



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 1, 2011

Mr. Brent A. Money  
Scott, Money & Ray, P.L.L.C.  
For City of Greenville  
P.O. Box 1353  
Greenville, Texas 75403-1353

OR2011-07700

Dear Mr. Money:

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# 419242.

The City of Greenville (the "city"), which you represent, received a request for all records pertaining to a specified contract, all correspondence between the city and Wimberly Surveying Professionals as it relates to the replatting of Majors Field, and the recordings of the Planning and Zoning meetings regarding the Majors Field replat. You state you will release some of the responsive information to the requestor. You claim that 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.

Initially, we note a portion of the submitted information does not pertain to any of the requested categories of information. This information, which we have marked, is not responsive to the instant request for information. This ruling does not address the public availability of non-responsive information, and the city is not required to release non-responsive information in response to this request.

Next, we note portions of the requested information are subject to a previous determination issued by this office in Open Records Letter No. 2011-05721 (2011). As we have no indication that the law, facts, or circumstances on which the prior ruling was based have changed, the city must continue to rely on this ruling as a previous determination and withhold or release any previously ruled upon information in accordance with this prior ruling. *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 addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

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.

Gov't Code § 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 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 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 354<sup>th</sup> 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 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.

You claim the information the opposing party has seen or had access to is also excepted under section 552.107 of the Government Code, which 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).

As noted above, the remaining information has been seen or accessed by the opposing party in the pending litigation, who is not a privileged party. Accordingly, this information is not protected by the attorney-client privilege and generally may not be withheld under section 552.107 of the Government Code. However, we note this information is contained in otherwise privileged e-mail strings. If this non-privileged information, which we have marked, does not exist separate and apart from the otherwise privileged e-mail strings, then this information may be withheld under section 552.107. To the extent the information at issue exists separate and apart from the otherwise privileged e-mail strings, it may not be withheld under section 552.107 and must be released.

In summary, the city must continue to rely upon Open Records Letter No. 2011-05721 as a previous determination and withhold or release the information at issue in accordance with that ruling. The city may withhold the information that the opposing party has not seen or had access under section 552.103 of the Government Code. If the marked non-privileged e-mails that the opposing party has seen or had access do not exist separate and apart from the otherwise privilege e-mail strings, then this information may be withheld under section 552.107 of the Government Code. To the extent the marked non-privileged information exists separate and apart from the otherwise privileged e-mail strings, the city must release this information 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,



Vanessa Burgess  
Assistant Attorney General  
Open Records Division

VB/dls

Ref: ID# 419242

Enc. Submitted documents

c: Requestor  
(w/o enclosures)