



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 7, 2011

Mr. Charles E. Zech
Denton, Navarro, Rocha & Bernal, P.C.
For City of Cibolo
2517 North Main Avenue
San Antonio, Texas 78212

OR2011-00397

Dear Mr. Zech:

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# 401768.

The City of Cibolo (the "city"), which you represent, received a request for thirty-one categories of information pertaining to general annexation plans, sign removal procedures, specified meeting agendas and minutes, the proposed annexation of the requestor's property, the official city limits, and city codes and enforcement.¹ You state the city will provide some of the requested information to the requestor. You claim the remaining requested information is excepted from disclosure under sections 552.103, 552.107, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

You claim the e-mails and attachments you have marked are protected by the attorney-client privilege. Section 552.107(1) of the Government Code protects information that comes

¹You state, and provide documentation showing, the city sought and received clarification from the requestor regarding portions of the request. *See* Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used).

²We assume 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 those records contain substantially different types of information than that submitted to this office.

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 assert the marked e-mails and attachments consist of communications between city attorneys and city officials made in furtherance of the rendition of professional legal services to the city. You indicate the communications were made in confidence, and that confidentiality has been maintained. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to most of the information at issue. We note, however, a letter attached to one of the privileged e-mails reflects it was sent from the opposing party’s attorney to an attorney for the city. Therefore, if the letter, which we have marked, exists separate and apart from the privileged e-mail to which it is attached, the city may not withhold the letter under section 552.107(1) of the Government Code. If the marked letter does not exist separate and apart from the privileged e-mail, the city may withhold it under section 552.107(1) of the Government Code. Regardless, the city may withhold the remaining information you have marked under section 552.107(1) of the Government Code.

Section 552.108(a)(1) of the Government Code excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov’t Code § 552.108(a)(1). A governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state the information you have marked pertains to a pending criminal prosecution. You have provided a letter from the city prosecutor stating the information at issue pertains to a pending criminal prosecution and indicating the information should be withheld from disclosure. We note the information you have marked contains two citations that have been provided to the individual who was cited. Because you have not provided additional arguments explaining how further release of the citations would interfere with the pending criminal prosecution, we find the city may not withhold the citations, which we have marked, under section 552.108(a)(1). We find, however, based on your representations and our review, the release of the remaining information you have marked would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests that are present in active cases), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Thus, with the exception of the citations, the city may withhold the information you have marked under section 552.108(a)(1) of the Government Code.

We will address your claim under section 552.103 of the Government Code for the marked citations and non-privileged letter, to the extent the letter exists separate and apart from the privileged e-mail to which it is attached. Section 552.103 provides:

(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 to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing (1) litigation was pending or reasonably anticipated on the date the governmental body 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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You state, and provide documentation showing, the city received the request for information after a lawsuit styled *City of Cibolo v. Roy Lee Parker*, Cause No. 10-0714-CV, was filed in the 25th District Court for Guadalupe County, Texas. Based on your representation and our review, we conclude litigation involving the city was pending when the city received the request. You also state the requested information is related to the pending litigation because it pertains to the issues that help form the basis of the lawsuit. Based on your representations and our review, we find the submitted citations and non-privileged letter are related to the pending litigation for the purposes of section 552.103.

We note, however, once information has been obtained by all parties to the 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 litigation is not excepted from disclosure under section 552.103(a). In this instance, the opposing party in the pending litigation has already been provided with copies of the citations and sent the non-privileged letter to the city. Therefore, because the opposing party in the pending litigation has seen the citations and the non-privileged letter, they may not be withheld under section 552.103 of the Government Code.

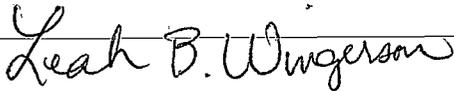
In summary, the city may generally withhold the e-mails and attachments you have marked under section 552.107(1) of the Government Code, but may not withhold the non-privileged letter we have marked, if it exists separate and apart from the privileged e-mail to which it is attached. With the exception of the citations we have marked, the city may withhold the information you have marked under section 552.108(a)(1) of the Government Code. The remaining information must be released.³

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.

³We note the information being released includes the requestor's Texas motor vehicle record information, which is generally confidential under section 552.130 of the Government Code. Because this exception was enacted to protect a person's privacy, the requestor has a right of access to his own private information under section 552.023(a) of the Government Code. See Gov't Code § 552.023(a) (person or person's authorized representative has special right of access, beyond right of general public, to information held by governmental body that relates to person and is protected from public disclosure by laws intended to protect person's privacy interests).

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,



Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/dls

Ref: ID# 401768

Enc. Submitted documents

c: Requestor
(w/o enclosures)