



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 17, 2004

Mr. Charles R. Kimbrough
Bickerstaff, Heath, Smiley, Pollan, Keever & McDaniel, L.L.P.
816 Congress Avenue, Suite 1700
Austin, Texas 78701

OR2004-1134

Dear Mr. Kimbrough:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 196343.

The Village of Bee Cave (the "village"), which you represent, received a request for sixteen categories of information related to the 4B sales tax election, the 4B Development Corporation, the proposed annexation of specified properties, and the Shops at the Galleria. You state that the village made information responsive to categories 1 through 12 available to the requestor. However, you claim that some of the remaining requested information is excepted from disclosure under sections 552.103, 552.107, 552.110, 552.117, and 552.137 of the Government Code.¹ Additionally, you have notified five interested third parties of the village's receipt of the request for information pursuant to section 552.305 of the Government Code.² See Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act ("Act") in certain circumstances). The village has

¹In a letter dated December 15, 2003, you state that the village withdraws its assertion of sections 552.105, 552.106, 552.111, and 552.131 of the Government Code.

²The interested third parties you notified are: Terry Boothe; Andrews & Kurth, LLP; Locke Liddell & Sapp, LLP; Martin & Salinas Public Affairs; and CCNG Development.

submitted the information at issue to this office.³ We have considered your arguments and reviewed the submitted information.

Initially, you state, and provide documentation showing, that the village sought clarification of categories 13, 14, and 15 of the request for information from the requestor. *See* Gov't Code § 552.222(b) (stating that if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used). You state that the village received a clarification from the requestor on December 3, 2003. Further, you state that the village again requested clarification of category 13 of the request on December 8, 2003, and that "the Village continues to communicate in good faith with the requestor about clarifying or narrowing this portion of her request." Therefore, the village had not received the requested clarification regarding category 13 of the request as of the date that it requested a ruling from this office. Accordingly, we conclude that the village need not respond to the request for this category of information until it receives the requestor's clarification. We note, however, that when the village receives the clarification, it must seek a ruling from this office before withholding any information that may be responsive to category 13 of the request. *See* Open Records Decision No. 663 (1999) (providing for tolling of ten business day deadline for requesting attorney general decision while governmental body awaits clarification). Further, we note that "the ten-day deadline is tolled during the [clarification or narrowing] process but resumes, upon receipt of the clarification or narrowing response, on the day that the clarification is received." ORD 663 at 5. Thus, the village's deadlines for requesting a ruling from this office with respect to responsive category 13 information that the village maintains will resume upon the village's receipt of the requestor's response.

In regard to the remaining categories of requested information at issue, we note that chapter 552 of the Government Code does not require a governmental body to release information that did not exist when it received a request for information. *See Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 452 at 3 (1986), 362 at 2 (1983). In this instance, the documents in Items 101, 250-282, 311, 313, 315-316, 320, 325-328, 334-337, 339, 341-343, 346, 351, 368-371, 379, and 386-387 were created after the date of the village's receipt of this request. Thus, these documents are not responsive to the request for information, and we need not address the applicability of the Act to them.

³You state that for certain documents "being too large and voluminous to photocopy efficiently," you have submitted a representative sample. We assume that 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). Here, we do not address any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

In regard to the submitted responsive information, you assert section 552.103 of the Government Code for the listed Items in Exhibit C. This section 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.

A governmental body 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 on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas 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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You inform us, and have provided documentation showing, that, prior to its receipt of the present request, the village was sued by the Save Our Springs Alliance ("SOS"). You inform us that, at the time the village received this request, no final judgment had been entered in that litigation. We therefore find that you have met the first prong of the section 552.103 test.

We note, however, that the pending litigation concerns a development project referred to as the Hill Country Galleria while the information at issue in this request pertains to a project known as the Shops at the Galleria. You assert that SOS and the requestor "clearly believe that the *Shops at the Galleria* project and the *Spanish Oaks* property are related to the factual and legal issues made the subject of the pending SOS suit involving the *Hill Country Galleria*." In support of this assertion, you have provided an excerpt from a deposition taken on August 27, 2003, in the pending lawsuit in which an attorney representing SOS asks several questions regarding the "Spanish Oaks property across the street from the Galleria" and agreements made concerning that property. Oral Deposition of Caroline Murphy, Taken August 27, 2003, pp. 115-19. When asked why information concerning other property was relevant to the pending lawsuit, the attorney for SOS responded, "Well it seems to be identical. We might want to amend our pleadings." Having considered your arguments and

reviewed the petition and submitted documents, we find that you have established that the documents in the Items you have listed are related to the pending litigation for purposes of section 552.103(a). Thus, you may withhold this information pursuant to section 552.103 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 party in the pending litigation is not excepted from disclosure under section 552.103(a), and 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).

In regard to the remaining responsive information, documents in Items 25, 102, 201, 230, and 246 of Exhibit H, you assert section 552.107(1) of the Government Code. This section 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. 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. 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 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).

You state that the information in Items 25, 102, 201, 230, and 246 of Exhibit H consists of communications between the village and its attorneys. Upon review of your arguments and the information in question, we conclude that this information is protected by the attorney-client privilege, and thus, may be withheld under section 552.107 of the Government Code.

In summary, we conclude that: 1) the village need not respond to category 13 of the request for information until it receives the requestor's clarification; and 2) the village may withhold the submitted responsive information under sections 552.103 and 552.107 of the Government Code. As our ruling on these issues is dispositive, we need not address your remaining arguments.

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 Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



W. Montgomery Meitler
Assistant Attorney General
Open Records Division

WMM/lmt

Ref: ID# 196343

Enc: Submitted documents

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