



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 5, 2010

Mr. Robert Bass
Allison, Bass & Associates, LLP
A.O. Watson House
402 West 12th Street
Austin, Texas 78701

OR2010-04699

Dear Mr. Bass:

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# 374693.

The Ochiltree County Attorney's Office (the "county"), which you represent, received a request for information pertaining to the requestor's request for service time credit from Ochiltree County and correspondence concerning the requestor or the Ochiltree County Constable's Office. You state you have released a portion of the requested information. You claim the submitted information is 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.

Initially, we note a portion of the information in Exhibit A is subject to section 552.022 of the Government Code. This section provides, in pertinent part:

(a) [T]he following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code. § 552.022(a)(3). In this instance, the submitted information contains a contract that is related to the expenditure of public funds. This information, which we have marked, is subject to section 552.022(a)(3) of the Government Code. Therefore, the information must be released under section 552.022 unless it is confidential under other law. You argue this information is excepted from disclosure by section 552.103 of the Government Code. Section 552.103 is a discretionary exception to disclosure that protect a governmental body's interests and may be waived. *See id.* § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.103 is not other law that makes information confidential for the purposes of section 552.022(a)(3). Therefore, the county may not withhold the marked information under section 552.103 of the Government Code. As you raise no additional exceptions to disclosure of the marked information, it must be released.

You claim section 552.103 of the Government Code is applicable to the remaining documents submitted as Exhibit A. Section 552.103 provides, in relevant part:

(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 sufficient to establish the applicability of section 552.103 to the information it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to that litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See* Open Records Decision No. 551 at 4 (1990).

Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To demonstrate litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* 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. *See* Open Records Decision Nos. 555 (1990), 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982).

You state prior to the date the county received the request for information, the requestor threatened litigation against the county. As noted above, a threat of litigation without any objective steps toward filing suit is not sufficient to establish anticipated litigation. You have not provided this office with evidence any objective steps had been taken toward filing a lawsuit against the county prior to the date the county received the request for information. *See* Gov't Code § 552.301(e); Open Records Decision No. 331 (1982). Upon review, therefore, we find you have not established litigation was reasonably anticipated on the date the county received the request for information. Therefore, the county may not withhold the remaining information in Exhibit A under section 552.103 of the Government Code.

We next turn to your arguments under section 552.107 of the Government Code for the information submitted in Exhibit B. Section 552.107(1) protects information that comes 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. *See* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate 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. *See* 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. *See 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. *See* 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. 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. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no pet.). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain 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 claim Exhibit B is protected by section 552.107 of the Government Code. You state Exhibit B consists of communications between the county’s attorney and legal counsel retained to represent the county in regard to matters in which the county has a legal interest. You indicate these communications have remained confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to Exhibit B. Accordingly, the county may generally withhold the information in Exhibit B under section 552.107 of the Government Code. We note, however, an attachment to one of the otherwise privileged e-mails, which we have marked, was shared with a non-privileged party. To the extent this non-privileged attachment exists separate and apart from the submitted e-mail, it may not be withheld under section 552.107.

We note portions of the remaining information may be subject to section 552.117 of the Government Code.¹ Section 552.117(a)(1) excepts from disclosure the personal information of a current or former employee of a governmental body who requests this information be kept confidential under section 552.024. *See Gov’t Code § 552.117(a)(1)*. We note section 552.117 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See Open Records Decision No. 506 at 5-6 (1988)* (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See Open Records Decision No. 530 at 5 (1989)*. Therefore, to the extent the employee at issue timely elected to keep his information confidential and the county does not pay for the employee’s cellular telephone service, the county must withhold the cellular telephone number we have marked under section 552.117(a)(1). Conversely, to the extent the involved employee did not make a timely election under section 552.024 or the county

¹The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987)*.

pays for the cellular telephone service, the county may not withhold the marked cellular telephone number under section 552.117(a)(1).

We note the submitted information contains information that is subject to section 552.137 of the Government Code. 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). We note section 552.137 is not applicable to an institutional e-mail address, an Internet website address, the general e-mail address of a business, an e-mail address of a person who has a contractual relationship with a governmental body, or an e-mail address maintained by a governmental entity for one of its officials or employees. We note one of the e-mail addresses at issue belongs to the requestor. Therefore, pursuant to section 552.137(b), the county may not withhold the requestor’s e-mail address under section 552.137(a). *See id.* § 552.137(b). Therefore, the county must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless the owner has affirmatively consented to their public disclosure or subsection (c) applies.²

In summary, the county may generally withhold the information in Exhibit B under section 552.107 of the Government Code; however, to the extent the marked non-privileged attachment exists separate and apart from the submitted e-mail, it may not be withheld under section 552.107. To the extent the employee at issue timely elected to keep his information confidential and the county does not pay for the cellular telephone service, the county must withhold the cellular telephone number we have marked under section 552.117(a)(1). The county must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners have affirmatively consented to their public disclosure or subsection (c) applies. The remainder of the submitted information must be released.

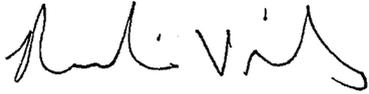
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

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, 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

²We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read 'Melanie Villars', with a stylized flourish at the end.

Melanie J. Villars
Assistant Attorney General
Open Records Division

MJV/jb

Ref: ID# 374693

Enc. Submitted documents

c: Requestor
(w/o enclosures)