ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 5, 2011

Mr. Scott Campbell
Town Manager/Public Information Officer
Town of Sunnyvale
127 North Collins Road
Sunnyvale, Texas 75182

OR2011-09424

Dear Mr. Campbell:

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# 422957.

The Town of Sunnyvale (the "town") received a request for 1) cellular telephone records and any text from three named individuals during a specified time period concerning any town business or to the town attorney or his associates and 2) e-mails sent from the town or the mayor to the town attorney or his associates. You state the town has released the information responsive to the first part of the request to the requestor. You claim the submitted information is excepted from disclosure under sections 552.103, 552.107, 552.110, and 552.131 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.103 of the Government Code provides in 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.
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> . . .

> (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 sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) that 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 inform us, and provide documentation showing, the town was named as a defendant in a lawsuit styled *Mary Dews v. Town of Sunnyvale, Texas*, Civil Action No. 3:88-CV-1604-O, which was filed in the United States District Court for the Northern District of Texas. You further state, and provide documentation showing, the lawsuit was filed prior to the town's receipt of the present request for information. Upon review, we conclude this litigation was pending when the town received the request. You also state, and we agree, some of the submitted information is related to this pending litigation for purposes of section 552.103. Accordingly, we find the town may withhold the submitted information we have marked under section 552.103 of the Government Code.[1] You also state, and provide documentation showing, the remaining information relates to an additional lawsuit, styled *In Re Lawrence Edward Boyd and Dale Brian Graves*, 05-11-003430CV, in the Fifth Court of Appeals of Texas. You state the court has issued an opinion in this case and the time period to appeal the judgment was still running when the request was made, and has not expired. You do not inform us, however, that either opposing party has taken any concrete steps toward commencing an appeal. Having considered your representations, we find the mere possibility of an appeal does not establish that litigation was pending or reasonably anticipated when the town received this request for information. *See* Gov't Code § 552.103(c); ORD 452 at 4; *see also* Open Records Decision No. 331 at 1-2 (1982) (mere chance of litigation not sufficient to trigger statutory predecessor to Gov't Code § 552.103). Consequently, the remaining information may not be withheld under 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.

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[1]As our ruling is dispositive, we need not address your remaining arguments against disclosure.

See Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing parties in the pending litigation is not excepted from disclosure under section 552.103(a), and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

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 explain the remaining information consists of communications from the town secretary and town manager to attorneys for the town. You state these communications were made in confidence for the furtherance of the rendition of professional legal services. Further, you

state their confidence has been maintained. Thus, we agree the remaining information consists of communications that fall within the scope of the attorney-client privilege. Therefore, the town may withhold the remaining information under section 552.107.

In summary, the town may withhold the information we have marked under section 552.103 of the Government Code. The town may withhold the remaining information under section 552.107 of the Government Code.

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,

Tamara Wilcox
Assistant Attorney General
Open Records Division

TW/dls

Ref: ID# 422957

Enc. Submitted documents

c: Requestor
(w/o enclosures)