



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 26, 2011

Mr. Michael W. Moran
Jackson Walker LLP
901 Main Street, Suite 6000
Dallas, Texas 75202

OR2011-05721

Dear Mr. Moran:

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# 415332.

The City of Greenville (the "city") received a request for documents created on or after January 1, 2007, containing any mention of Majors Field or the city's ownership interest, or a named entity's leasehold interest, therein.¹ You state you have released some of the requested information. You claim the remaining requested 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 representative sample of information.² We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

¹We note the city sought and received clarification of the information requested. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request).

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.

Initially, we note, and the requestor asserts, some of the information responsive to the instant request may be the subject of previous requests for information, as a result of which this office issued Open Records Letter Nos. 2010-05109 (2010) and 2011-03959 (2011). In Open Records Letter No. 2010-05109, we determined the city may withhold the submitted information under section 552.107(1) of the Government Code. In Open Records Letter No. 2011-03959, we determined (1) the city may generally withhold certain e-mail strings under section 552.107(1) of the Government Code; however, to the extent certain e-mails existed separate and apart from the otherwise privileged e-mail strings, they may not be withheld under section 552.107(1); and (2) the city must release the remaining submitted information. The requestor argues some of the information responsive to the instant request for information may also have been responsive to the previous requests for information. We note the Act does not permit selective disclosure of information to the public. *See id.* §§ 552.007 (b), .021; Open Records Decision No. 463 at 1-2 (1987). Thus, as a general rule, if a governmental body voluntarily releases information to a member of the public, the information may not subsequently be withheld from another member of 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). You now raise section 552.103 of the Government Code for the requested information. We note section 552.103 is a discretionary exception that protects 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 section 552.103); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.103 does not prohibit the release of information or make information confidential. Thus, to the extent the information responsive to the instant request was responsive to any of the previous requests for information, it may not now be withheld under section 552.103. You also again raise section 552.107(1) of the Government Code for the information responsive to the instant request. We note once this office has determined information is not excepted from disclosure, a governmental body may generally not seek another ruling pertaining to precisely the same information. *See Gov't Code* § 552.301(f); Open Records Decision No. 665 at 2 (2000) (governmental body not authorized to seek attorney general decision unless it in good faith believes valid legal arguments exist to support claimed exception). We have no indication there has been any change in the law, facts, or circumstances on which the previous rulings were based. Accordingly, to the extent the requested information is identical to the information previously requested and ruled upon by this office, we conclude the city must rely on Open Records Letter Nos. 2010-05109 and 2011-03959 as previous determinations and withhold or release the identical information in accordance with those rulings.³ *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was

³To the extent any additional information responsive to the previous requests for information existed on the date the city received the instant request, we assume it has been released.

addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). To the extent the requested information was not responsive to the previous requests for information and is not encompassed by the prior rulings, we will consider your submitted arguments.

Next, we note the submitted information includes minutes and agendas of public meetings. Minutes and agendas of a governmental body's public meetings are specifically made public under the Open Meetings Act, chapter 551 of the Government Code. *See* Gov't Code §§ 551.022 (minutes and tape recordings of open meeting are public records and shall be available for public inspection and copying on request to governmental body's chief administrative officer or officer's designee), .043 (notice of meeting of governmental body must be posted in a place readily accessible to general public at least 72 hours before scheduled time of meeting), .053-.054 (district governing bodies required to post notice of meeting at a place convenient to the public in administrative office of district). As a general rule, the exceptions to disclosure found in the Act, such as section 552.103, do not apply to information other statutes make public. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Therefore, the minutes and agendas of the public meetings, which we have marked, must be released pursuant to section 551.022 of the Government Code.

