



City of Austin

Law Department

City Hall, 301 West 2nd Street, P.O. Box 1088
Austin, Texas 78767-8828
(512) 974-2268

Writer's Direct Line
(512) 974-2509

Writer's Fax Line
(512) 974-2912

February 24, 2010

VIA FIRST CLASS MAIL

Honorable Greg Abbott
Attorney General of Texas
Supreme Court Building
P.O. Box 12548
Austin, Texas 78711-2548

Re: Open Records Request from Mr. David Griffin, received February 2, 2010;
Attorney General ID#376856

Dear Attorney General Abbott,

This is a follow up to my letter dated February 17, 2010. As noted in that correspondence, on February 2, 2010 the City of Austin (the "City") received a request for information from Mr. David Griffin. Also as noted, the City of Austin's administrative offices were closed on Monday, February 15, 2010, in observance of the President's Day holiday. Again, no information exists that is responsive to item numbers six, eleven, twelve, thirteen, and twenty. Further, no information exists for portions of item numbers sixteen and seventeen. Most of the information, which is extremely voluminous, has been made available to Mr. Griffin via a cost estimate letter that the City sent him on February 17th. However, also as noted, the City believes that other portions of the requested information are excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code. Further, while the City takes no position regarding the applicability of section 552.110 of the Government Code to other portions of the requested information, some information submitted to the City by Time Warner Cable ("Time Warner") may be proprietary to it. Accordingly, the City has notified Time Warner, as provided by Section 552.305 of the Texas Government Code, so that it may submit to your office reasons why it considers the information it submitted to the City to be excepted from release. This letter is a request for

a determination under Section 552.301 of the Government Code that the requested offense report is so excepted. Another copy of the request and copies of representative samples of the information at issue are enclosed.

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state or a political subdivision is or may be a party. The City has the burden of providing relevant facts and documents to show that 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, 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 City must meet both prongs of this test for information to be excepted under section 552.103(a).

The mere chance of litigation will not trigger section 552.103(a). 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.* Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

The submitted information labeled **Exhibit A** consists of representative samples of information that is related to litigation that is currently on-going between the requestor and the City. Prior to the City's receipt of the instant request for information, a lawsuit was filed by the requestor against the City. As the submitted Plaintiff's Original Petition reflects, the pending lawsuit is designated as Cause Number D-1-GN-09-002028, and it was filed in the 126th District Court of Travis County on June 24, 2009. Subsequently, the Court granted the City's and other defendants' Plea to the Jurisdiction and Motion to Dismiss Defendant Rondella Hawkins, and Defendant Public Access Community Television's ("PACT") Motion for Summary Judgment. By doing so, the Court dismissed with prejudice all claims against the City, Ms. Hawkins, and PACT. On or about January 4, 2010, Mr. Griffin noticed the City and PACT of his intent to appeal the Court's rulings. The Plaintiff's Original Petition and his Notice of Appeal, to which the Court's rulings are attached, are included with Exhibit A for informational purposes. Thus, the litigation is on-going. Further, all of the **Exhibit A** information is related to the pending litigation. Accordingly, the City seeks to withhold the information labeled "**552.103**" in **Exhibit A** under section 552.103 of the Government Code.

As item number one of the request reflects, Mr. Griffin has requested "... complete records of all lawsuits filed against the city the last 24 months." The submitted information labeled **Exhibit B** consists of a representative sample of information that is related to another lawsuit currently being defended by the City. A copy of the Plaintiff's First Amended Complaint related to this lawsuit is enclosed for informational purposes. As the First Amended Complaint reflects, this case is designated as Cause Number A 90 CA 620 SS, and the suit was originally filed in Federal Court by the Plaintiff on August 14, 2009. The

litigation is on-going. Further, all of the Exhibit B information is related to this pending litigation. Accordingly, the City seeks to withhold the information labeled "552.103" in **Exhibit B** under section 552.103 of the Government Code.

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 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 Texas Farmers Ins. Excb.*, 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)(A), (B), (C), (D), (E). Thus, a governmental body must inform your 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 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, no writ). 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).

The information labeled as **Exhibit C** consists of representative samples of confidential communications between and amongst numerous assistant city attorneys and staff in the City's Law Department, including assistant city attorneys and staff who work in Austin Energy (the City's municipally-owned electric utility) and clients in the City's Police Department, Human Resources Department, and the Office of Telecommunications and Regulatory Affairs. These communications were made for the purpose of facilitating the rendition of professional legal services and the confidentiality of these communications has been maintained. Accordingly, the City believes that the **Exhibit C** information labeled "552.107" is excepted from disclosure under section 552.107(1).

Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." Gov't Code

§ 552.111. This section encompasses the attorney work product privilege found in Rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002).

Rule 192.5 defines work product as:

(1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or

(2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

A governmental body seeking to withhold information under this exception bears the burden of demonstrating that the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. Tex. R. Civ. P. 192.5; ORD 677 at 6-8. In order for your office to conclude that the information was made or developed in anticipation of litigation, you must be satisfied that

a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

Nat'l Tank Co. v. Brotherton, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204; ORD 677 at 7.

The information labeled **Exhibit D**, as well as the information labeled "**552.111 work product**" in **Exhibit C**, consists of representative samples of legal research conducted by assistant city attorneys in preparation of defending the City in ongoing litigation and of memoranda prepared by Law Department staff concerning the City's potential liability and settlement of on-going litigation. As all of this information reflects, it was prepared or developed in anticipation of litigation or for trial by attorneys or paralegals who are supervised by attorneys. All of this information contains the mental impressions, opinions, conclusions, and/or legal theories of the assistant city attorneys assigned to these cases. Thus, the City asserts that the **Exhibit D** information and the **552.111** information in Exhibit C is excepted from disclosure under section 552.111 of the Government Code.

Finally, all of the information that may be proprietary to Time Warner is labeled **Exhibit E**.

Please do not hesitate to contact me at 974-2509 if you have any questions concerning this matter.

Sincerely,

A handwritten signature in blue ink that reads "Cary Grace". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Cary Grace
Assistant City Attorney

Enclosures

cc: (without enclosures)
Mr. David Griffin
P.O. Box 1013
Johnson City, Texas 78636

Ms. Susan Patten
Vice President of Government Affairs
Time Warner Cable
1005 Congress, Suite 420
Austin, Texas 78701