



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 16, 2010

Mr. Scott A. Durfee
Assistant General Counsel
Harris County District Attorney's Office
1201 Franklin Suite 600
Houston, Texas 77002-1901

OR2010-18943

Dear Mr. Durfee:

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# 404315.

The Harris County District Attorney's Office (the "district attorney") received two requests from the same requestor for (1) all upcoming subpoenas served on a former Houston police officer; (2) records of arrangements for the former officer to travel to Harris County; (3) records of county funds used to pay for the former officer's travel; and (4) e-mails regarding the former officer to or from persons employed by the district attorney's office since a specified date.¹ You state the district attorney has no information responsive to items one and three of these requests.² You also state the district attorney will release any information responsive to item two of these requests that existed when the district attorney received the requests. You claim some of the submitted information is excepted from disclosure under

¹We note the district attorney sought and received clarification of this request for information. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

²We note the Act does not require the district attorney to release information that did not exist when it received this request, create responsive information, or obtain information that is not held by the district attorney or on her behalf. *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), 534 at 2-3 (1989), 518 at 3 (1989), 452 at 3 (1986), 362 at 2 (1983).

sections 552.103, 552.107, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the information you submitted.³

We first note some of the submitted information was created subsequent to the district attorney's receipt of these requests for information. The Act does not require a governmental body to release information that did not exist when it received a request.⁴ Thus, the submitted information that did not exist when the district attorney received these requests is not responsive to the requests. We have marked the non-responsive information. This decision does not address the public availability of the non-responsive information, which need not be released in response to these requests.

We also note the district attorney previously released to a member of the public some of the information in Exhibit D-1 you now seek to withhold. We have marked that information. The Act does not permit selective disclosure of information to the public. *See* Gov't Code §§ 552.007(b), .021; Open Records Decision No. 463 at 1-2 (1987). Information that has been voluntarily released to a member of the public may not subsequently be withheld from the public, unless public disclosure of the information is expressly prohibited by law or the information is confidential under law. *See* Gov't Code § 552.007(a); Open Records Decision Nos. 518 at 3 (1989), 490 at 2 (1988); *but see* Open Records Decision Nos. 579 (1990) (exchange of information among litigants in "informal" discovery is not "voluntary" release of information for purposes of statutory predecessor to Gov't Code § 552.007), 454 at 2 (1986) (governmental body that disclosed information because it reasonably concluded that it had constitutional obligation to do so could still invoke statutory predecessor to Gov't Code § 552.108). Although we understand you to claim sections 552.103 and 552.108 of the Government Code for the information we have marked, we note those sections are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *See 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 Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 177 at 3 (1977) (statutory predecessor to Gov't Code § 552.108 could be waived). As such, sections 552.103 and 552.108 neither expressly prohibit the release of information to the public nor make information confidential under law for purposes of section 552.007. Therefore, the marked information that was previously released may not be withheld under section 552.103 or section 552.108.

³This letter ruling assumes the submitted representative samples of information are truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the district attorney to withhold any information that is substantially different from the submitted information. *See* Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

⁴*See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d at 267-68; ORD 452 at 3.

Next, we consider your arguments against disclosure of the rest of the responsive information at issue. 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. *See* 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. *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 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).

We understand you to claim section 552.107(1) for the information you have highlighted in Exhibit D-2. You inform us the information at issue consists of communications between the district attorney’s assistant general counsel and assistant district attorneys. You state these communications were made for the purpose of facilitating the rendition of professional legal services to the district attorney. You also state these communications were intended to be and remain confidential. You have provided an affidavit in support of your representations. Based on your representations, your affidavit, and our review of the information at issue, we conclude the district attorney may withhold the information you have highlighted in Exhibit D-2 under section 552.107(1) of the Government Code.

Section 552.108 of the Government Code provides in part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

...

(4) it is information that:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) represents the mental impressions or legal reasoning of an attorney representing the state.

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [required public disclosure] if:

...

(3) the internal record or notation:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) represents the mental impressions or legal reasoning of an attorney representing the state.

Gov't Code § 552.108(a)(4), (b)(3). A governmental body must reasonably explain how and why section 552.108 is applicable to the information at issue. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). We understand you to claim section 552.108 for the remaining responsive information you have highlighted in Exhibit D-1. You state the information at issue constitutes information, internal records, and notations prepared by attorneys representing the state in anticipation of or in the course of preparing for criminal litigation. You state this information was "generated in the course of discussing trial scheduling and witness contacts in criminal cases." Based on your representations and our review of the information at issue, we conclude the district attorney may withhold the rest

of the responsive highlighted information in Exhibit D-1 under section 552.108(a)(4) and (b)(3) of the Government Code.⁵

We note the district attorney may be required to withhold some of the remaining information in Exhibit D-1 under section 552.1175 of the Government Code.⁶ Section 552.1175 is applicable to information relating to a peace officer, as defined by article 2.12 of the Code of Criminal Procedure. *See* Gov't Code § 552.1175(a)(1). Section 552.1175(b) provides as follows:

(b) Information that relates to the home address, home telephone number, or social security number of an individual to whom this section applies, or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

- (1) chooses to restrict public access to the information; and
- (2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Id. § 552.1175(a)-(b). The district attorney must withhold the information we have marked under section 552.1175 of the Government Code if the information is related to a peace officer who elects to restrict access to the marked information in accordance with section 552.1175(b).

In summary: (1) the district attorney may withhold the highlighted information in Exhibit D-2 under section 552.107(1) of the Government Code; (2) except for the information we have marked for release, the district attorney may withhold the responsive highlighted information in Exhibit D-1 under section 552.108(a)(4) and (b)(3) of the Government Code; and (3) the district attorney must withhold the information we have marked in Exhibit D-1 under section 552.1175 of the Government Code if the information is related to a peace officer who

⁵As we are able to make this determination, we need not address your other arguments against disclosure of the information in question.

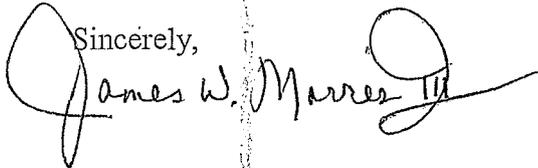
⁶This office will raise section 552.1175 on behalf of a governmental body, as this exception is mandatory and may not be waived. *See* Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

elects to restrict access to the marked information in accordance with section 552.1175(b). The rest of the responsive information must be released.⁷

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 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,



James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/em

Ref: ID# 404315

Enc: Submitted documents

c: Requestor
(w/o enclosures)

⁷We note that the information to be released includes the requestor's personal e-mail address, which the district attorney would ordinarily be required to withhold under section 552.137 of the Government Code unless the requestor has consented to its disclosure. The requestor has a right, however, to his own e-mail address under section 552.137(b). We also note this office issued Open Records Decision No. 684 (2009), a previous determination authorizing all governmental bodies to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137, without the necessity of requesting an attorney general decision. Thus, should the district attorney receive another request for these same records from a person who would not have a right of access to the present requestor's e-mail address, the district attorney is authorized to withhold the requestor's e-mail address under section 552.137 without the necessity of requesting an attorney general decision.