



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 8, 2017

Mr. Joseph R. Crawford
Assistant City Attorney
City of Houston
P.O. Box 368
Houston, Texas 77001-0368

OR2017-09842

Dear Mr. Crawford:

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# 656866 (GC No. 24133).

The City of Houston (the "city") received a request for information pertaining to the provision of actuarial services to the city, including a specified contract and a specified city council resolution. You claim the submitted information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.

Initially, we note you have not submitted information responsive to the request for the specified executed contract. Further, you do not inform us you have released this information. Although you state the city has submitted a representative sample of the requested information, we find the submitted information is not representative of all the types of information to which the requestor seeks access. Please be advised, this open records letter ruling applies only to the types of information you have submitted for our review. This ruling does not authorize the city to withhold any information that is substantially different from the types of information you submitted to this office. *See* Gov't Code § 552.302 (where request for attorney general decision does not comply with requirements of Gov't Code § 552.301, information at issue is presumed to be public). Accordingly, to the extent any information responsive to the request for the executed contract existed on the date the city received the request, we assume the city has released it. If the city has not released any such information, it must do so at this time. *See id.* §§ 552.301(a), .302; *see also* Open Records

Decision No. 664 (2000) (if governmental body concludes no exceptions apply to requested information, it must release information as soon as possible).

Next, you state some of the submitted information has been previously released to this requestor in response to discovery in pending civil litigation. We understand you to assert that the present request is duplicative and that, as such, the district should not be required to release the requested information in response to the present request. Section 552.232 of the Government Code provides as follows:

(a) A governmental body that determines that a requestor has made a request for information for which the governmental body has previously furnished copies to the requestor or made copies available to the requestor on payment of applicable charges under Subchapter F, shall respond to the request, in relation to the information for which copies have been already furnished or made available, in accordance with this section, except that:

(1) this section does not prohibit the governmental body from furnishing the information or making the information available to the requestor again in accordance with the request; and

(2) the governmental body is not required to comply with this section in relation to information that the governmental body simply furnishes or makes available to the requestor again in accordance with the request.

(b) The governmental body shall certify to the requestor that copies of all or part of the requested information, as applicable, were previously furnished to the requestor or made available to the requestor on payment of applicable charges under Subchapter F. The certification must include:

(1) a description of the information for which copies have been previously furnished or made available to the requestor;

(2) the date that the governmental body received the requestor's original request for that information;

(3) the date that the governmental body previously furnished copies of or made available copies of the information to the requestor;

(4) a certification that no subsequent additions, deletions, or corrections have been made to that information; and

(5) the name, title, and signature of the officer for public information or the officer's agent making the certification.

(c) A charge may not be imposed for making and furnishing a certification required under Subsection (b).

(d) This section does not apply to information for which the governmental body has not previously furnished copies to the requestor or made copies available to the requestor on payment of applicable charges under Subchapter F. A request by the requestor for information for which copies have not previously been furnished or made available to the requestor, including information for which copies were not furnished or made available because the information was redacted from other information that was furnished or made available or because the information did not yet exist at the time of an earlier request, shall be treated in the same manner as any other request for information under this chapter.

Gov't Code § 552.232. Thus, section 552.232 allows a governmental body to certify that records have previously been provided to a requestor, rather than make those same records available to the same requestor in response to subsequent requests. However, section 552.232 applies only where a requestor has made a previous request for information under the Act. In this instance, you inform us some of the submitted information was previously provided to the requestor in the course of civil discovery and not in response to a request made under the Act. *See id.* § 552.0055 (request for discovery not considered to be a request for information under the Act.) Thus, we conclude section 552.232 does not apply to the information that was previously released in the course of civil discovery. Accordingly, we will address your claimed exception to disclosure for this information.

Next, we note a portion of the submitted information consists of an ordinance adopted by the city council. Because laws and ordinances are binding on members of the public, they are matters of public record and may not be withheld from disclosure under the Act. *See* Open Records Decision No. 221 at 1 (1979) ("official records of the public proceedings of a governmental body are among the most open of records"); *see also* Open Records Decision No. 551 at 2-3 (1990) (laws or ordinances are open records). Accordingly, the city must release the ordinance we marked.

