



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

This ruling has been modified by court action.  
The ruling and judgment can be viewed in PDF  
format below.



KEN PAXTON  
ATTORNEY GENERAL OF TEXAS

May 26, 2017

Mr. Michael Shaunessy  
Counsel for the City of Hutto  
McGinnis Lochridge, LLP  
600 Congress Avenue, Suite 2100  
Austin, Texas 78701

**The ruling you have requested has  
been amended as a result of litigation  
and has been attached to this**

OR2017-11590

Dear Mr. Shaunessy:

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# 659413.

The City of Hutto (the "city"), which you represent, received a request for e-mail communications between specified individuals during specified periods of time. You state you released some information. You claim the submitted information is excepted from disclosure under sections 552.103, 552.104, 552.105, 552.107, 552.111, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>1</sup>

Initially, you have marked some of the submitted information is not responsive to the instant request. Upon review, we agree a portion of the information at issue, which we have marked, is not responsive. This ruling does not address the public availability of any information that is not responsive to the request, and the city is not required to release such information in response to this request. However, we find the remaining documents you submitted to be responsive to the request. Accordingly, we will consider whether or not this information may be withheld under the Act.

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<sup>1</sup>We 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 that submitted to this office.

We note some of the responsive information may have been the subject of previous request for information, in response to which this office issued Open Records Letter 2017-11238 (2017). We have no indication the law, facts, or circumstances on which the prior ruling was based have changed. Accordingly, to the extent the responsive information is identical to the information previously submitted and ruled on by this office, the city must continue to rely on Open Records Letter No. 2017-11238 as a previous determination and withhold or release the information in accordance with that ruling. *See* Open Records Decision No. 673 at 6-7 (2001) (discussing criteria for first type of previous determination). To the extent the responsive information is not subject to Open Records Letter No. 2017-11238, we will address the submitted arguments against release of the submitted information.

Next, we must address the city's procedural obligations under section 552.301 of the Government Code when requesting a decision from this office under the Act. Pursuant to section 552.301(b), within ten business days after receiving a written request the governmental body must request a ruling from this office and state the exceptions to disclosure that apply. Gov't Code § 552.301(b). You state the city received the request for information on March 3, 2017. This office does not count the date the request was received or holidays as business days for the purpose of calculating a governmental body's deadlines under the Act. Accordingly, the city's ten-business-day deadline was March 17, 2017. Although you timely raised section 552.103 of the Government Code, you did not raise sections 552.104, 552.105, 552.107, 552.111, and 552.137 of the Government Code until after the ten-business-day deadline passed. Consequently, we find the city failed to comply with the procedural requirements of section 552.301 with respect to its claims under sections 552.104, 552.105, 552.107, 552.111, and 552.137.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless there is a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ). By failing to timely raise sections 552.104, 552.105, and 552.111 of the Government Code, we find the city has failed to establish a compelling reason to address its claims under these sections. Accordingly, the city may not withhold any portion of the submitted information under section 552.104, section 552.105, or section 552.111 of the Government Code. However, we will consider the city's timely raised claim under section 552.103 of the Government Code for the responsive information. Further, because sections 552.107, 552.117, and 552.137 can provide compelling reasons to overcome the presumption of openness, we will also address these exceptions for the information at issue.<sup>2</sup>

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<sup>2</sup>The Office of the Attorney General will raise a mandatory exception 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 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.

...

(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 sufficient to establish the applicability of section 552.103 to the information it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to that litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See Open Records Decision No. 551 at 4 (1990).*

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 litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* This office has found a pending complaint with the Equal Opportunity Employment Commission ("EEOC") indicates litigation is reasonably anticipated. *See Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982), 281 at 1 (1981).*

You inform us that, after the city received the request for information, an attorney notified the city "she represented several female employees who were planning on filing sex discrimination suits against the [city]." You state, and provide documentation showing, the attorney at issue subsequently filed discrimination claims on behalf of three city employees against the city with the EEOC. However, you do not inform our office that, at the time the city received the instant request, any party had taken any concrete steps toward the initiation of litigation regarding this matter. Accordingly, we find you have failed to demonstrate the city reasonably anticipated litigation on the date it received the instant request for information. Therefore, the city may not withhold any of the remaining information under section 552.103 of the Government Code.

