the city that was made in furtherance of the rendition of professional legal services. You also assert the communication was intended to be confidential and its confidentiality has been maintained.

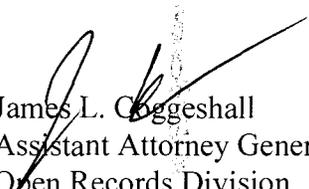
After reviewing your arguments and the submitted information, we agree the information at issue constitutes a privileged attorney-client communication. Therefore, the city may withhold the information you have marked under section 552.107. However, we note part of this e-mail string consists of a communication with a nonprivileged party. If the communication with the nonprivileged party, which we have marked, exists separate and apart from the e-mail string in which it appears, then the city may not withhold the communication with the non-privileged parties under section 552.107(1).

To conclude, the city must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 143.089 of the Government Code and common-law privacy. With the exception of the information that the requestor has seen or had access to, the city may withhold the responsive information you have marked under section 552.103. The city may also withhold the information you have marked under section 552.107; however, to the extent the nonprivileged e-mail we have marked exists separate and apart from the submitted e-mail string, the city may not withhold it under section 552.107(1). The city must release the remaining information.

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,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/ag

Ref: ID# 433078

Enc. Submitted documents

c: Requestor
(w/o enclosures)