



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 13, 2007

Mr. Rashaad V. Gambrell
Assistant City Attorney
City of Houston
P.O. Box 1562
Houston, Texas 77251-1562

OR2007-14914

Dear Mr. Gambrell:

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# 294475.

The City of Houston (the "city") received a request for several categories of information pertaining to the Housing and Community Development Department. You state that you are releasing some information to the requestor, but claim that some of the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.117, 552.130, 552.137, and 552.147 of the Government Code.¹ You also indicate that some of the submitted information may implicate the privacy interests of two third parties and have provided documentation showing that pursuant to section 552.305 of the Government Code you notified the interested third parties of the request for information and of their right to submit arguments explaining why the information at issue should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under the Act in

¹Although you initially raised sections 552.104, 552.110, 552.111, 552.113, 552.131, 552.133, and 552.136 of the Government Code, you have not submitted arguments explaining how these exceptions apply to the submitted information. Therefore, we presume that you have withdrawn these exceptions. *See* Gov't Code §§ 552.301, 552.302.

certain circumstances). We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

Initially, we note that an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why requested information relating to that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, this office has not received comments from either third party explaining how the release of the information at issue, submitted in Exhibits A and B, will affect their proprietary interests. Accordingly, we conclude that the city may not withhold any portion of the information at issue on the basis of any proprietary interest these third parties may have in it. *See, e.g.*, Open Records Decision Nos. 661 at 5-6 (1999) (stating that business enterprise that claims exception for commercial or financial information under section 552.110(b) must show by specific factual evidence that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret).

Next, we note that some of the information in Exhibit 3 is subject to section 552.022 of the Government Code, which provides in pertinent part as follows:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). The information at issue contains a completed report, which we have marked. Consequently, unless this information is excepted from disclosure under section 552.108 of the Government Code or expressly confidential under other law, it must be released to the requestor.³ Although the city raises section 552.103 of the Government Code for the information at issue, we note that section 552.103 is a discretionary exception to public disclosure that protects the governmental body's interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); *see also*

²We assume that 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 that those records contain substantially different types of information than that submitted to this office.

³The city does not raise section 552.108 of the Government Code as an exception to disclosure.

Open Records Decision No. 665 at 2 n.5 (discretionary exceptions generally). Therefore, the city may not withhold the information we have marked in Exhibit 3 pursuant to section 552.103 of the Government Code and must release this information to the requestor.

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 made confidential by other statutes. The city argues that federal law requires it to keep confidential information that relates to recipients of Housing Opportunities for Persons with AIDS (“HOPWA”) grant money. The stated purpose of HOPWA is “to provide States and localities with the resources and incentives to devise long-term comprehensive strategies for meeting the housing needs of persons with acquired immunodeficiency syndrome and families of such persons.” 42 U.S.C. § 12901. Section 12905(e) of chapter 42 of the United States Code requires that the city “ensure the confidentiality of the name of any individual assisted with amounts from a grant under this chapter and any other information regarding individuals receiving such assistance.” *Id.* § 12905(e); *see also* 24 C.F.R. § 574.440. We believe that the intent of this confidentiality provision is to keep confidential information that would tend to identify individual patients with AIDS and thereby prevent housing discrimination against such individuals.⁴

We understand that the recipient of the HOPWA grants at issue is an apartment complex. We take from this representation that the recipient is not actually an individual suffering from AIDS; rather, the recipient of the grant monies provides housing assistance to persons with AIDS and their families. The responsive information at issue consists of the name and address of an apartment complex that receives HOPWA grants. The question we must address is whether the identity and address of an apartment complex or residence receiving HOPWA grant monies from the city constitutes “information regarding individuals receiving such assistance.”

Our office has been provided with a letter written in September 2005 by Ms. Katie S. Worsham, Director with the U.S. Department of Housing and Urban Development (“HUD”). HUD states that the “publication of an address receiving HOPWA assistance does not bre[a]ch the confidentiality provision of 24 CFR 574.440 because that section only obligates HUD and grantees to keep names of clients confidential.” The identity and address of the apartment complex at issue here do not identify the name of an actual client with AIDS who receives assistance. Accordingly, based on HUD’s representation and our review of the responsive information, we find that the name and address of the apartment complex

⁴*See generally Housing Needs of Persons With Acquired Immune Deficiency Syndrome (AIDS): Hearings before the Subcomm. on Housing and Community Development of the House Banking, Finance, and Urban Affairs Comm.*, 101st Cong. (1990) (hearing devoted to housing problems of persons with AIDS, their causes, such as discrimination, and their remedies); *see also National Housing Policy Conference and Public Hearing: Hearings before the Subcomm. on Housing and Urban Affairs, Senate Banking, Housing, and Urban Affairs Comm. and the Subcomm. on Housing and Community Development, House Banking, Finance, and Urban Affairs Comm.*, 100th Cong. p. 154 (1988).

receiving HOPWA grants are not confidential under section 12905 of chapter 42 of the United States Code. Thus, none of the information at issue may be withheld on this basis.

