



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 29, 2004

Ms. Meredith A. Ladd
Brown & Hofmeister, L.L.P.
740 East Campbell Road, Suite 800
Richardson, Texas 75081

OR2004-10894

Dear Ms. Ladd:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 215749.

The City of Pilot Point (the "city"), which you represent, received a request for information pertaining to two pending lawsuits, styled *Stacie L. Williams v. City of Pilot Point and Mike Sloggett*; and *City of Pilot Point, Texas and Mike Sloggett v. Hon. Greg Abbott, Attorney General of Texas*. You claim that the requested information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

As a preliminary matter, we note that the information submitted as Exhibit B-1 contains information that was created by the city after the date the city received the present request. Information created after the date the city received the present request is not responsive to the request and need not be released at this time.

Furthermore, as you indicate, portions of the remaining information in Exhibit B-1 are currently the subject of a pending lawsuit by the city against the Office of the Attorney General (the "attorney general"), Cause No. GN403165 in the 353rd District Court of Travis County, Texas. In the lawsuit, the city is challenging a prior ruling of this office, issued as Open Records Letter Ruling No. 2004-7839 (2004) on September 14, 2004, which required the city to release certain information. Because the present request encompasses the same

¹ 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). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

information at issue in that litigation, we are closing our file with regard to this information without issuing a decision and will allow the trial court to determine whether the information must be released to the public.

With respect to the remaining submitted information in Exhibit B-1 that is not subject to the prior ruling at issue in the city's lawsuit, as well as the information submitted as Exhibit B-2, we will address your claimed exceptions to disclosure. We note that Exhibit B-1 contains documents, which we have marked, that were created after July 2, 2004, the date the city received the request that is the subject of the prior ruling at issue. Because that prior ruling did not address these documents, which you now seek to withhold, we will address the applicability of your claimed exceptions to these documents in the present ruling. 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 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 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, 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).

Based on your representations and our review, we find that the remaining documents in Exhibit B-1 are related to the lawsuit styled *Stacie L. Williams v. City of Pilot Point and Mike Sloggett*, which was pending on the date the city received the present request. Accordingly, we find that section 552.103 is applicable to the documents we have marked in Exhibit B-1. We note, however, that 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 lawsuit 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).

Next, you contend the information submitted as Exhibit B-2 is protected by the attorney-client privilege.² Section 552.107(1) of the Government Code excepts from disclosure information protected by 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.³ TEX. R. EVID. 503(b)(1). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives.⁴ TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body seeking to establish that a communication is protected by the attorney-client privilege must inform this office of the identity and capacity of each individual involved in the communication. Finally, the attorney-client privilege applies only

² You raise Rule 503 of the Texas Rules of Evidence for this information, in conjunction with the Texas Supreme Court’s holding that the “Texas Rules of Evidence are ‘other law’ within the meaning of section 552.022.” *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). In this instance, as the information in Exhibit B-2 is not subject to section 552.022 of the Government Code, the city’s claim under the attorney-client privilege is properly raised under section 552.107 of the Government Code. *See* Open Records Decision No. 676 (2002); *see also* Gov’t Code § 552.022 (listing categories of information that are expressly public under the Public Information Act and must be released unless confidential under “other law.”)

³ The privilege does not apply when an attorney or representative is acting in a 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). Because government attorneys often act in capacities other than that of professional legal counsel, including as administrators, investigators, or managers, the mere fact that a communication involves an attorney for the government does not demonstrate this element.

⁴ Specifically, the privilege applies only to confidential communications between the client or a representative of the client and the client’s lawyer or a representative of the lawyer; between the lawyer and the lawyer’s representative; by the client or a representative of the client, or the client’s lawyer or a representative of the lawyer, to a lawyer or representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein; between representatives of the client or between the client and a representative of the client; or among lawyers and their representatives representing the same client. *See* TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E); *see also id.* 503(a)(2), (a)(4) (defining “representative of the client,” “representative of the lawyer”).

to a communication that is confidential. *Id.* 503(b)(1). A confidential communication is a communication that 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 the definition of a confidential communication 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) of the Government Code 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, and the documents reflect, that Exhibit B-2 consists of confidential communications between the city and its attorney made for the purpose of rendering legal services to the city. You also indicate that the confidentiality has been maintained. Based on your representations and our review, we agree that the information in Exhibit B-2 is protected by the attorney-client privilege and may be withheld from disclosure pursuant to section 552.107(1) of the Government Code.

In summary, we have marked information that is not responsive to the present request and need not be released. To the extent the submitted documents are identical to the documents that are the subject of the city’s pending litigation against the attorney general, we decline to issue a ruling with regard to such information at this time. The city may withhold the remaining information at issue in Exhibit B-1, which we have marked, pursuant to section 552.103 of the Government Code. The city may withhold the information in Exhibit B-2 pursuant to section 552.107(1) of the Government Code as information protected by the attorney-client privilege.

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 thirty calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within ten 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 ten 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 ten 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); *Tex. 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 ten calendar days of the date of this ruling.

Sincerely,



David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/jev

Ref: ID# 215749

Enc: Submitted documents

c: Mr. David Lewis
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(w/o enclosures)