



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 6, 2012

Ms. Molly Shortall
Assistant City Attorney
City of Arlington
P.O. Box 90231
Arlington, Texas 76004-3231

OR2012-01841

Dear Ms. Shortall:

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# 444500.

The City of Arlington (the “city”) received four requests for information concerning a specified incident. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103 and 552.107 of the Government Code.¹ We have considered the claimed exceptions and reviewed the submitted information.

We first note portions of the submitted information were created after the dates the city received the requests. The Act does not require a governmental body to release information that did not exist when it received a request, or to create responsive information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983). Thus, information created after the date the city received a request is not responsive to that request. Therefore, the city need not release information created after November 14, 2011 to the first requestor; after November 16, 2011

¹We note you also raise section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503. However, this office has concluded section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Section 552.107 is the proper exception to raise when asserting the attorney-client privilege for information not subject to required disclosure under section 552.022.

to the first, second, or third requestor; or after November 17, 2011 to any requestor. This decision does not address the public availability of non-responsive information.

We next note portions of Exhibit C, which we have marked, are subject to section 552.022 of the Government Code. Section 552.022(a) provides for the required public disclosure of the following categories of information, unless the information is made confidential under the Act or other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body;

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(1), (3). Although you raise section 552.103 of the Government Code for this information, this is a discretionary exception and does not make information confidential under the Act. *See id.* § 552.007; *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); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 473 (1987) (section 552.103 may be waived). As such, section 552.103 does not make information confidential for the purposes of section 552.022(a), and the city may not withhold any information subject to section 552.022(a) on that basis. However, we note portions of this information are subject to sections 552.101 and 552.136 of the Government Code.² As these sections make information confidential under the Act, we will address their applicability to the information subject to section 552.022, as well as your arguments against disclosure of the remaining information.

We first address the applicability of section 552.103 of the Government Code to Exhibit B and the information in Exhibit C that is not subject to section 552.022, as section 552.103 is potentially the most encompassing exception. Section 552.103 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.

² The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

...

(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.

Id. § 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, 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 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, 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.³ Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that 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. Open Records Decision No. 331 (1982). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983). This office has concluded a governmental body's receipt of a claim letter it represents to be in compliance with the notice requirements of the Texas Tort Claims Act (the "TTCA"), chapter 101 of the Civil Practice and Remedies Code, is sufficient to establish litigation is reasonably anticipated.

³ In 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).

See Open Records Decision No. 638 at 4 (1996). If that representation is not made, the receipt of the claim letter is a factor we will consider in determining, from the totality of the circumstances presented, whether the governmental body has established litigation is reasonably anticipated. *Id.*

You assert that the city reasonably anticipates litigation pertaining to the incident at issue. You provide documentation showing that, prior to the date the city received the first request for information, the affected individuals had notified the city of their damages, demanded compensation from the city, and threatened to sue the city. You also state the individuals have hired attorneys and filed suit against the contractor, and the city and the contractor are in dispute over liability. Based on your representations, our review of the information, and the totality of the circumstances, we find you have demonstrated that the city reasonably anticipated litigation at the time it received the requests, and that the submitted information is related to the anticipated litigation. Accordingly, section 552.103 generally applies to the responsive information that is not subject to section 552.022.

We note, however, the potential opposing parties to the anticipated litigation have seen or had access to some of the information. 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 the litigation to obtain such information through discovery procedures. *See* ORD 551 at 4-5 (1990). Thus, once an opposing party has seen or had access to information that is related to the litigation, there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Accordingly, we have marked portions of Exhibits B and C that a potential opposing party to the anticipated litigation has seen or had access to and that the city therefore may not withhold under section 552.103. To the extent any of the information we did not mark has also been seen or accessed by a potential opposing party, this information may also not be withheld by the city under section 552.103. However, the remaining information in Exhibits B and C that is not subject to section 552.022 may be withheld under section 552.103.⁴ We note the applicability of section 552.103 ends once the related litigation has concluded or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

As to the information that has been seen or accessed by opposing parties, you raise section 552.107 of the Government Code for such information in Exhibit B, and we note some of the information in Exhibits B and C is subject to sections 552.101, 552.130, 552.136 and 552.137 of the Government Code. Thus, we will address the applicability of these exceptions to the remaining information not subject to section 552.022. As noted above, we will also address sections 552.101 and 552.136 of the Government Code for the information subject to release under section 552.022.

