ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 14, 2008

Ms. Roberta B. Cross
Assistant City Attorney
City of Galveston
P.O. Box 779
Galveston, Texas 77553-0779

OR2008-09529

Dear Ms. Cross:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 315710.

The City of Galveston (the "city") received a request for four categories of correspondence involving the former police chief during a specified time period. You state that some information will be released to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.103, 552.107, 552.108, and 552.111 of the Government Code.[1] We have considered the exceptions you claim and reviewed the submitted representative sample information.[2]

Initially, we must address the city's obligations under section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow in asking this

[1]Although you raise section 552.101 in conjunction with the attorney-client privilege and the attorney work product privilege, this office has concluded that section 552.10 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990).

[2]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.

office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. The city received the request for information on April 22, 2008. However, although the city requested a ruling and raised sections 552.103, 552.107, and 552.108 by the ten business day deadline, you did not raise section 552.111 of the Government Code until May 12, 2008. Therefore, we find that the city has waived its claims under section 552.111 and the requested information may not be withheld under this section. Open Records Decision Nos. 677 at 10 (2002) (section 552.111 is not compelling reason to withhold information under section 552.302), 473 (1987) (statutory predecessor to section 552.111 may be waived); *see also* Open Records Decision No. 522 (1989) (discretionary exceptions in general).

We also note that some of the submitted information, which we have marked, is not responsive to the instant request for information. The request seeks correspondence sent or received by certain named city officials as well as correspondence that contains complaints against the former police chief. Some of the submitted correspondence is neither addressed to, nor sent by, an individual named in the request, and does not contain complaints about the police chief . The city need not release non-responsive information in response to this request, and this ruling will not address that information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio1978, writ dism'd).

Section 552.103 of the Government Code provides:

> (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.
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> . . .
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> (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). The 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, 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 governmental body must meet both prongs of this test for information to be excepted under 552.103(a).

You state, and provide documentation showing, that portions of the submitted information relate to a lawsuit styled *Renaye Ochoa v. City of Galveston*, Cause No. 07CV1239, which was filed in the District Court of Galveston County, Texas, 212th Judicial District. Based upon your representations and the information presented, we conclude that the litigation was pending on the date that the city received this request for information. Furthermore, we find that portions of the submitted information relate to the pending litigation for purposes of section 552.103(a). Accordingly, we conclude that section 552.103 of the Government Code is applicable to the information we have marked.

We note, however, that once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103 interest exists with respect to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). We also note that section 552.103 is no longer applicable to this information once the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350(1982).

You next claim that some of the information is excepted from disclosure under section 552.107 of the Government Code. Section 552.107 protects information that falls 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 Tex. Farmers Inc. 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). 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)-(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. Finally, the attorney-client privilege applies only to a confidential communication, 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 portions of the submitted information consist of confidential e-mail communications between city attorneys and city officials that were made for the purpose of rendering professional legal advice. You also state that the confidentiality of the communications has been maintained. Based on these representations and our review of the information at issue, we conclude that the information we have marked consists of privileged attorney-client communications that may be withheld under section 552.107 of the Government Code.

Section 552.108 of the Government Code excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]" Gov't Code § 552.108(a)(1). A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why this exception is applicable to the information at issue. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977).

The Texas Rangers have informed this office that they are conducting an ongoing criminal investigation regarding a portion of the submitted information. Based on this representation, we conclude that section 552.108(a)(1) is applicable in this instance. *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); *see also* Open Records Decision Nos. 474 (1987), 372 (1983) (where incident involving allegedly criminal conduct is still under active investigation or prosecution, section 552.108 may be invoked by any proper custodian of information relating to incident). Accordingly, the city may withhold the information we have marked under section 552.108(a)(1) of the Government Code.

We note that some of the submitted information includes a personal e-mail address that is excepted from disclosure under section 552.137 of the Government Code.[3] 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 is not a type specifically excluded by section 552.137(c). Accordingly, the city must withhold the e-mail address we have marked under section 552.137 of the Government Code, unless the owner has affirmatively consented to its disclosure.

In summary, the city may withhold the following: (1) the information we have marked under section 552.103 of the Government Code; (2) the information we have marked under section 552.107 of the Government Code; and (3) the information we have marked under section 552.108(a)(1) of the Government Code. The city must withhold the e-mail address we have marked under section 552.137, unless the owner has affirmatively consented to its disclosure. 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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3). If the governmental body does not file suit over 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 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,

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[3]The 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. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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 challenge 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,

Bill Longley
Assistant Attorney General
Open Records Division

BL/ma

Ref: ID# 315710

Enc. Submitted documents

c: Mr. Scott E. Williams
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