



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

August 23, 2016

Mr. David V. Bryce  
Office of General Counsel  
Houston Housing Authority  
2640 Fountain View Drive, Suite 409  
Houston, Texas 77057

OR2016-18976

Dear Mr. Bryce:

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# 623756.

The Houston Housing Authority (the "authority") received a request for (1) all e-mails and text messages pertaining to a specified project sent, received, and drafted by named individuals during a specified time period, and (2) all documentation pertaining to temporary communication towers at specified locations. You state you will make some information available to the requestor. You state you will redact information pursuant to section 552.136(c) of the Government Code.<sup>1</sup> You claim the submitted information is excepted from disclosure under sections 552.103, 552.105, and 552.107 of the Government Code and privileged under Texas Rule of Evidence 503. We have considered the submitted arguments and reviewed the submitted representative sample of information.<sup>2</sup>

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<sup>1</sup>Section 552.136 of the Government Code permits a governmental body to withhold the information described in section 552.136(b) without the necessity of seeking a decision from this office. *See* Gov't Code § 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). *See id.* § 552.136(d), (e).

<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.

Initially, we note you have indicated portions of the submitted information as not responsive to the instant request for information. We note a governmental body must make a good faith effort to relate a request to information held by the governmental body. *See* Open Records Decision No. 561 at 8 (1990). The requestor seeks, in part, all e-mails and text messages pertaining to a specified project sent, received, and drafted by named individuals during a specified time period. Upon review, we find Exhibit 5 consists of e-mails pertaining to the specified project sent, received, or drafted by one of the named individuals during the specified time period. Thus, we find Exhibit 5 is responsive to the present request. Accordingly, we will address your arguments for this information. However, we find the remaining information you indicated does not consist of e-mails and text messages pertaining to the specified project sent, received, and drafted by named individuals during the specified time period or documentation pertaining to temporary communication towers at specified locations. Accordingly, we find the remaining information you indicated is not responsive to the present request. This ruling does not address the public availability of non-responsive information, and the authority need not release non-responsive information to the requestor.

Next, we note a portion of the responsive information may have been the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2016-15865 (2016). In Open Records Letter No. 2016-15865, we determined the authority (1) may withhold the information we marked within Exhibit 7 pursuant to rule 503 of the Texas Rules of Evidence, (2) may withhold the information it indicated under section 552.104(a) of the Government Code, (3) may withhold the information it marked in Exhibits 4 through 6 and 8 through 12 under section 552.107(1) of the Government Code, (4) may withhold the information it marked in Exhibit 13 under section 552.111 of the Government Code, (5) must withhold the personal e-mail address we marked under section 552.137 of the Government Code, unless the owner affirmatively consents to its public disclosure, and (5) must release the remaining information. We have no indication there has been any change in the law, facts, or circumstances on which the previous ruling was based. Accordingly, to the extent the responsive information is identical to the information previously requested and ruled upon by this office, we conclude the authority must continue to rely on Open Records Letter No. 2016-15865 as a previous determination and withhold or release the identical information in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes information is or is not excepted from disclosure). To the extent the responsive information is not encompassed by the previous ruling, we will address the arguments against its release.

We note a portion of the responsive information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

- (a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

...

(16) information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege[.]

Gov't Code § 552.022(a)(16). The responsive information includes information in an attorney fee bill that is subject to section 552.022(a)(16). This information must be released unless it is made confidential under the Act or other law. *See id.* The authority seeks to withhold the information at issue under section 552.107 of the Government Code. However, section 552.107 is discretionary in nature and does not make information confidential under the Act. *See* Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the information subject to section 552.022, which we have marked, may not be withheld under section 552.107 of the Government Code. However, the Texas Supreme Court has held the Texas Rules of Evidence are "other law" within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). We will therefore consider your assertion of the attorney-client privilege for the information subject to section 552.022(a)(16) of the Government Code under rule 503 of the Texas Rules of Evidence. We will also consider your remaining arguments against disclosure of the information not subject to section 552.022.

Texas Rule of Evidence 503(b)(1) provides as follows:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to facilitate the rendition of professional legal services to the client:

- (A) between the client or the client's representative and the client's lawyer or the lawyer's representative;
- (B) between the client's lawyer and the lawyer's representative;
- (C) by the client, the client's representative, the client's lawyer, or the lawyer's representative to a lawyer representing another party in a pending action or that lawyer's representative, if the communications concern a matter of common interest in the pending action;
- (D) between the client's representatives or between the client and the client's representative; or
- (E) among lawyers and their representatives representing the same client.

Tex. R. Evid. 503(b)(1). A communication is “confidential” if it is 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).

Accordingly, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must 1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; 2) identify the parties involved in the communication; and 3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. *See* ORD 676. Upon a demonstration of all three factors, the entire communication is confidential under rule 503 provided the client has not waived the privilege or the communication does not fall within the purview of the exceptions to the privilege enumerated in Rule 503(d). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero Energy Corp.*, 973 S.W.2d 453, 457 (Tex. App.—Houston [14<sup>th</sup> Dist.] 1998, orig. proceeding) (privilege attaches to complete communication, including factual information).

You assert portions of the responsive fee bill include privileged attorney-client communications between the authority’s attorneys and authority officials and staff in their capacities as clients. You state the communications at issue were made for the purpose of the rendition of legal services to the authority. You indicate the communications at issue have not been, and were not intended to be, disclosed to third parties. Based on your representations and our review of the information at issue, we find the authority has established the information we have marked constitutes attorney-client communications under rule 503. Thus, the authority may withhold the information we have marked within Exhibit 6 pursuant to rule 503 of the Texas Rules of Evidence. However, as we find you have failed to demonstrate any of the remaining information at issue consists of privileged attorney client communications, no portion of the remaining information at issue may be withheld under rule 503.

