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ATTORNEY GENERAL OF TEXAS

March 1, 2016

Ms. June Harden
Assistant Attorney General
Assistant Public Information Coordinator
General Counsel Division
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

OR2016-04921

Dear Ms. Harden:

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# 600092 (OAG PIR No. 15-43051).

The Office of the Attorney General (the "OAG") received a request for numerous categories of information pertaining to OAG policies, job descriptions, organization charts, the personnel files of three named employees, information regarding the termination of two named employees, and certain information maintained by the OAG's Child Support Division. You state the OAG does not possess some of the requested information.¹ You state the OAG will release some of the requested information. You state the OAG has previously released some of the requested information to the requestor in response to a prior request for information. *See* Gov't Code § 552.232 (prescribing procedures for response to repetitious or redundant request for information). You claim the remaining requested information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code. We

¹The Act does not require a governmental body to release information that did not exist when it received a request, create responsive information, or obtain information that is not held by the governmental body or on its behalf. *See Economic 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).

have considered the exceptions you claim and reviewed the submitted representative sample of information.²

Initially, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides in relevant part the following:

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 unless made confidential under this chapter or other law:

...

...

(15) information regarded as open to the public under an agency's policies[.]

Gov't Code § 552.022(a)(15). The submitted information includes a job announcement, which we have marked. Because the marked information was published online, we find it is subject to section 552.022(a)(15) of the Government Code. The OAG may withhold the information subject to section 552.022 only if it is made confidential under the Act or other law. Although you seek to withhold this information under section 552.103 of the Government Code, that exception does not prohibit the release of information or make information confidential. *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); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Accordingly, the OAG may not withhold the marked information under section 552.103. As you raise no other exceptions to disclosure of this information, it must be released. However, we will address your arguments for the remaining information.

Section 552.103 of the Government Code provides in relevant part 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

²This letter ruling assumes the submitted representative sample of information is truly representative of the requested information as a whole. This ruling does not reach, and therefore does not authorize, the withholding of any other requested information to the extent the other information is substantially different than that submitted to this office. *See* Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

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, 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 prongs of this test for information to be excepted from disclosure under section 552.103(a).

This office has stated a pending complaint with the Equal Employment Opportunity Commission (the "EEOC") indicates litigation is reasonably anticipated. Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982). You state the information in Exhibit B relates to various EEOC complaints filed against the OAG prior to the OAG's receipt of the present request for information, and these complaints are still pending. Based on these representations and our review of the submitted documents, we find you have demonstrated the OAG reasonably anticipated litigation when it received the request for information. We also find you have established the information at issue is related to the anticipated litigation for purposes of section 552.103(a). Therefore, we conclude the OAG has established the applicability of section 552.103(a) of the Government Code to the remaining information in Exhibit B.

We note, however, the opposing parties to the pending EEOC complaints have seen or had access to some of the information at issue, which we have marked. The purpose of section 552.103 of the Government Code 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. Thus, once the opposing party in pending litigation 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). Thus, information that has either been obtained from or provided to the opposing party in pending

litigation is not excepted from disclosure under section 552.103(a), and the OAG may not withhold such information on that basis. Therefore, with the exception of the information we have marked, the OAG may withhold the remaining information in Exhibit B under section 552.103(a). We note the applicability of section 552.103(a) ends once the litigation has concluded. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision No. 350 (1982).

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *See* 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. *See* 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 “to facilitate the rendition of professional legal services” to the client governmental body. *See* 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. *See 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 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, and lawyer representatives. *See* 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: (A) to whom disclosure is made to further the rendition of professional legal services to the client; or (B) reasonably necessary to transmit 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. *See 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 state the information in Exhibit C consists of communications and records that document communications between employees of the OAG's Child Support Division and their attorney in the OAG's Human Resources Division. You state the communications were

made for the purpose of providing legal services to the OAG regarding a variety of employment and personnel matters. Further, you state these communications were not intended to be disclosed and have not been disclosed to non-privileged parties. Upon review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the OAG may withhold the information in Exhibit C under section 552.107(1) of the Government Code.

We note some of the remaining information is subject to sections 552.102 and 552.117 of the Government Code.³ 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 OAG must withhold the dates of birth we have marked under section 552.102(a) of the Government Code.

Section 552.117(a)(1) of the Government Code 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). 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. Therefore, to the extent the individuals whose information is at issue timely requested confidentiality under section 552.024 of the Government Code, the OAG must withhold the information we have marked under section 552.117(a)(1) of the Government Code. Conversely, to the extent the individuals at issue did not timely request confidentiality under section 552.024, the OAG may not withhold the marked information under section 552.117(a)(1).

In summary, the OAG must release the marked job announcement pursuant to section 552.022(a)(15) of the Government Code. Except for the information we have marked for release, the OAG may withhold the remaining information in Exhibit B under

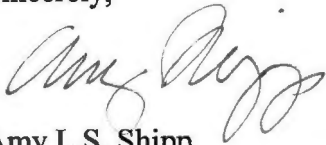
³The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

section 552.103 of the Government Code. The OAG may withhold the information in Exhibit C under section 552.107(1) of the Government Code. The OAG must withhold the information we marked under section 552.102(a) of the Government Code. To the extent the individuals whose information is at issue timely requested confidentiality under section 552.024 of the Government Code, the OAG must withhold the information we have marked under section 552.117(a)(1) of the Government Code. The OAG must release the remaining information in Exhibit B.

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, 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,



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

ALS/akg

Ref: ID# 600092

Enc. Submitted documents

c: Requestor
(w/o enclosures)