



July 25, 2001

Mr. Dick Gregg, Jr.
Attorney for the City of Webster
Gregg & Gregg, P.C.
16055 Space Center Boulevard
Houston, Texas 77062

OR2001-3237

Dear Mr. Gregg:

The prior city attorney for the City of Webster (the "city") asked whether certain information is subject to required public disclosure under chapter 552 of the Government Code. The request was assigned ID# 149793.

The city received a written request for certain correspondence, including attachments, from an attorney representing the city to the Texas Municipal League Governmental Risk Pool (the "TML") concerning the requestor's potential legal claim against the city. You contend that the requested information is excepted from disclosure under sections 552.103, 552.107(1), and 552.108 of the Government Code.

Section 552.107(1) of the Government Code provides in relevant part that information is excepted from required public disclosure if:

it is information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct.

Gov't Code § 552.107(1). Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107(1) excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the

client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. Open Records Decision No. 574 at 5 (1990). However, based on our review of the submitted documents, we conclude that all of the requested information constitutes a privileged communication from the city's attorney to the TML, the city's representative. See Tex. R. Evid. 503(b)(1)(A).

The requestor contends, however, that the city has waived the attorney client privilege in this instance because she previously viewed the information at issue while serving as the city's Finance and Administration Director. In this regard, you do not dispute that the information at issue was previously provided to the requestor. You inform this office, however, that at the time of the release the requestor was

the direct supervisor of the Human Resources Department (and of Risk Management) and of everyone she ordered to search for the file. The custodian [of the information at issue] was a vulnerable employee under [the requestor's] supervision and control. [The requestor] went to his office and demanded access to the document. The fear of termination for insubordination, and the knowledge that she was his Department Head in his chain of command, caused him to conclude that he should follow her command. He did. She looked. She . . . sought a copy. He balked. He said that responding to record copying requests was a City Secretary function and he was uncomfortable with permitting the release of a copy of the City's confidential legal analysis of her . . . [legal claims against the city] - so they asked the City Secretary.

You further contend that the requestor's conduct

in demanding access to a document she knows to be the confidential legal analysis of her claim against the City was not a valid or proper use of her position. It was an ultra vires act. Her ability to fire the custodian is the only reason she had the access.

We note that the requestor has provided this office with a different description of the facts surrounding the previous release of the information at issue. This office cannot resolve disputes of fact in the open records process, and therefore, we must rely on the representations of the governmental body requesting our opinion. Open Records Decision Nos. 554 (1990), 552 (1990).

Whether there has been a waiver of the attorney-client privilege through the release of otherwise privileged information depends not on whether the disclosure was intentional or inadvertent, but whether the disclosure was voluntary or was consented to or whether the disclosure was compelled erroneously or was made without opportunity to claim the privilege. *Gulf Oil Corp. v. Fuller*, 695 S.W.2d 769, 773 (Tex. App.-El Paso 1985, orig.

proceeding). Based on your representations to this office, we conclude that the previous release of the requested information to the requestor was not “voluntary” and that the release was made without the opportunity of the city to claim the attorney-client privilege. We therefore conclude that no waiver of the privilege occurred and that the city may withhold the requested information in its entirety pursuant to section 552.107(1) of the Government Code in conjunction with the attorney-client privilege.¹

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body’s intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general’s Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

¹Because we resolve your request under section 552.107(1), we need not address the applicability of the other exceptions you raised.

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script, appearing to read "Kay Hastings".

Kay Hastings
Assistant Attorney General
Open Records Division

KH/RWP/seg

Ref: ID# 149793

Enc. Submitted documents

c: Ms. Debra Keller, CPA
1383 El Camino Village Drive
Houston, Texas 77058
(w/o enclosures)