



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 27, 2010

Mr. Leonard V. Schneider  
Liles Parker  
525 East Sam Houston Parkway North, Suite 415  
Houston, Texas 77060

OR2010-14668

Dear Mr. Schneider:

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# 394666.

The City of Huntsville (the "city"), which you represent, received a request for e-mails sent to or from two specified e-mail accounts during a specified time period. You state the city has released some of the requested information. You claim some of 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.

Section 552.103 of the Government Code provides in 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). The city 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 on the date the city 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). The city must meet both prongs of this test for information to be excepted under section 552.103(a).

You state, and provide documentation showing, that portions of the submitted information relate to two pending lawsuits against the city. Based on your representations and our review of the submitted information, we conclude that litigation was pending when the city received the present request. We also agree that the information at issue is related to the litigation for purposes of section 552.103. Therefore, we conclude the city may withhold the information at issue, which we have marked, under section 552.103 of the Government Code.<sup>1</sup>

We note, however, once information has been obtained by all parties to the relevant 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 litigation 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 relevant litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Section 552.107(1) of the Government Code 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. 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

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<sup>1</sup>As our ruling is dispositive of this information, we need not address your remaining argument against its disclosure.

privilege does not apply if attorney acting in a capacity other than that of attorney). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *See* 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, 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 pet.). 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 the communications you have marked in the remaining information were made for the purpose of providing legal advice to the city. You inform us that the communications at issue were intended to be and have remained confidential. You have identified the parties to the communications. Based on your representations and our review, we agree that the information you have marked constitutes privileged attorney-client communications. Accordingly, the city may withhold the information you have marked under section 552.107(1) of the Government Code.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code.<sup>2</sup> *See* Gov’t Code §§ 552.117(a)(1), .024. 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). The city may only withhold information under section 552.117(a)(1) on behalf of a former or current official who has made a request for confidentiality under section 552.024 prior to the date on which the request for information was made. In this instance, we have marked the information within the remaining information that is generally subject to section 552.117. You do not inform this office whether the city official whose information we have marked elected to keep his personal information confidential before the city received the present request for information.

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<sup>2</sup>The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Therefore, we must rule conditionally. If the individual whose personal information we have marked timely elected to withhold such information under section 552.024, the marked information must be withheld under section 552.117(a)(1). If the individual at issue did not timely elect confidentiality, the marked information may not be withheld under section 552.117(a)(1).

Section 552.137 of the Government Code 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), (b). The e-mail addresses we have marked are not of a type specifically excluded by section 552.137(c). *See id.* § 552.137(c). Therefore, the city must withhold the marked e-mail addresses under section 552.137 of the Government Code, unless their owners consent to their release.

In summary, (1) the city may withhold the information we have marked under section 552.103 of the Government Code; (2) the city may withhold the information you have marked under section 552.107(1) of the Government Code; (3) if the individual whose personal information we have marked timely elected to withhold such information under section 552.024 of the Government Code, the city must withhold the marked information under section 552.117(a)(1) of the Government Code; and (4) the city must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless their owners of the e-mail addresses consent to their release. The remaining information must be released to the requestor.<sup>3</sup>

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

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<sup>3</sup>We note the remaining information contains the requestor's e-mail address. This requestor has a special right of access to his e-mail address, which would otherwise be confidential with regard to the general public. *See* Gov't Code § 552.023(a). We further 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 an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision. Accordingly, if the city receives another request for this information from an individual other than one with a right of access under section 552.023, the city is authorized to withhold the requestor's e-mail address under section 552.137 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 "Chris Sterner", written over a horizontal line.

Christopher D. Sterner  
Assistant Attorney General  
Open Records Division

CDSA/eeg

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Ref: ID# 394666

Enc. Submitted documents

c: Requestor  
(w/o enclosures)