ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 11, 2012

Ms. Tiffany N. Evans
Assistant City Attorney
City of Houston
P.O. Box 368
Houston, Texas 77001-0368

OR2012-00566

Dear Ms. Evans:

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# 441993 (Houston GC Nos. 19050 and 19076).

The City of Houston (the "city") received two requests from the same requestor for (1) all documents that evidence meetings related to the 380 agreement between the city and a specified company; (2) all communications between named entities and individuals regarding the agreement or company; and (3) the 2011 schedules of two named individuals. You state the city will release some of the responsive information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.103 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note a portion of the submitted information, which we have marked, is not responsive to the instant requests because it was created after the requests were received by the city. This ruling does not address the public availability of information that is not responsive to the requests, and the city is not required to release this information in response to these requests.

We next note it appears a portion of the requested information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2012-00285 (2012). In that ruling, we concluded that city may withhold a portion of the submitted information under section 552.107 of the Government Code. However, to the extent the non-privileged e-mails we marked existed separate and apart from the otherwise

privileged e-mail strings, we concluded the city must release this information as well as the remaining information. We have no indication the law, facts, and circumstances on which the prior ruling was based have changed. Accordingly, to the extent the requested information is identical to the information previously requested and ruled upon by this office in the prior ruling, the city must continue to rely on that ruling as a previous determination and withhold the requested information in accordance with Open Records Letter No. 2012-00285. *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 that information is or is not excepted from disclosure). To the extent the requested information is not encompassed by Open Records Letter No. 2012-00285, we will address your arguments against its release.

Section 552.103 of the Government Code provides, in relevant 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.
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> . . .
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> (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 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* Open Records Decision No. 551 at 4-5 (1990). A governmental body has the burden of providing relevant facts and documents to show 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, 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.); ORD 551 at 4. 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.

You state, and provide documentation showing, prior to the city's receipt of the requests, a lawsuit styled *Responsible Urban Development for Houston vs. The City of Houston*, Cause

No. 2011-62725, was filed and is currently pending in the 55th Judicial District Court of Harris County, Texas. Therefore, we agree the litigation was pending on the date the city received the requests for the information at issue. You state the lawsuit challenges the constitutionality of the city ordinance that authorizes chapter 380 agreements. You explain the submitted information pertains to a chapter 380 agreement. Further, you provide an affidavit from the Assistant City Attorney stating the information at issue directly relates to the pending litigation. Based on your representations, we find the city may withhold the information at issue under section 552.103(a) of the Government Code.[1]

We note, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

In summary, the city must continue to rely on Open Records Letter No. 2012-00285 as a previous determination and continue to withhold or release any previously ruled upon information in accordance with that ruling. The remaining information may be withheld under section 552.103(a) of the Government Code.

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,

Michelle R. Garza
Assistant Attorney General
Open Records Division

MRG/em

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[1]Because our ruling is dispositive, we need not address your remaining argument against disclosure.

Ref: ID# 441993

Enc. Submitted documents

c: Requestor
(w/o enclosures)