



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 20, 2012

Ms. Valeria M. Acevedo
City Attorney
City of New Braunfels
P.O. Box 311747
New Braunfels, Texas 78131-1747

OR2012-04076

Dear Ms. Acevedo:

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# 448296 (New Braunfels ORR No. 2011-346).

The City of New Braunfels (the "city") received a request for all e-mail correspondence to or from a named city council member during a specified time period. You state you will release some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.103, 552.107, and 552.131 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note the requestor specifically consents to the redaction of social security numbers, driver's license numbers, home addresses, personal phone numbers, and e-mail addresses. Thus, this information is not responsive to the present request. This ruling does not address the public availability of any information that is not responsive to the request.

You raise section 552.103 of the Government Code for portions of the submitted information. Section 552.103 provides, in pertinent 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

¹Although you also raise section 552.101 of the Government Code in conjunction with sections 552.103, 552.107, and 552.131 of the Government Code, this office has concluded section 552.101 does not encompass other exceptions found in the Act. See Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990).

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 has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is 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). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). *See* ORD 551 at 4.

You state that lawsuits styled *City of New Braunfels v. New Braunfels Aero Service, Inc.*, Cause No. 2011-0283D and *City of New Braunfels v. Carowest Land, Ltd.*, Cause No. C2010-1519D were filed in the 433rd District Court of Comal County prior to the city's receipt of this request for the information at issue. You explain both lawsuits were pending at the time the city received the request for information. You state the information you have marked relates to these lawsuits. Based on your representations and our review, we find you have established the information at issue is related to litigation that was pending on the date the city received this request for information. Accordingly, we conclude that the city may withhold the information it has marked under section 552.103 of the Government Code.

Generally, however, once information has been obtained by all parties to the pending litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to all parties to 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 been concluded or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

You raise section 552.107(1) of the Government Code for portions of the remaining submitted information. Section 552.107 protects information coming within the attorney-client privilege. Gov't Code § 552.107(1). 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. 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. 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.*, 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, orig. proceeding). Section 552.107(1) generally excepts an entire communication 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 state portions of the remaining submitted information constitute e-mail communications, which were made for the purpose of providing legal services to the city. You explain the e-mail communications were between city attorneys, the City Manager, City Council Members, and other city employees. You state these e-mails were intended to be confidential and they have remained confidential. Based on these representations, and our review, we agree section 552.107 is applicable to the information at issue, and the city may generally withhold this information, which it has marked, under section 552.107(1) of the Government Code. We note, however, these privileged e-mail strings include e-mails from a non-privileged party that is separately responsive to the instant request. Consequently, if these e-mails, which we have marked, exist separate and apart from the privileged e-mail strings in which they were included, the city may not withhold them under section 552.107(1) of the Government Code. If these e-mails do not exist separate and apart from the privileged e-mail strings in which they were included, the city may withhold them as privileged attorney-client communications under section 552.107(1) of the Government Code.

You raise section 552.131 of the Government Code for the remaining information. Section 552.131 provides:

(a) Information is excepted from [required public disclosure] if the information relates to economic development negotiations involving a governmental body and a business prospect that the governmental body seeks to have locate, stay, or expand in or near the territory of the governmental body and the information relates to:

(1) a trade secret of the business prospect; or

(2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained.

(b) Unless and until an agreement is made with the business prospect, information about a financial or other incentive being offered to the business prospect by the governmental body or by another person is excepted from [required public disclosure].

Gov't Code § 552.131. We note that the scope of section 552.131(a) is co-extensive with that of section 552.110 of the Government Code. *See id* § 552.110(a)-(b); Open Records Decision Nos. 661 at 5-6 (1999), 552 at 5 (1990). Thus, section 552.131(a) protects the proprietary interests of third parties that have provided information to governmental bodies, not the interests of governmental bodies themselves. Therefore, we do not address the city's arguments under subsection 552.131(a). In this instance, there has been no demonstration by a third party that any of the information at issue constitutes a trade secret or that release of any of the information at issue would cause a third party substantial competitive harm. *See* ORDs 552 at 5 (attorney general will accept private person's claim under Gov't Code § 552.110(a) if person establishes prima facie case for trade secret exception, and no one submits argument that rebuts claim as matter of law), 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm). Therefore, the city may not withhold any of the submitted information under subsection 552.131(a).

Section 552.131(b) of the Government Code protects information about a financial or other incentive that is being offered to a business prospect by a governmental body or another person. You assert the remaining information relates to economic development negotiations between the city and a business prospect regarding potential financial incentives. You state there is no final contract in place with the business prospect. Upon review, we agree the remaining information consists of information about financial or other incentives being offered to a business prospect by the city. Accordingly, the city may withhold the information, which it has marked, under section 552.131(b) of the Government Code.

In summary, the city may withhold the information it has marked under section 552.103 of the Government Code. The city may generally withhold the information it has marked under section 552.107(1) of the Government Code; however, if the non-privileged e-mails we have marked exist separate and apart from the privileged e-mail strings in which they are included, the city may not withhold them under section 552.107(1) of the Government Code. The city may withhold the information it has marked under section 552.131(b) 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,



Cynthia G. Tynan
Assistant Attorney General
Open Records Division

CGT/em

Ref: ID# 448296

Enc. Submitted documents

c: Requestor
(w/o enclosures)