



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 19, 2013

Ms. Danielle Folsom
Assistant City Attorney
City of Houston
P.O. Box 368
Houston, Texas 77001-0368

OR2013-06445

Dear Ms. Folsom:

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# 484491 (GC Nos. 20271, 20272).

The City of Houston (the "city") received two requests from the same individual for information concerning chart documentation involving the jail medical specialist staff, e-mails involving certain individuals during a specified period, department personnel records of certain named individuals, and medical charts completed by a named individual. We note the requestor has excluded protected health information from the scope of her requests. You state the city does not maintain information responsive to a portion of the request.¹ You claim the remaining requested information is excepted from disclosure under sections 552.101, 552.102, 552.103, and 552.107 of the Government Code or is privileged under rule 503 of the Texas Rules of Evidence. We have considered your arguments and reviewed the submitted representative sample of information.²

¹The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *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), 563 at 8 (1990), 555 at 1–2 (1990).

²We 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 those submitted to this office.

Initially, we note some of the information you submitted in response to the first request was created after the date the city received that request. This information, which we marked, is not responsive to the request. 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), 563 at 8 (1990), 555 at 1–2 (1990). Our ruling does not address the public availability of information that is not responsive to a request, and the city is not required to release non-responsive information.

Next, you inform us a portion of the information submitted as Exhibit 5 pertains to a completed investigation. We also note some of the other information submitted in Exhibits 4, 5, and 6, which we marked, consists of a completed audit or evaluations. Section 552.022(a)(1) of the Government Code deems public “a completed report, audit, evaluation, or investigation made of, for, or by a governmental body,” unless it is excepted under section 552.108 of the Government Code or is made confidential under the Act or “other law.” Gov’t Code § 552.022(a)(1). Although you raise sections 552.103 and 552.107 of the Government Code for this information, we note these are discretionary exceptions to disclosure that protect a governmental body’s interests and may be waived. *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 Open Records Decision Nos. 676 at 10–11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, sections 552.103 and 552.107 do not make information confidential for purposes of section 552.022. Accordingly, the city may not withhold the report of the completed investigation in Exhibit 5 or the completed audit or evaluations in Exhibits 4, 5, and 6 under either section 552.103 or section 552.107 of the Government Code. As you make no other arguments for some of the completed evaluations, we marked them for release. However, you argue the completed investigation in Exhibit 5 is privileged under rule 503 of the Texas Rules of Evidence. Likewise, you raised the attorney-client privilege for the completed audit and some of the evaluations in Exhibit 4. 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). Rule 503 of the Texas Rules of Evidence establishes the attorney-client privilege. Accordingly, we will consider your arguments and attorney-client privilege claims under rule 503 of the Texas Rules of Evidence for this information.

However, we turn first to your assertions of section 552.103 and section 552.107 of the Government Code for the information not subject to section 552.022 of the Government Code, as they are the most encompassing. Section 552.103 of the Government Code provides:

(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). The governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is 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). The governmental body must meet both prongs 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 that 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. *See* Open Records Decision No. 555 (1990); *see also* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). This office also has concluded litigation was reasonably anticipated when the potential opposing party filed a complaint with the Equal Employment Opportunity Commission ("EEOC"). *See* Open Records Decision No. 336 (1982). 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. *See* 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 litigation is reasonably anticipated. *See* Open Records Decision No. 361 (1983).

You argue all of the information at issue is excepted under section 552.103 of the Government Code because the city anticipates litigation from the requestor's client. You state, and provide documentation showing, the requestor's client has filed an internal grievance regarding an employment decision. You also state the requestor's client has indicated he intends to file a complaint with the EEOC against the city. We note, however, as of the date of the request, the requestor's client had not yet filed an EEOC complaint and had not taken any steps beyond hiring an attorney. Based on our review of your arguments, we find you failed to demonstrate the requestor's client had taken any objective steps toward

litigation against the city prior to the date the city received the request for information. Thus, the city has failed to demonstrate it reasonably anticipated litigation on the date it received the request, and we conclude the city may not withhold the information at issue under section 552.103 of the Government Code.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. Gov't Code § 552.107(1). 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. 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 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). 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. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). 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 the e-mails you marked in Exhibit 4 were sent between attorneys for the city and city employees in order to facilitate the rendition of legal services to the city. You state these e-mails were intended to be, and have remained, confidential. Based on your representations and our review, we agree the information you marked in Exhibit 4 that is not subject to section 552.022(a)(1) consists of privileged attorney-client communications. Accordingly,

the city may withhold the information you marked in Exhibit 4 that is not subject to section 552.022(a)(1) under section 552.107(1) of the Government Code.³

We now address the completed investigation report in Exhibit 5 and the audit and evaluations subject to section 552.022(a)(1) that are attached to the otherwise privileged e-mails in Exhibit 4. Rule 503(b)(1) of the Texas Rules of Evidence provides:

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

(A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer's representative;

(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; 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).

Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show 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 the communication is confidential by explaining it was not intended to be disclosed to third persons and it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *See Pittsburgh Corning Corp. v. Caldwell*, 861

³As our ruling is dispositive, we do not address your assertion of section 552.101 of the Government Code for some of this information.

