



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 4, 2007

Ms. Cary Grace
Assistant City Attorney
City of Austin
P.O. Box 1088
Austin, Texas 78767-8828

OR2007-11938A

Dear Ms. Grace:

This office issued Open Records Letter No. 2007-11938 (2007) on September 12, 2007. We have examined this ruling and determined that we made an error. Where this office determines that an error was made in the decision process under sections 552.301 and 552.306, and that error resulted in an incorrect decision, we will correct the previously issued ruling. Consequently, this decision serves as the correct ruling and is a substitute for the decision issued on September 12, 2007. *See generally* Gov't Code 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of Public Information Act (the "Act")).

You ask whether certain information is subject to required public disclosure under the Act, chapter 552 of the Government Code. Your request was assigned ID# 289004.

The City of Austin (the "city") received a request for seven categories of information for a specific time period related to the Austin Convention Center, the EARR Fund, and ARAMARK Corporation, including financial statements filed by specified individuals. You state that some responsive information will be released to the requestor. You explain that, due to the city's record retention schedule, some of the requested financial disclosures have all been purged and/or destroyed, and further state that the city has no information

responsive to a portion of category number seven of the request.¹ You claim that the submitted information is excepted from disclosure under sections 552.107, 552.108, and 552.116 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.² We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, we address the requestor's assertion that the city has previously released some of the requested information which the city now seeks to withhold from disclosure under section 552.107 of the Government Code. Section 552.007 of the Government Code provides that if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law. *See* Gov't Code 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Section 552.107 is a discretionary exception to disclosure under the Act and does not constitute law that makes information confidential or expressly prohibits its release for purposes of section 552.007. Open Records Decision No. 663 at 5 (1999) (governmental body may waive section 552.107). Accordingly, to the extent any of the information submitted in Exhibits A and C was previously released to the public by the city, the city may not now withhold that information under section 552.107 of the Government Code, but instead must release it to the requestor.

We next note, and you acknowledge, that the city has not complied with section 552.301(e) of the Government Code in submitting the information responsive to category three of the request. When a governmental body fails to comply with the procedural requirements of section 552.301, the information at issue is presumed public. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *City of Houston v. Houston Chronicle Publ'g Co.*, 673 S.W.2d 316, 323 (Tex. App.—Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). To overcome this presumption, the governmental body must show a compelling reason to withhold the information. *See* Gov't Code § 552.302; *Hancock*, 797 S.W.2d at 381. Generally, a compelling interest is that some other source of law makes the information confidential or

¹The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App. — San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

²We 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.

that third party interests are at stake. Open Records Decision No. 150 at 2 (1977). Section 552.108 is a discretionary exception to disclosure that protects a governmental body's interests and may be waived by the governmental body. *See* Open Records Decision No. 177 (1977) (governmental body may waive statutory predecessor to section 552.108); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). The city's claim under section 552.108 is not a compelling reason for nondisclosure of the information at issue under section 552.302. *See* Open Records Decision No. 586 at 2-3 (1991). However, the need of another governmental body to withhold information under section 552.108 can provide a compelling reason under section 552.302. *See* ORD 586 at 3. Because the Travis County District Attorney's Office (the "district attorney") has informed this office that it objects to the release of the information responsive to category three of the request, we will consider your claim regarding section 552.108 for this information as well your arguments for the information that was submitted timely by the city.

You claim that the submitted information in Exhibit B is excepted from public disclosure under section 552.116 of the Government Code, which provides as follows:

(a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, a municipality, or a joint board operating under Section 22.074, Transportation Code, is excepted from the requirements of Section 552.021. If information in an audit working paper is also maintained in another record, that other record is not excepted from the requirements of Section 552.021 by this section.

(b) In this section:

(1) "Audit" means an audit authorized or required by a statute of this state or the United States, the charter or an ordinance of a municipality, an order of the commissioners court of a county, or a resolution or other action of a joint board described by Subsection (a) and includes an investigation.