Section 552.101 also encompasses section 6103(a) of title 26 of the United States Code, which provides that tax return information is confidential. *See* 26 U.S.C. § 6103(a)(2), (b)(2)(A), (p)(8); *see also* Open Records Decision No. 600 (1992); Attorney General Op. MW-372 (1981). Accordingly, the 1040 tax form submitted in Exhibit 2, which we have marked, is confidential under section 6103(a), and the city must withhold it under section 552.101 of the Government Code.

Next, we address your section 552.103 claim for the information in Exhibit 3 that is not subject to section 552.022. Section 552.103 provides 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). A 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 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 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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You state, and provide documentation showing, that the city is currently involved in litigation regarding criminal activity occurring at the apartment complex that is the subject of the remaining information in Exhibit 3. Based upon your representations and our review of the information at issue, we conclude that litigation was pending when the city received the request. We also conclude that the remaining information in Exhibit 3 is related to the pending litigation for the purposes of section 552.103. Therefore, the city may withhold the remainder of Exhibit 3 under section 552.103 of the Government Code.

In reaching this conclusion under section 552.103, we assume that the opposing parties to the litigation have not seen or had access to the information at issue. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to that litigation to obtain it through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). If the opposing parties have seen or had access to information that relates to the pending litigation, through discovery or otherwise, then there is no interest in withholding that information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Furthermore, 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).

You assert that the information submitted in Exhibit 4 is excepted under section 552.107 of the Government Code. Section 552.107(1) protects information 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 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). Because government attorneys often act in capacities other than that of professional legal counsel, including as administrators, investigators, or managers, 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)(A), (B), (C), (D), (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. Finally, 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 the definition of a confidential communication 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 writ). 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 state that the information in Exhibit 4 consists of communications between city attorneys and their clients. You argue that these confidential communications constitute legal advice and should be withheld. Upon review, we determine that the information we have marked consists of confidential attorney-client communications and may be withheld pursuant to section 552.107 of the Government Code. However, we determine that the city has failed to demonstrate that the remaining information constitutes attorney-client communications. Consequently, no portion of the remaining information may be withheld under section 552.107 of the Government Code.

Next, we address your argument that some of the remaining information in Exhibit 5 is excepted under section 552.117 of the Government Code. Section 552.117(a)(1) excepts from disclosure the current and former home addresses, telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Gov't § 552.117(a)(1). *See also* Open Records Decision No. 670 (2001) (extending section 552.117(a)(1) exception to personal cellular telephone number and personal pager number of employee who elects to withhold home telephone number in accordance with section 552.024). Whether a particular piece of information is protected under section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). You state that the employees at issue elected to keep their information confidential. Thus, pursuant to section 552.117(a)(1), the city must withhold the personal information that you have marked and the additional information we have marked.

Section 552.130 of the Government Code excepts from disclosure information relating to a Texas motor vehicle driver's license and information relating to a Texas motor vehicle title or registration. Gov't Code § 552.130. Thus, with the exception of the information we have marked for release, we agree that you must withhold the Texas motor vehicle record information that you have marked in Exhibit 5 under section 552.130. We have also marked additional Texas motor vehicle record information that the city must withhold under section 552.130 of the Government Code.

Next, we address your assertion that the remaining information contains e-mail addresses that are excepted from disclosure under section 552.137 of the Government Code. Section 552.137 requires a governmental body to withhold the e-mail address of a member of the general public, unless the individual to whom the e-mail address belongs has affirmatively consented to its public disclosure. *See id.* § 552.137 (b). You state that the owners of the e-mail addresses at issue have not affirmatively consented to their release. Therefore, the city must withhold the e-mail addresses you have marked, as well as the additional information we have marked, under section 552.137 of the Government Code.

Section 552.147 of the Government Code provides that "[t]he social security number of a living person is excepted from" required public disclosure under the Act. We agree that the

city may withhold the social security numbers in the remaining submitted information under section 552.147 of the Government Code.⁵

In summary, the city must release the completed report we have marked in Exhibit 3 under section 552.022 of the Government Code. The city must withhold the submitted 1040 form under section 552.101 of the Government Code in conjunction with federal law. The city may withhold the remaining information in Exhibit 3 under section 552.103 of the Government Code. The city may also withhold the information we have marked in Exhibit 4 pursuant to section 552.107 of the Government Code. The city must withhold the information you have marked, and the additional information we have marked, under section 552.117 of the Government Code. With the exception of the information we have marked for release, the city must withhold the information you have marked pursuant to section 552.130 of the Government Code, in addition to the information we have marked. The city must withhold the information it has marked, and the additional information we have marked, pursuant to section 552.137 of the Government Code. The city may withhold the social security numbers in the remaining submitted information under section 552.147 of the Government Code. The remaining submitted information must be released to the requestor.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline,

⁵We note that section 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.

toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Office of the Attorney General at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Amy L.S. Shipp
Assistant Attorney General
Open Records Division

ALS/mcf

Ref: ID# 294475

Enc. Submitted documents

c: Mr. Darren Preacely
2214 Bagby, #3316
Houston, Texas 77002
(w/o enclosures)

Pastor Joe Fred Russell
Chairman
W. Leo Daniels Towers, Inc.
8826 Harrell Street
Houston, Texas 77003
(w/o enclosures)

Mr. Rodney Wilson
A Caring Safe Place, Inc.
1804 Carr Street
Houston, Texas 77026
(w/o enclosures)