S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ). You state the completed investigation report in Exhibit 5 was prepared by the Office of the Inspector General, which is a division of the City Attorney's Office and acts under the supervision of the city attorney. You explain this report was prepared in order to facilitate the rendition of legal services to the city. You further explain this report was intended to be, and has remained, confidential. Based on these representations and our review, we conclude the city may withhold the completed investigation report in Exhibit 5 under rule 503 of the Texas Rules of Evidence.

As for the audit and evaluations attached to the otherwise privileged e-mails in Exhibit 4, you state these are part of a communication that was sent between attorneys for the city and city employees in order to facilitate the rendition of legal services to the city. You state the communication to which these documents are attached was intended to be, and has remained, confidential. However, if these documents are removed from the otherwise privileged e-mail to which they are attached and stand alone, they are responsive to the request for information. Furthermore, we find these documents are maintained separate from the otherwise privileged e-mail to which they are attached. Accordingly, we conclude the city may not withhold these unattached documents under rule 503 of the Texas Rules of Evidence.

We turn now to the remaining information. Section 552.101 of the Government Code exempts 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 section 6103(a) of title 26 of the United States Code, which makes tax return information confidential. Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision No. 600 (1992) (W-4 forms). Section 6103(b) defines the term "return information" as a taxpayer's "identity, the nature, source, or amount of his income[.]" See 26 U.S.C. § 6103(b)(2)(A). Federal courts have construed the term "return information" expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code. See *Mallas v. Kolak*, 721 F. Supp. 748, 754 (M.D.N.C. 1989), *aff'd in part*, 993 F.2d 1111 (4th Cir. 1993). Accordingly, the city must withhold the tax return information we marked under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code.

Section 552.101 of the Government Code also encompasses the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. See Occ. Code §§ 151.001–168.202. Section 159.002 of the MPA provides in part:

- (a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.
- (b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(b)–(c). This office has concluded the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician and information obtained from those records. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). Upon review, we find the information we marked consists of confidential medical records that are subject to the MPA. Accordingly, the city must withhold that information under section 552.101 of the Government Code in conjunction with the MPA.

Section 552.101 of the Government Code also encompasses the doctrine of common-law 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 established. *Id.* at 681–82. This office has found the following types of information are excepted from required public disclosure under common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps); and personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990). However, this office has also found the public has a legitimate interest in information relating to employees of governmental bodies and their employment qualifications and job performance. *See* Open Records Decision Nos. 562 at 10 (1990), 542 at 5 (1990); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow). Upon review, we find the personal financial and medical information we marked is highly intimate or embarrassing and of no legitimate public interest. Accordingly, the city must withhold this information under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.102(a) of the Government Code excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” Gov’t Code § 552.102(a). The Texas Supreme Court held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). Accordingly, the city must withhold the dates of birth you marked, and the dates of birth we marked, under section 552.102(a) of the Government Code.

Section 552.117 of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, 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.⁴ Gov't Code § 552.117(a). 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). Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former employee 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 who did not timely request under section 552.024 the information be kept confidential. We note section 552.117 also encompasses a personal cellular telephone number, unless the cellular 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). Accordingly, the city must withhold the personal information we marked under section 552.117(a)(1) of the Government Code, but only if the individual it pertains to made a timely election under section 552.024 of the Government Code. Additionally, the city must withhold the marked cellular numbers under section 552.117(a)(1) of the Government Code only if the city does not pay for the cellular service.

Section 552.130 of the Government Code excepts from disclosure information relating to a motor vehicle operator's or driver's license or permit issued by an agency of this state or another state or country. Gov't Code § 552.130(a)(1). Accordingly, the city must withhold the driver's license information we marked under section 552.130 of the Government Code.

Section 552.137 of the Government Code provides, "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]," unless the owner of the e-mail address has affirmatively consented to its release or the e-mail address is specifically excluded by subsection (c). *Id.* § 552.137(a)–(c). Accordingly, the city must withhold the e-mail address we marked under section 552.137 of the Government Code, unless the owner of the e-mail address affirmatively consents to its release.

In summary, the city may withhold the information you marked in Exhibit 4 that is not subject to section 552.022(a)(1) of the Government Code under section 552.107(1) of the Government Code. The city may withhold the completed investigation in Exhibit 5 under rule 503 of the Texas Rules of Evidence, but copies of the unattached audit and evaluations in Exhibit 4 must be released. The city must withhold the tax return information we marked under section 552.101 of the Government Code in conjunction with section 6103(a) of

⁴The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470.

title 26 of the United States Code. The city must withhold the medical records we marked under section 552.101 of the Government Code in conjunction with the MPA. The city must withhold the personal financial and medical information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. The city must withhold the dates of birth you marked, and the dates of birth we marked, under section 552.102(a) of the Government Code. To the extent the individuals whose personal information is at issue timely elected confidentiality, the city must withhold the information we marked under section 552.117(a)(1) of the Government Code, but it must withhold the marked cellular telephone numbers only if the city does not pay for the cellular service. The city must withhold the driver's license information we marked under section 552.130 of the Government Code. The city must withhold the e-mail address we marked under section 552.137 of the Government Code, unless the owner of the e-mail address consents to its release. The remaining responsive 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.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,



Neal Falgoust
Assistant Attorney General
Open Records Division

NF/ag

Ref: ID# 484491

Enc. Submitted documents

c: Requestor
(w/o enclosures)