Section 552.103 of the Government Code provides, in relevant part, the following:

(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 has the burden of providing relevant facts and documents to show that the section 552.103(a) exception applies in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the requested information is related to that 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.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both parts of this test for information to be excepted under section 552.103(a). *See* ORD 551 at 4.

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 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.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, an attorney for a potential opposing party making a demand for payment and asserting an intent to sue if such payments are not made. Open Records Decision Nos. 555 at 3 (1990), 346 (1982). In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party threatened to sue on several occasions and hired an attorney. *See* Open Records Decision No. 288 at 2 (1981). However, an individual publicly threatening to bring suit against a governmental body, but who does not actually take objective steps toward filing suit, is not concrete evidence that litigation is reasonably anticipated. *See* Open Records Decision No. 331 at 1-2 (1982).

You claim section 552.103 for the information in Exhibits 3 and 4. You argue the authority anticipates litigation pertaining to a housing development project because an organization that is against the development has “publically [sic] and plainly stat[ed] its intention to initiate litigation in an effort to stop the [project.]” You further state the organization has formed a political action committee with the purpose of, among other things, “raising money to fund litigation aimed at stopping the [project.]” However, upon review, we find the authority has not demonstrated any party had taken concrete steps toward the initiation of litigation when the authority received the request for information. Thus, we conclude the authority has failed to demonstrate it reasonably anticipated litigation when it received the request for information. Therefore, the authority may not withhold Exhibits 3 and 4 under section 552.103 of the Government Code.

Section 552.105 excepts from disclosure information relating to:

- (1) the location of real or personal property for a public purpose prior to public announcement of the project; or

(2) appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property.

Gov't Code § 552.105. We note this provision is designed to protect a governmental body's planning and negotiating position with regard to particular transactions. *See* Open Records Decision Nos. 564 (1990), 357 (1982), 310 (1982). Information that is excepted from disclosure under section 552.105 that pertains to such negotiations may be excepted from disclosure so long as the transaction relating to that information is not complete. *See* ORD 310. A governmental body may withhold information "which, if released, would impair or tend to impair [its] planning and negotiating position in regard to particular transactions." Open Records Decision Nos. 357 at 3, 222 (1979). The question of whether specific information, if publicly released, would impair a governmental body's planning and negotiating position with regard to particular transactions is a question of fact. Accordingly, this office will accept a governmental body's good-faith determination in this regard, unless the contrary is clearly shown as a matter of law. *See* ORD 564.

You state the authority develops real property for public housing. You argue the information you marked in Exhibit 3 pertains to real property under consideration for use in an authority project. You state negotiations for the project have begun, but have not yet been finalized. You further state the release of the information at issue would harm the authority's negotiating position for the project. We understand the authority has made a good-faith determination that release of this information would impair the authority's position in regard to the transactions in question. Based on your representations and our review, we conclude the authority may withhold the information we have marked in Exhibit 3 under section 552.105 of the Government Code. However, we find you have not demonstrated any of the remaining information at issue pertains to the location, appraisal, or purchase price of real or personal property for a public purpose. Accordingly, the authority may not withhold any of the remaining responsive information under section 552.105 of the Government Code.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *See* Gov't Code § 552.107(1). The elements of the privilege under section 552.107(1) are the same as those discussed above for rule 503. 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. ORD 676 at 6-7. 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*, 922 S.W.2d at 923.

You claim section 552.107(1) of the Government Code for the remaining responsive information you marked in Exhibits 5 and 6. You state the information at issue consists of communications between attorneys for the authority, authority employees, and entities that are privileged parties with respect to the communications at issue. Additionally, the authority states these communications were made for the purpose of facilitating the rendition of professional legal services to the authority, and the confidentiality of the communications has been maintained. Based on these representations and our review, we find the authority

has demonstrated the applicability of the attorney-client privilege to the information you marked. Thus, the authority may withhold the remaining responsive information you marked in Exhibits 5 and 6 under section 552.107(1) of the Government Code.

Some of the remaining responsive information may be subject to section 552.117 of the Government Code.<sup>3</sup> Section 552.117(a)(1) excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee or official of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(1). Section 552.117 is applicable to cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (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). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former employee or official 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. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee or official who did not timely request under section 552.024 the information be kept confidential. Accordingly, if the individual whose information is at issue timely requested confidentiality pursuant to section 552.024, the authority must withhold the information we have marked under section 552.117(a)(1); however, the cellular telephone number may only be withheld if a governmental body does not pay for the cellular telephone service.

In summary, to the extent the responsive information is identical to the information previously requested and ruled upon by this office, the authority must continue to rely on Open Records Letter No. 2016-15865 as a previous determination and withhold or release the identical information in accordance with that ruling. The authority may withhold the information we have marked within Exhibit 6 pursuant to rule 503 of the Texas Rules of Evidence. The authority may withhold the information we have marked in Exhibit 3 under section 552.105 of the Government Code. The authority may withhold the remaining responsive information you marked in Exhibits 5 and 6 under section 552.107(1) of the Government Code. If the individual whose information is at issue timely requested confidentiality pursuant to section 552.024, the authority must withhold the information we have marked under section 552.117(a)(1); however, the cellular telephone number may only be withheld if a governmental body does not pay for the cellular telephone service. The authority must release the remaining responsive information.

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<sup>3</sup>The 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).

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](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,

A handwritten signature in black ink, appearing to read 'Kenny Moreland', written over a horizontal line.

Kenny Moreland  
Assistant Attorney General  
Open Records Division

KJM/som

Ref: ID# 623756

Enc. Submitted documents

c: Requestor  
(w/o enclosures)