



ATTORNEY GENERAL OF TEXAS
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October 29, 2014

Mr. Gary B. Lawson
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OR2014-19539

Dear Mr. Lawson:

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# 541175.

The Dallas Police & Fire Pension System (the "system"), which you represent, received a request for copies of all e-mails sent by a specified person from June 1, 2014 to the date of the request. You state you have provided some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.103, 552.107, 552.111, 552.117, 552.137, and 552.143 of the Government Code and privileged under rule 192.3 of the Texas Rules of Civil Procedure.¹ You also state release of a portion of the information implicates the proprietary interests of third parties. Accordingly, you state, and provide documentation showing, you notified J.P. Morgan Chase Bank, N.A. ("Chase") and Hudson Clean Energy Partners, L.P. ("Hudson") of the request for information and of their right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305; Open Records Decision No. 542 (1990) (statutory predecessor

¹ Although you raise Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5, we note the proper exceptions to raise when asserting the attorney-client privilege and the attorney work product privilege for information not subject to section 552.022 of the Government Code are sections 552.107 and 552.111 of the Government Code, respectively. *See* Open Records Decision Nos. 677 (2002), 676 at 1-2 (2002). Additionally, although you raise section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.3, this office has concluded section 552.101 does not encompass discovery privileges. *See* ORDs 676 at 1-2 (2002), 575 at 2 (1990).

to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received comments on behalf of Chase and Hudson. We have considered the arguments we have received and reviewed the submitted information.

You claim some of the information at issue is protected under section 552.103 of the Government Code. Section 552.103 provides, in part:

(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). A governmental body that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). The governmental body must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a). *See Open Records Decision No. 551 at 4 (1990).*

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 provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *Id.* 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.² 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).

You contend the system reasonably anticipates litigation because it is currently in a dispute with the Nasher Sculpture Center (the “Nasher”). You explain the Nasher has made allegations that glare emanating from the glass walls of the Museum Tower, a high-rise residential condominium owned by the system, is damaging the Nasher’s art and vegetation and creating an unpleasant experience for visitors. You state representatives of the Museum Tower and the Nasher recently participated in mediation efforts which were unsuccessful. You indicate all efforts short of litigation to resolve the dispute have failed and state the system anticipates being a party to any suit regarding the Museum Tower and you argue there would be legal and financial recourse against the system as a result of any suit. Based on your representations and our review, we determine the system has established it reasonably anticipated litigation on the date it received the request for information. We also find the information we have marked is related to litigation the system anticipated on the date of its receipt of the request for information. Accordingly, the system may withhold the information we have marked under section 552.103.³ However, we find you have failed to demonstrate how the remaining information at issue is related to any anticipated or pending litigation involving the system for purposes of section 552.103. Therefore, the system may not withhold the remaining information under section 552.103 of the Government Code.

Once the information at issue has been obtained by all parties to the anticipated litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to the information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Further, the applicability of section 552.103(a) ends once the litigation has concluded or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

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

²In addition, this office 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).

³As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

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 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, 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). 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. *See 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 claim the information you have marked is protected by section 552.107(1) of the Government Code. You state the information constitutes a communication involving employees of the system and attorneys representing the system. You state the communication was made in confidence for the purpose of rendering professional legal services to the system and that the communication has remained confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information we have marked. Therefore, the system may withhold the information we have marked under section 552.107(1) of the Government Code.⁴

⁴As our ruling is dispositive, we need not address your remaining arguments against the disclosure of this information.

Section 552.143 of the Government Code provides in relevant part the following:

(c) All information regarding a governmental body's direct purchase, holding, or disposal of restricted securities that is not listed in Section 552.0225(b)(2)-(9), (11), or (13)-(16) is confidential and excepted from the requirements of Section 552.021. This subsection does not apply to a governmental body's purchase, holding, or disposal of restricted securities for the purpose of reinvestment nor does it apply to a private investment fund's investment in restricted securities. This subsection applies to information regarding a direct purchase, holding, or disposal of restricted securities by the Texas growth fund, created under Section 70, Article XVI, Texas Constitution, that is not listed in Section 552.0225(b).