Next, we note portions of the submitted information are 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, portions of the submitted information consist of information in a voucher or contract relating to the expenditure of public funds by a governmental body, and thus are 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. *See id.* You claim this information is subject to section 552.103 of the Government Code. As noted above, section 552.103 is a discretionary exception to disclosure that protects the governmental body's interests. Thus, section 552.103 is not "other law" that makes information expressly confidential for purposes of section 552.022(a)(3). *See Dallas Area Rapid Transit*, 4 S.W.3d at 469; *see also* ORD 665 at 2 n.5. Consequently, the city may not withhold the information subject to section 552.022(a)(3) pursuant to section 552.103 of the Government Code. However,

because section 552.136 of the Government Code is other law for purposes of section 552.022(a)(3), we will consider the applicability of this section to the information at issue.⁴

Section 552.136 of the Government Code provides, “[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136(b). Section 552.136(a) defines “access device” as “a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to . . . obtain money, goods, services, or another thing of value [or] initiate a transfer of funds other than a transfer originated solely by paper instrument.” *Id.* § 552.136(a). Accordingly, the city must withhold the bank account numbers we have marked under section 552.136 of the Government Code. The remaining information subject to section 552.022(a)(3) of the Government Code must be released.

We will now consider your claim under section 552.103 of the Government Code for the information in Exhibit C not subject to section 552.022. 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.

Id. § 552.103(a), (c). The governmental body claiming section 552.103 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

⁴The 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).

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).*

You claim section 552.103 for the remaining information in Exhibit C. You state, and provide documentation showing, prior to the city's receipt of the request for information, a lawsuit styled *L-3 Communications Integrated Systems, L.P., v. City of Greenville*, Cause No. 76,399, was filed and is currently pending against the city in the 354th District Court of Hunt County, Texas. Therefore, we agree litigation was pending on the date the city received the request for information. You also state the information at issue pertains to the substance of the lawsuit claims. Based on your representations and our review, we find the information at issue is related to the pending litigation. Therefore, we conclude section 552.103 of the Government Code is generally applicable to the remaining information in Exhibit C.

We note, however, it appears the opposing party in the pending litigation has seen or had access to some of the information at issue. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to the litigation to obtain such information through discovery procedures. *See ORD 551 at 4-5 (1990)*. Thus, once the opposing party in pending litigation has seen or had access to information that is related to the litigation, there is no interest in withholding such information from public disclosure under section 552.103. *See Open Records Decision Nos. 349 (1982), 320 (1982)*. Accordingly, the city may withhold the portions of the information at issue that the opposing party to the litigation has not seen or had access to under section 552.103 of the Government Code. We note the applicability of section 552.103 ends once the related litigation concludes. *See Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982)*. To the extent the opposing party in the pending litigation has seen or had access to the information at issue, the city may not withhold it under section 552.103.

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 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, 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. *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 D is protected by section 552.107(1) of the Government Code. You state the information at issue consists of e-mail correspondence and legal memoranda between the city attorney and other city staff members. You state the communications were made for the purpose of facilitating the rendition of professional legal services to the city and that 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 the information submitted as Exhibit D. Accordingly, the city may withhold Exhibit D under section 552.107(1) of the Government Code.~~

In summary, to the extent the information responsive to the instant request is identical to the information previously requested and ruled upon by this office, the city must rely on Open Records Letter Nos. 2010-05109 and 2011-03959 as previous determinations and withhold or release the identical information in accordance with those rulings. The minutes and agendas of the public meetings we have marked in Exhibit C must be released pursuant to section 551.022 of the Government Code. The city must release the information in Exhibit C subject to section 552.022(a)(3) of the Government Code; however, in releasing this information, the city must withhold the bank account numbers we have marked under section 552.136 of the Government Code. To the extent the opposing party in the pending litigation has not seen or had access to the remaining information in Exhibit C, the city may withhold it under section 552.103 of the Government Code. The city may withhold Exhibit

D under section 552.107(1) of the Government Code. The remaining information, including any information responsive to the instant request that was responsive to any previous request for 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 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,



Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/tf

Ref: ID# 415332

Enc. Submitted documents

c: Requestor
(w/o enclosures)