



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 14, 2009

Ms. Kristy Ashberry  
City Secretary  
City of Rockwall  
385 South Goliad  
Rockwall, Texas 75087

OR2009-11396

Dear Ms. Ashberry:

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# 352201.

The City of Rockwall (the "city") received a request for documents and e-mails pertaining to certain fee calculations performed by the city. You claim that the submitted communications are excepted from disclosure under sections 552.103 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that an interested third party may submit comments stating why information should or should not be released).

You assert the submitted communications are subject to section 552.103 of the Government Code, which provides in relevant part 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.

*Id.* § 552.103(a), (c). The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. See Open Records Decision No. 551 at 4-5 (1990). 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 that the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Thomas v. Cornyn*, 71 S.W.3d 473, 487 (Tex. App.—Austin 2002, no pet.); *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.); ORD 551 at 4. A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

To establish that litigation is reasonably anticipated for purposes of section 552.103, a governmental body must provide this office with “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” See Open Records Decision No. 452 at 5 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body’s receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); see Open Records Decision No. 518 at 5 (1989) (litigation must be “realistically contemplated”). We also note that the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983).

In this case, the requestor applied to the city for waiver of a street improvement fee imposed by the city on certain land developers. In support of this application, the requestor sent the city a packet, consisting of a brief and supporting exhibits, which has been submitted for our review. The city argues that this packet “gives the indication that litigation may be reasonably anticipated if [a fee waiver] is not granted.” The requestor states the packet was submitted to the city solely to establish a hardship pursuant to section 24-26 of the city’s Subdivision Regulation Ordinance, not for the purpose of threatening litigation. You do not identify, and we are unable to locate, any part of the submitted packet that contains a threat of litigation against the city. After reviewing your arguments, we conclude the city has merely shown that a potential opposing party has hired an attorney who made a request for information. As previously stated, this fact does not constitute concrete evidence that litigation is reasonably anticipated. See ORD 361. Accordingly, the city may not withhold any portion of the submitted communications under section 552.103 of the Government Code.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. Gov’t Code § 552.107(1). 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 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). 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.*, 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 assert that the submitted e-mails and attachments are confidential communications between and among city employees, attorneys, and consulting experts. You also assert the communications were made for the purpose of facilitating the rendition of legal services to the city, and were not intended to be disclosed to third parties. Based on your representations and our review of the submitted communications, we agree that most of the submitted communications are privileged and may be withheld under section 552.107. However, a few of the individual e-mails contained in the e-mail strings were sent to parties who are not identified in the submitted documents. *See* ORD 676 at 8 (governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made). Because you have not explained the nature of the city’s relationship with these individuals and how they are privileged parties, we find that you have failed to establish how these communications are between or among city representatives and attorneys for purposes of section 552.107; thus we conclude these communications, which we marked,

are not privileged under section 552.107. *See id.* We have also marked the submitted communications which were sent to the requestor, who is not a privileged party. Thus, to the extent that these non-privileged e-mails exist separate and apart from the submitted e-mail chains, they may not be withheld under section 552.107.

In summary, the city may generally withhold the submitted communications under section 552.107 of the Government Code; however, to the extent the e-mails we marked exist separate and apart from the submitted e-mail chains, these non-privileged e-mails must be released.

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

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Bob Davis  
Assistant Attorney General  
Open Records Division

RSD/cc

Ref: ID# 352201

Enc. Submitted documents

cc: Requestor  
(w/o enclosures)

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