⁴Because our ruling as to this information is dispositive, we do not address your remaining argument against disclosure of portions of this information.

You raise section 552.107 of the Government Code for the information in Exhibit B that potential opposing parties have seen or had access to. Section 552.107(1) 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 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.*, 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 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 contend the information in Exhibit B that has been seen or accessed by the opposing parties consists of confidential attorney-client communications. However, as noted above, the e-mails at issue are communications with opposing parties. Therefore, we find you have failed to demonstrate the e-mails at issue are between privileged parties for purposes of section 552.107(1). Therefore, the e-mails at issue may not be withheld under section 552.107(1) of the Government Code.

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. This section encompasses the common-law right to privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which

would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be met. *Id.* at 681-82. Common-law privacy protects the types of information held to be intimate or embarrassing in *Industrial Foundation*. *See id.* at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). Additionally, this office has found some kinds of medical information or information indicating disabilities or specific illnesses are generally highly intimate or embarrassing. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Upon review, we find the information we have marked in the portions of Exhibit C subject to section 552.022 or previously seen by a potential opposing party is highly intimate or embarrassing and of no legitimate public interest. Therefore, the city must generally withhold the marked information under section 552.101 in conjunction with common-law privacy.

We note a portion of the remaining information in Exhibit C is protected by section 552.130 of the Government Code. Section 552.130 excepts from disclosure information that relates to a motor vehicle title or registration issued by an agency of this state or another state or country. Gov't Code § 552.130(a)(2). The city must generally withhold the information we have marked under section 552.130.

Section 552.136 of the Government Code provides that “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” *Id.* § 552.136(b). An access device number is one that may be used to “(1) obtain money, goods, services, or another thing of value; or (2) initiate a transfer of funds other than a transfer originated solely by paper instrument,” and includes an account number. *Id.* § 552.136(a). The city must generally withhold the information we marked in Exhibit C under section 552.136.

However, we note portions of the information marked under section 552.101 in conjunction with common-law privacy and under sections 552.130 and 552.136 pertain to some of the requestors. Because common-law privacy, section 552.130, and section 552.136 protect personal privacy, each requestor has a special right of access to his or her own private information. *See* Gov't Code § 552.023(a) (person has special right of access, beyond right of general public, to information held by governmental body that relates to person and is protected from public disclosure by laws intended to protect person's privacy interests); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individuals request information concerning themselves). Therefore, the city must release to each requestor information pertaining to that requestor that is otherwise confidential under common-law privacy, section 552.130, or section 136.

We note the information at issue in Exhibits B and C contains e-mail addresses subject to section 552.137 of the Government Code. Section 552.137 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). *See id.* § 552.137(a)-(c). The e-mail addresses we have marked are not of a type specifically excluded by section 552.137(c). Accordingly, the city must generally withhold the e-mail addresses we have marked under section 552.137, unless their owners have affirmatively consented to disclosure.⁵ However, we note each requestor has a right to his or her own e-mail address under section 552.137(b) of the Government Code, and a requestor’s own e-mail address may not be withheld from him or her under section 552.137.

We note portions of the information are protected by copyright. A custodian of public records must comply with copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). However, a governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with copyright law and the risk of a copyright infringement suit.

In summary, the city must release (1) the information we have marked under section 552.022 of the Government Code, (2) the information we have marked for release, and (3) any remaining information that a potential opposing party has seen or had access to. However, in releasing this information, the city must generally withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy and under sections 552.130, 552.136, and 552.137 of the Government Code; however, the marked information may not be withheld under these exceptions from a requestor to whom it pertains. In addition, any information protected by copyright may be released only in accordance with copyright law. The city may withhold under section 552.103 of the Government Code the remaining responsive information that is not subject to section 552.022.

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.

⁵We note Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

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,



Misty Haberer Barham
Assistant Attorney General
Open Records Division

MHB/agn

Ref: ID # 444500

Enc. Submitted documents

c: Requestors
(w/o enclosures)