



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 29, 2010

Mr. Alan P. Petrov  
Johnson, Radcliffe, Petrov & Bobbitt, P.L.L.C.  
For City of West University Place  
1001 McKinney, Suite 1000  
Houston, Texas 77002-6424

OR2010-17799

Dear Mr. Petrov:

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# 400994.

The Horizon Regional Municipal Utility District (the "district"), which you represent, received a request for seventeen categories of information related to the expansion of the district's wastewater treatment facilities pertaining to specified time periods.<sup>1</sup> You state you have no information responsive to categories 11, 12, and 15 of the request. The Act does not require a governmental body to release information that did not exist when it received a request or create responsive information.<sup>2</sup> *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983). You claim the submitted information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code.<sup>3</sup> We have considered the exceptions you claim and

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<sup>1</sup>You inform this office that the district sought and obtained clarification of the request. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

<sup>2</sup>As we make this determination, we do not address your claim that information responsive to these items is "not public information as defined by the Act."

<sup>3</sup>Although you also raised section 552.111 of the Government Code, you have not submitted any arguments regarding the applicability of this exception nor have you identified any information you seek to withhold under this exception. Therefore, we assume you no longer assert section 552.111 as an exception to disclosure. *See* Gov't Code §§ 552.301, .302.

reviewed the submitted representative sample of information.<sup>4</sup> We have also received and considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit written comments regarding availability of requested information).

Initially, we address the requestor's contention that the district did not comply with the requirements of section 552.301 of the Government Code in requesting a decision from this office. Section 552.301 prescribes procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. *See id.* § 552.301(a). Section 552.302 of the Government Code provides that if a governmental body fails to comply with section 552.301, the requested information is presumed to be subject to required public disclosure and must be released, unless there is a compelling reason to withhold any of the information. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ).

The requestor contends the district failed to submit its request for a ruling within the ten-business-day time period required by section 552.301(b) of the Government Code. Section 552.301(b) provides that a governmental body must ask for the attorney general's decision and claim its exceptions to disclosure no later than the tenth business day after the date of its receipt of the written request for information. *See id.* § 552.301(b). The district informs us that it sought clarification of the initial request for information. *See id.* § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information). When a governmental body, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed. *See City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010).

The requestor claims that the district failed to act in good faith in requesting clarification and asserts that the district's "deadlines under the Act should not be re-set[.]" Whether or not a governmental body failed to act in good faith is a question of fact. This office is unable to make factual determinations or resolve factual disputes in the opinion process. *See* Open Records Decision Nos. 592 at 2 (1991), 552 at 4 (1990), 435 at 4 (1986). Where fact issues are not resolvable as a matter of law, we must rely on the facts alleged to us by the governmental body requesting our decision, or upon those facts that are discernible from the documents submitted for our inspection. *See* ORD 552 at 4. Based on the submitted information, we cannot conclude that the district failed to act in good faith. The requestor acknowledges, and the submitted documents show, he responded to the clarification on September 8, 2010. Thus, the date the district is deemed to have received the request is September 8, 2010, and the district's ten-business-day deadline was September 22, 2010.

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<sup>4</sup>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.

*See City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding that when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date the request is clarified or narrowed); Gov't Code § 552.301(b). The shipping documentation provided by the district reflects that the district's request for a ruling was submitted to this office on September 22, 2010. *See* Gov't Code § 552.308 (stating requirements for submissions to attorney general by common contract carrier). Thus, we consider the district's request for this decision to have been timely submitted.

Pursuant to section 552.301(d), a governmental body must provide the requestor with (1) a written statement that the governmental body wishes to withhold the requested information and has asked for a decision from the attorney general, and (2) a copy of the governmental body's written communication to the attorney general within ten business days of receiving the request for information. *Id.* § 552.301(d). The requestor contends that the district failed to comply with section 552.301(d) because the district failed to provide a "written statement" to the requestor. However, we consider the district's September 21, 2010 letter to be a request to this office for a decision. The submitted information and the requestor's comments reveal that the district sent a copy of that letter to the requestor. Accordingly, by sending a copy of the September 21, 2010 letter to the requestor, we find that the district has complied with its requirements under section 552.301(d). Therefore, we will consider the district's claimed exceptions.

We note the submitted information includes a copy of a city ordinance. Because laws and ordinances are binding on members of the public, they are matters of public record and may not be withheld from disclosure under the Act. *See* Open Records Decision Nos. 551 at 2-3 (1990) (laws or ordinances are open records), 221 at 1 (1979) (official records of governmental body's public proceedings are among most open of records). Therefore, the submitted city ordinance, which we have marked, must be released.

Section 552.103 of the Government Code provides in 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.

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 was pending or reasonably anticipated on the date of the receipt of the request for information, and (2) the information at issue is related to the pending or anticipated 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 section 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). In the context of anticipated litigation in which the governmental body is the prospective plaintiff, the concrete evidence must at least reflect that litigation is "realistically contemplated." See Open Records Decision No. 518 at 5 (1989); see also Attorney General Opinion MW-575 (1982) (finding that investigatory file may be withheld from disclosure if governmental body attorney determines that it should be withheld pursuant to section 552.103 and that litigation is "reasonably likely to result"). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. See ORD 452 at 4.

You state that the district had substantially completed construction of a wastewater pipeline in May, 2010, when the City of Socorro (the "city") red-tagged the project, causing construction on the project to halt. You explain that when the district applied for the permits the city asserted were required, the city did not issue the permits, but asserted the district was required to apply for a zoning change. You further state that, prior to its receipt of the instant request for information, the district engaged outside counsel to evaluate the district's options against the city, including the possibility of a mandamus action. Based on your representations and our review, we determine the district reasonably anticipated litigation on the date it received the request for information. Furthermore, you explain the submitted information relates to the district's proposed wastewater discharge, which is the basis of the anticipated litigation. Upon review, we agree the submitted information relates to the anticipated litigation. We therefore conclude section 552.103 of the Government Code is applicable.

We note, however, that once information has been obtained by all parties to the anticipated 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 anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. The information at issue contains an e-mail communication from an attorney for the city and two citations issued by the city against the district. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information that is related to litigation through discovery procedures. See Open Records Decision No. 551 at 4-5 (1990). These records have been obtained from or provided to the

opposing party in the anticipated litigation, and therefore may not be withheld under section 552.103 of the Government Code. Further, the applicability of section 552.103(a) ends when the litigation has concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

You also claim the records obtained from or provided to the opposing party in the anticipated litigation consist of attorney-client communications that are excepted from disclosure under section 552.107 of the Government Code. Section 552.107(1) protects information coming 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 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, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *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. *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 assert that the records at issue are either communications made for the purpose of facilitating the rendition of professional legal services to the district or communications between the district’s attorney and district representatives for the same purpose. Upon

review, we find you have failed to demonstrate the records at issue reveal communications between privileged parties. *See* ORD 676. Therefore, the records obtained from or provided to the opposing party are not privileged, and may not be withheld under section 552.107(1) of the Government Code.

In summary, with the exception of the city ordinance and the records obtained from or provided to the opposing party in the anticipated litigation, the district may withhold the submitted information under section 552.103 of the Government Code. The city ordinance and the records obtained from or provided to the opposing party in the anticipated litigation must be released to the requestor.

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, toll free, at (888) 672-6787.

Sincerely,



Cindy Nettles  
Assistant Attorney General  
Open Records Division

CN/dls

Ref: ID# 400994

Enc. Submitted documents

c: Requestor  
(w/o enclosures)