(2) "Audit working paper" includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Gov't Code § 552.116. You state that Exhibit B consists of audit working papers that are maintained by the auditor in connection with the criminal investigation, and that this audit

was conducted under the authority granted by section 2-3-5 of the Austin City Code. Based on our review and your representations, we find you have sufficiently demonstrated that this information was prepared or maintained by the city's auditors in conducting audits authorized or required by an ordinance of the city. *See* Gov't Code § 552.116(a), (b)(1), (b)(2). Accordingly, the city may withhold the documents in Exhibit B under section 552.116 of the Government Code.³

Section 552.107(1) of the Government Code protects information within the attorney-client privilege. When asserting the attorney-client privilege under section 552.107, 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 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 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).

³As section 552.116 is dispositive, we do not address your remaining claim for this information.

You state that the information in Exhibit A consists of communications between two assistant district attorneys, city staff, and city police officers, while the information in Exhibit C consists of communications between city staff and attorneys representing the city. You explain that employees of the city Auditor's Office have been assigned to the district attorney's office to assist with the criminal investigation. You also state that these communications were made in confidence for the purpose of facilitating the rendition of professional legal services to the city, and that their confidentiality has been maintained. Based on our review of your representations and the submitted information, we find that you have demonstrated the applicability of the attorney-client privilege to the some of the information in Exhibit C. Accordingly, we conclude that the city may withhold this information, which we have marked, pursuant to section 552.107(1) of the Government Code. However, you have not explained how any of the information in Exhibit A or the remaining information in Exhibit C constitutes or documents privileged communications made for the purpose of facilitating the rendition of professional legal services to the city. Thus, you have failed to demonstrate how section 552.107 is applicable to the remaining information at issue. Accordingly, the city may not withhold any of the information in Exhibit A or the remaining information in Exhibit C under section 552.107 of the Government Code.

You assert that the e-mails in Exhibit A and the information responsive to category three of the request are excepted from public disclosure under section 552.108 of the Government Code. This exception provides in pertinent part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime; [or]

(4) it is information that:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [required public disclosure] if:

...

(3) the internal record or notation:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

Gov't Code § 552.108(a)(1), (a)(4), (b)(3). Generally, a governmental body claiming section 552.108(a)(1) of the Government Code must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state that the information responsive to category three of the request relates to a pending criminal investigation. The district attorney informs us that “release of this information would interfere with the . . . investigation[] and prosecution of crime.” Based upon these representations and our review, we conclude that the release of the information at issue would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases). Thus, the information responsive to category three, which we have marked, is excepted from public disclosure under section 552.108(a)(1) of the Government Code.

Sections 552.108(a)(4) and 552.108(b)(3) are applicable to information that was prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation or that reflects the mental impressions or legal reasoning of an attorney representing the state. Gov't Code §§ 552.108(a)(4), (b)(3). However, for sections 552.108(a)(4) and 552.108(b)(3) to be applicable, the information at issue must either be “held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime[, or] an internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution.” *See id.* §§ 552.108(a), (b). Upon review, we find that the information in Exhibit A consists of e-mail records of the city, not records “of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution”; further, the records at issue are held by the city, not “by a law enforcement agency or prosecutor[.]” Thus, section 552.108 is inapplicable to these records, and the city may not withhold any portion of the information in Exhibit A under section 552.108.

Finally, we note that some of the remaining information is excepted under section 552.137 of the Government Code.⁴ Section 552.137 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). See Gov’t Code § 552.137(a)-(c). The e-mail address at issue does not appear to be of a type specifically excluded by section 552.137(c). You do not inform us that a member of the public has affirmatively consented to the release of the e-mail address contained in the submitted materials. Therefore, the city must withhold the e-mail address we have marked under section 552.137 of the Government Code.

In summary, to the extent any of the information submitted in Exhibits A and C was previously released to the public by the city, the city must release it to the requestor. We have marked the information (1) in Exhibit C that the city may withhold pursuant to section 552.107(1) of the Government Code, and (2) that is excepted from public disclosure under section 552.108(a)(1) of the Government Code. The city may withhold the audit working papers in Exhibit B under section 552.116 of the Government Code. The marked e-mail address must be withheld under section 552.137 of the Government Code. The remaining information must be released to the requestor.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the

⁴The Office of the Attorney General will raise a mandatory exception like section 552.137 on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/mcf

Ref: ID# 289004

Enc. Submitted documents

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