Next, we note the remaining information contains a copy of minutes of a public meeting of the city council. Minutes of a governmental body's public meetings are specifically made public under the Open Meetings Act, chapter 551 of the Government Code. *See* Gov't Code § 551.022 (minutes and tape recordings of open meeting are public records and shall be available for public inspection and copying on request to governmental body's chief administrative officer or officer's designee). As a general rule, the exceptions to disclosure found in the Act, such as section 552.103, do not apply to information other statutes make public. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Therefore, the

information at issue, which we marked, must be released pursuant to chapter 551 of the Government Code.

Next, we note that a portion of the remaining submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

...

(4) the name of each official and the final record of voting on all proceedings in a governmental body[.]

Gov't Code § 552.022(a)(4). A portion of the remaining information consists of a record of a vote taken by the city council. That information must be released under section 552.022(a)(4) unless it is expressly confidential under other law. You seek to withhold the information subject to section 552.022(a)(4) under section 552.103 of the Government Code. However, this exception is discretionary in nature and does not make information confidential under the Act. *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 Gov't Code § 552.103); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the information subject to section 552.022(a)(4), which we marked, may not be withheld under section 552.103 of the Government Code. However, we will address your arguments against disclosure of the remaining information.

Section 552.103 of the Government Code 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 the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing (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, 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). 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, prior to the city's receipt of the request for information, the city filed a lawsuit styled *City of Houston v. Towers Watson & Co.*, Case 4:15-cv-02213 in the United States District Court for the Southern District of Texas, Houston Division. You state the remaining information in Exhibit 2 is related to the pending lawsuit. Based on your representations, the submitted documentation, and our review of the submitted information, we find litigation was pending when the city received this request for information, and the remaining information in Exhibit 2 is related to the pending litigation for the purposes of section 552.103. Therefore, the city may withhold the remaining information in Exhibit 2 under section 552.103(a) of the Government Code.

Generally, 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 parties in the litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (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. 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 "to facilitate 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, 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. Lastly, 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. *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 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 Exhibit 4 consists of communications involving attorneys for the city and city employees and officials in their capacities as clients. You state these communications were made in furtherance of the rendition of professional legal services to the city. You state these communications were intended to be, and have remained, confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Accordingly, the city may withhold Exhibit 4 under section 552.107(1) of the Government Code.

Section 552.107(2) of the Government Code provides information is excepted from disclosure if “a court by order has prohibited disclosure of the information.” Gov’t Code § 552.107(2). You inform us Exhibit 5 is subject to an Agreed Protective Order (the “protective order”) in the matter of *City of Houston v. Towers Watson & Co.*, No. 4:15-cv-02213, whereby some of the information at issue in the instant request is to be disclosed only under the terms of the protective order. You have submitted a copy of a protective order signed on November 16, 2015, by a judge in the United States District Court for the Southern District of Texas, Houston Division. The protective order encompasses certain information that is designated “Confidential Information” by certain persons. You explain the information in Exhibit 5 “has been designated ‘Confidential’ under the Court’s order.” Based on your representations and our review, we agree a court by order has prohibited disclosure of the information at issue. Accordingly, the city must withhold Exhibit 5 under section 552.107(2) of the Government Code.

In summary, the city must release the ordinance we marked. The information we marked must be released pursuant to chapter 551 of the Government Code. The city must release the information we marked pursuant to section 552.022(a)(4) of the Government Code. The city may withhold the remaining information in Exhibit 2 under section 552.103(a) of the Government Code. The city may withhold Exhibit 4 under section 552.107(1) of the

Government Code. The city must withhold Exhibit 5 under section 552.107(2) 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.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,



Matthew Taylor
Assistant Attorney General
Open Records Division

MHT/bw

Ref: ID# 656541

Enc. Submitted documents

c: Requestor
(w/o enclosures)