



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 25, 2011

Ms. Julie V. Pandya
For City of Allen
Nichols, Jackson, Dillard, Hager & Smith, L.L.P.
1800 Lincoln Plaza
500 North Akard
Dallas, Texas 75201

OR2011-12314

Dear Ms. Pandya:

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# 427917 (Ref. #50000).

The City of Allen (the "city"), which you represent, received a request for correspondence between the city and its attorney and the attorney and the general contractor related to the Celebration Park Phase II project. You state some responsive information will be made available 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 representative sample of information.¹

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

¹We 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.

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, orig. proceeding). 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).

The city seeks to withhold portions of the submitted information, which you have marked, under section 552.107(1). The city states this information consists of communications between attorneys for and employees of the city that were made for the purpose of facilitating the rendition of professional legal services to the city. The city also states the communications were intended to be and remain confidential. Based on the city’s representations and our review of the information at issue, we conclude the city may withhold the marked information under section 552.107(1) of the Government Code.

The city claims the remaining information is excepted from public disclosure under section 552.103 of the Government Code. 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 purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception applies in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the requested information is related to that litigation. *See 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.); ORD 551 at 4. The governmental body must meet both parts of this test for information to be excepted under section 552.103(a). *See* ORD 551 at 4.

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To demonstrate litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. Open Records Decision No. 331 (1982). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983).

You argue the city reasonably anticipated litigation at the time the city received the instant request. You explain that the city has an on-going dispute with its general contractor regarding several aspects of the Celebration Park Phase II project, including potential liquidated damages owed to the city and retainage money being held by the city. You have

submitted a copy of an e-mail from the attorney for the general contractor stating that he was prepared to file suit if a settlement was not reached in the dispute. You also provided documentation showing that prior to receiving this request for information, the city received notice from project subcontractors alleging unpaid claims resulting from the project. You state that the city anticipates that liens will be filed by the subcontractors as a result of these claims.

After reviewing the submitted documentation and your arguments, we find the city reasonably anticipated litigation when it received the request for information. We also find that the remaining information is related to the anticipated litigation for purposes of section 552.103(a). We therefore conclude that the remaining information may generally be withheld under section 552.103.

We note, however, once the information at issue has been obtained by all parties to the anticipated litigation through discovery or otherwise, a section 552.103(a) interest no longer exists as to that information. *See Open Records Decision Nos. 349 (1982), 320 (1982)*. The submitted information includes a document that the opposing party either provided to the city or has otherwise already seen. Information that has either been obtained from or provided to all other parties in the litigation is not excepted from disclosure under section 552.103(a). However, we note a portion of this document may be subject to section 552.117 of the Government Code.² Thus, we will address the applicability of this exception. Furthermore, the applicability of section 552.103(a) ends once the litigation has been concluded or is no longer reasonably anticipated. *Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982)*.

Section 552.117 of the Government Code excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 2 (to be codified as an amendment to Gov't Code § 552.117(a)). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See Open Records Decision No. 530 at 5 (1989)*. Therefore, a governmental body must withhold information under section 552.117 on behalf of a current or former official or employee only if the individual made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. We note section 552.117 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See Open Records Decision No. 506 at 5-6 (1988)* (statutory predecessor to section 552.117 of the Government Code not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use).

²The Office of the Attorney General will raise a mandatory exception such as section 552.117 on behalf of a governmental body. *See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987)*.

Accordingly, to the extent the individual whose information is at issue timely-elected confidentiality under section 552.024, the city must withhold the cellular telephone number we have marked under section 552.117(a)(1) of the Government Code if the cellular telephone services are paid for with personal funds.

In summary, the city may withhold the information marked under section 552.107(1) of the Government Code. With the exception of the information the opposing party has already seen, the city may withhold the remaining information under section 552.103 of the Government Code. To the extent the individual whose information is at issue timely-elected confidentiality under section 552.024, the city must withhold the cellular telephone number we have marked under section 552.117(a)(1) of the Government Code if the cellular telephone services are paid for with personal funds.

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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/dls

Ref: ID# 427917

Enc. Submitted documents

c: Requestor
(w/o enclosures)