



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 25, 2012

Mr. Warren M.S. Ernst  
Chief of the General Counsel Division  
City of Dallas  
1500 Marilla Street, Room 7DN  
Dallas, Texas 75201

OR2012-08045

Dear Mr. Ernst:

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# 454837.

The City of Dallas (the "city") received a request for several categories of information pertaining to fair housing complaints and certification. You state you will release some of the requested information. You state the city does not possess information responsive to one of the categories of information.<sup>1</sup> You claim the remaining information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.<sup>2</sup>

You raise section 552.103 of the Government Code for the information in Exhibits B and C. Section 552.103 provides, in pertinent part:

---

<sup>1</sup>We note the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dism'd); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

<sup>2</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 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 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). *See* ORD 551 at 4.

You state, and provide documentation demonstrating, that lawsuits styled *Lockey v. City of Dallas*, Cause No. 3:11-cv-00354-O and *Avalon Residential Care Homes, Inc. v. City of Dallas, Texas*, Cause No. 3:11:cv:1239-D were filed in the United States District Court Northern District of Texas, Dallas Division, prior to the city's receipt of this request for the information at issue. You explain both lawsuits were pending at the time the city received the request for information. You state the information at issue relates to these lawsuits. Based on your representations and our review, we find you have established the information at issue is related to litigation that was pending on the date the city received this request for information. Accordingly, we conclude that the city may generally withhold Exhibits B and C under section 552.103 of the Government Code.

We note 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. Thus, when the opposing party has seen or had access to information relating to litigation, through discovery or otherwise, there is no interest in withholding that information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Accordingly with the exception of the information an opposing party has already seen or had access to, which we have marked for release in Exhibit B, you may withhold Exhibits B and C under section 552.103 of the

Government Code.<sup>3</sup> We note the applicability of section 552.103 ends once the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Section 552.107 of the Government Code 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 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 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). 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.* 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, orig. proceeding). 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 inform us the draft documents at issue consist of communications between city attorneys and employees that were made for the purpose of providing legal advice to the city. You have identified the parties to these communications. You inform us the communications were intended to be, and have remained, confidential. Based on your representations and our review, we conclude you have established the information at issue is protected by the

---

<sup>3</sup>As our ruling for this information is dispositive, we need not address your remaining arguments against its disclosure.

attorney-client privilege. Therefore, the city may withhold the information you have marked in the remaining information under section 552.107(1) of the Government Code.<sup>4</sup>

Section 552.111 of the Government Code 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.

You claim some of the remaining information consists of attorney work product that should be withheld under section 552.111. You indicate the information at issue consists of communications among the city’s attorneys and employees pertaining to anticipated litigation regarding fair housing complaints. Upon review, we find you have demonstrated the information you have marked consists of material prepared, mental impressions developed,

---

<sup>4</sup>As our ruling for this information is dispositive, we need not address your remaining arguments against its disclosure.

or communications made in anticipation of litigation or for trial. *See* TEX. R. CIV. P. 192.5. Accordingly, the remaining information you have marked is protected by the attorney work-product privilege, and the city may withhold it under section 552.111 of the Government Code.<sup>5</sup>

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses information protected by federal and state law. You assert the remaining information contained in Exhibit E is confidential under section 103.330 of title 24 of the Code of Federal Regulations, section 3610 of title 42 of the United States Code, and section 301.085 of the Property Code. *See* 24 C.F.R. § 103.330; *see also* 42 U.S.C. § 3610(b); Prop. Code § 301.063. Part 103 applies to complaints alleging discriminatory housing practices because of race, color, religion, sex or national origin, and complaints alleging discriminatory housing practices on account of handicap or familial status occurring on or after March 12, 1989. 24 C.F.R. § 103.1(b). Upon the filing of a complaint, both federal and state law mirror each other in language and encourage conciliation to the extent feasible. Section 103.330 provides the following:

(a) Except as provided in paragraph (b) of this section and § 103.230(c), nothing that is said or done in the course of conciliation under this part may be made public or used as evidence in a subsequent administrative hearing under Part 180 or in civil actions under Title VIII of the Fair Housing Act, without the written consent of the persons concerned.

*Id.* § 103.330(a); *see id.* § 103.9 (defining conciliation for purposes of part 103). Section 3610 of title 42 of the United States Code provides in pertinent part:

(d) Prohibitions and requirements with respect to disclosure of information

(1) Nothing said or done in the course of conciliation under this subchapter may be made public or used as evidence in a subsequent proceeding under this subchapter without the written consent of the persons concerned.

42 U.S.C. § 3610(d)(1). Section 301.085 of the Property Code provides in pertinent part:

(e) Statements made or actions taken in the conciliation may not be made public or used as evidence in a subsequent proceeding under this chapter without the written consent of the persons concerned.

Prop. Code § 301.085(e). You indicate the information at issue consists of statements made or actions taken in the course of conciliation in relation to a fair housing complaint. You

---

<sup>5</sup>As our ruling for this information is dispositive, we need not address your remaining argument against its disclosure.

state, and provide documentation reflecting, you have not received the written consent of the persons concerned. Accordingly, we find the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with federal law.<sup>6</sup> However, the remaining information at issue consists of a complaint notification letter and a copy of the housing discrimination complaint at issue. Although you contend this information is also protected under the federal law and state law, we find it consists of neither things said nor done in the course of conciliation. Further, we find the information consists of neither statements made nor actions taken in conciliation. Accordingly, we find the city may not withhold the remaining information at issue under section 552.101 of the Government Code in conjunction with section 103.330 of title 24 of the Code of Federal Regulations, section 3610 of title 42 of the United States Code, or section 301.085(e) of the Property Code.

In summary, with the exception of the information we have marked for release, the city may withhold Exhibits B and C under section 552.103 of the Government Code. The city may withhold the information you have marked under sections 552.107 and 552.111 of the Government Code. The city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with federal law. The remaining information must be released.

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,



Paige Lay  
Assistant Attorney General  
Open Records Division

PL/som

---

<sup>6</sup>As our ruling for this information is dispositive, we need not address your remaining arguments against its disclosure.

Ref: ID# 454837

Enc. Submitted documents

cc: Requestor  
(w/o enclosures)