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 the responsive information you marked consists of communications involving attorneys for the city and city employees. 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 you marked. Accordingly, the city may withhold the responsive information you marked under section 552.107(1) 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). We note section 552.117 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). 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 individual whose cellular telephone number we marked timely requested confidentiality under section 552.024 of the Government Code, the city must withhold the information we marked under section 552.117(a)(1) of the Government Code; however, the city may only withhold the cellular telephone number at issue if the service is not paid for by a governmental body.

Section 552.137 of the Government Code 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). Gov't Code § 552.137(a)-(c). Section 552.137 does not apply to an institutional e-mail address, the general e-mail address of a business, an e-mail address of a person who has a contractual relationship with a governmental body, an e-mail address of a vendor who seeks to contract with a governmental body, an e-mail address maintained by a governmental entity for one of its officials or employees, or an e-mail address provided to a governmental body on a letterhead. *See id.* § 552.137(c). To the extent the e-mail addresses you marked belong to city officials or employees, or to the extent subsection (c) applies, this information is not subject to section 552.137 and may not be withheld on that basis. *See Austin Bulldog v. Leffingwell*, 490 S.W.3d 240 (Tex. App.—Austin 2016, no pet.) (holding personal e-mail addresses of government officials used to conduct official government business are not e-mail addresses of "members of the public" for purposes of Gov't Code § 552.137(a)). However, to the extent the e-mail addresses at issue are not the personal e-mail addresses of city officials or employees and subsection (c) does not apply, this information is subject to section 552.137 and must be withheld under section 552.137, unless the owners of the e-mail addresses affirmatively consent to their release.

In summary, to the extent the submitted information is identical to the information previously submitted and ruled on by this office, the city must continue to rely on Open Records Letter No. 2017-11238. The city may withhold the responsive information you marked under section 552.107(1) of the Government Code. To the extent the individual whose cellular telephone number we marked timely requested confidentiality under section 552.024 of the Government Code, the city must withhold the information we marked under section 552.117(a)(1) of the Government Code. To the extent the e-mail addresses you

marked are not the personal e-mail addresses of city officials or employees and subsection (c) does not apply, this information is subject to section 552.137 and must be withheld under section 552.137, unless the owners of the e-mail addresses affirmatively consent to their release. The city must release the remaining responsive information.

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](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,



Paige Lay  
Assistant Attorney General  
Open Records Division

PL/som

Ref: ID# 659413

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Velva L. Price  
District Clerk  
Travis County  
D-1-GN-17-003006  
Alexus Rodriguez

CAUSE NO. D-1-GN-17-003006

CITY OF HUTTO, TEXAS,

*Plaintiff,*

V.

KEN PAXTON ATTORNEY  
GENERAL OF TEXAS,

*Defendant.*

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THE DISTRICT COURT OF

TRAVIS COUNTY, TEXAS

53<sup>RD</sup> JUDICIAL DISTRICT

**NOTICE OF NONSUIT WITH PREJUDICE**

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiff City of Hutto, Texas (“Plaintiff”), advises this Court that it is nonsuiting its claims against Defendant Ken Paxton, Attorney General of Texas, in this matter, with prejudice, based on the fact that Plaintiff has produced all of the responsive documents pursuant to the underlying Attorney General’s Opinion in this matter.

WHEREFORE, PREMISES CONSIDERED, Plaintiff nonsuits all of its claims against Defendant in this matter with prejudice.

Respectfully submitted,  
Bojorquez Law Firm, PC

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ATTORNEY FOR PLAINTIFF  
CITY OF HUTTO

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document has been served upon all known counsel of record pursuant to the Texas Rules of Civil Procedure on this 29<sup>th</sup> day of July, 2020.

Cole Hutchison  
Administrative Law Division  
Office of the Attorney General of Texas  
P.O. Box 12548  
Austin, TX 78711  
Cole.hutchison@oag.texas.gov



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Erin Higginbotham