Gov't Code § 552.143(c). You argue the information you have marked pertains to the system's direct purchase, holding, or disposal of a restricted security. *See id.* § 552.143(d)(3); *see also* 17 C.F.R. § 230.144(a)(3) (defining "restricted securities" as "securities acquired directly or indirectly from the issuer, or from an affiliate of the issuer, in a transaction or chain of transactions not involving public offering"). You inform us the information involves Hudson, a private equity fund. You also state the system's limited partnership interest in Hudson is a security acquired directly from the issuer of the security, Hudson, in a transaction that did not involve a public offering. You explain the system's investment in Hudson was not for purposes of reinvestment. Accordingly, based on your representations and our review, we find the system has demonstrated the applicability of section 552.143(c) to the information we have marked. The system must withhold the information we have marked under section 552.143(c) of the Government Code.⁵

Chase raises section 552.104 of the Government Code for some of the remaining information. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. We note section 552.104 protects the interests of governmental bodies, not third parties. *See* Open Records Decision No. 592 at 8 (1991) (purpose of section 552.104 is to protect governmental body's interest in competitive bidding situation). As the system does not argue section 552.104 is applicable, we will not consider Chase's claim under this section. *See id.* (section 552.104 may be waived by governmental body). Therefore, the system may not withhold any of the remaining information under section 552.104 of the Government Code.

Section 552.117(a)(2) of the Government Code excepts from public disclosure the home addresses, home telephone numbers, emergency contact information, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with section 552.024 of

⁵As our ruling is dispositive, we need not address the remaining arguments against the disclosure of this information.

the Government Code or section 552.1175 of the Government Code. Gov't Code § 552.117(a)(2). Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. We note section 552.117 also encompasses a personal cellular telephone or pager number, unless the cellular or pager service is paid for by a governmental body. *See* Open Records Decision No. 506 at 5-7 (1988) (statutory predecessor to section 552.117 not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). We are unable to discern whether the retired officer is a licensed police officer. Accordingly, to the extent the information you have marked pertains to a licensed peace officer, the system must withhold this information under section 552.117(a)(2) of the Government Code; however, the system may only withhold the marked cellular telephone number if the cellular service is not paid for by a governmental body. To the extent the information you have marked does not pertain to a licensed peace officer, the system may not withhold this information under section 552.117(a)(2) of the Government Code.

To the extent the information you have marked does not pertain to a licensed peace officer, we note it may be subject to section 552.117(a)(1) of the Government Code. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the system may only withhold information under section 552.117 on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Therefore, to the extent the information you have marked does not pertain to a licensed peace officer, and to the extent the employee at issue timely elected to keep such information confidential under section 552.024, the system must withhold the information you have marked under section 552.117(a)(1) of the Government Code; however, the system may only withhold the marked cellular telephone number if the cellular service is not paid for by a governmental body. If the employee whose information is at issue did not make a timely election under section 552.024, or the cellular service is paid for by a governmental body, the system may not withhold the information you have marked under section 552.117(a)(1) of the Government Code.

Section 552.137 of the Government Code 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). Gov't Code § 552.137(a)-(c). The e-mail addresses you have marked, and we have marked, are not of the types specifically excluded by section 552.137(c). Accordingly, the system must withhold the e-mail addresses

you have marked, and additional ones we marked, under section 552.137 of the Government Code, unless the owners of the addresses affirmatively consent to their release.

In summary, the system may withhold the information we have marked under section 552.103 of the Government Code. The system may withhold the attorney-client privileged information we have marked under section 552.107(1) of the Government Code. The system must withhold the information we have marked under section 552.143(c) of the Government Code. To the extent the information you have marked pertains to a licensed police officer, the system must withhold this information under section 552.117(a)(2) of the Government Code; however, the system may only withhold the marked cellular telephone number if the cellular telephone service is not paid for by a governmental body. To the extent the information you have marked does not pertain to a licensed peace officer, and to the extent the employee at issue timely elected to keep such information confidential under section 552.024 of the Government Code, the system must withhold the information you have marked under section 552.117(a)(1) of the Government Code; however, the system may only withhold the marked cellular telephone number if the cellular service is not paid for by a governmental body. The system must withhold the e-mail addresses you have marked, and additional ones we marked, under section 552.137 of the Government Code, unless the owners of the addresses affirmatively consent to their release. 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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



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Assistant Attorney General
Open Records Division

RA/dls

Ref: ID# 541175

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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