



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

March 27, 2012

Ms. Elizabeth White  
Ross, Banks, May, Cron & Cavin, P.C.  
2 Riverway, Suite 700  
Houston, Texas 77056-1918

OR2012-04472

Dear Ms. White:

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# 448780 (City ID# W001129-010412).

The City of Friendswood (the "city"), which you represent, received a request for e-mails between city council members, the city manager, and the city secretary over a specified time period.<sup>1</sup> You state the city has released some of the requested information. You claim the submitted information is excepted from disclosure under sections 552.103, 552.107, and 52.137 of the Government Code.<sup>2</sup> We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>3</sup>

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<sup>1</sup>We note the city received clarification regarding this request. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

<sup>2</sup>You also claim this information is protected under the attorney-client privilege based on Texas Rule of Evidence 503. In this instance, however, the information is properly addressed here under section 552.107, rather than rule 503. *Open Records Decision No. 676 at 3 (2002)*. Although we understand you to assert the submitted information is excepted under section 552.101 of the Government Code and privileged under Texas Rule of Civil Procedure 192.5, you have not submitted any arguments regarding the applicability of section 552.101 or rule 192.5, nor have you identified any information you seek to withhold under this exception or rule. Therefore, we do not address the applicability of section 552.101 or rule 192.5 to the submitted information. *See* Gov't Code §§ 552.301, .302.

<sup>3</sup>We 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 that those records contain substantially different types of information than that submitted to this office.

Initially, we note the requestor has excluded from his request personal e-mail addresses; cellular telephone numbers; routine council meeting agenda items; invitations and meeting notices to civic events, seminars, and training opportunities; routine information and news letters from governmental entities and private organizations; and routine inter-city reports and city news or information messages regarding city departments or operations. Accordingly, these types of information are not responsive to the present request for information. The city need not release nonresponsive information in response to this request, and this ruling will not address that information.<sup>4</sup>

Next, we address your assertion the instant request for information is redundant of two recent requests made to the city. Generally, section 552.232 of the Government Code outlines the procedures a governmental body must follow in responding to a repetitious or redundant request. Gov't Code § 552.232. You inform us the requestor previously requested e-mails sent by a specified investigator and e-mails between a named council member and a specified law firm between September 12, 2011 and December 7, 2011. The current request is for all e-mails between city council members, the city manager, and the city secretary between September 12, 2011 to January 2, 2012. You have not identified any of the submitted information as the same information that was at issue in the previous requests for information. Further, we are unable to determine whether any of the submitted information is the same information at issue in the previous requests. Therefore, you have failed to demonstrate the instant request for information is a repetitious or redundant request for purposes of the Act. Thus, we will address your arguments against disclosure of the information at issue.

Section 552.103 of the Government Code provides as follows:

(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.

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<sup>4</sup>As we are able to make this determination, we do not address your argument under section 552.137 of the Government Code.

Gov't Code § 552.103(a), (c). A 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 was 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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You state the city is a party to pending litigation. You explain the city has been notified the opposing party in *Wight Realty Interests, Ltd. v. City of Friendswood* has filed an appeal in the Ninth Court of Appeals in Beaumont. The submitted documents demonstrate this appeal was filed prior to the city's receipt of the present request for information. You state the information submitted as Exhibit B is related to the pending litigation. Upon review of your arguments and the information at issue, we find litigation was pending when the city received this request for information and Exhibit B relates to the pending litigation. Therefore, the city may withhold Exhibit B under section 552.103 of the Government Code.

We note 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 the opposing party in the pending litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Section 552.107(1) of the Government Code 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 capacity other than 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 state the information submitted as Exhibit C constitutes communications between city staff, city council members, and city attorneys that were made for the purpose of providing legal services to the city. You also assert these communications were made in confidence and that confidentiality has been maintained. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to Exhibit C. Accordingly, the city may withhold Exhibit C under section 552.107 of the Government Code.

In summary, the city may withhold Exhibit B under section 552.103 of the Government Code. The city may withhold Exhibit C under section 552.107 of the Government Code. The remaining responsive 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](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,



Jennifer Luttrill

Assistant Attorney General  
Open Records Division

JL/som

Ref: ID# 448780

Enc. Submitted documents

c: Requestor  
(w/o enclosures)