



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 25, 2012

Ms. Tiffany N. Evans
Assistant City Attorney
City of Houston
P.O. Box 368
Houston, Texas 77001-0368

OR2012-11559

Dear Ms. Evans:

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# 459916 (GC No. 19633).

The City of Houston (the "city") received a request for any correspondence between two named individuals and all correspondence regarding three named business establishments. You claim that the submitted information is excepted from disclosure under sections 552.103 and 552.2107 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 in order to withhold the information at issue. *See* Open Records Decision No. 676 at 6-7 (2002). 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. *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)

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.

(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 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 Exhibits 2, 3, and 4 contain correspondence sent to, from, and among city attorneys, other legal staff, and various city employees in their capacity as clients. You acknowledge that a portion of Exhibit 4 consists of communications between the city’s Legal Department and various members of the Texas Alcoholic Beverage Commission (“TABC”) legal staff, however, you state the city shared a common interest with the TABC in a pending action at the time that the communications were made. See TEX. R. EVID. 503(b)(1)(c) (discussing privilege among parties “concerning a matter of common interest”); see also *In re Auclair*, 961 F.2d 65, 69 (5th Cir. 1992) (citing *Hodges, Grant & Kaufmann v. United States Government*, 768 F.2d 719, 721 (5th Cir. 1985)) (attorney-client privilege not waived if privileged communication is shared with third person who has common legal interest with respect to subject matter of communication). You state all of the communications at issue were made in furtherance of the rendition of professional legal services to the city. Further, you state the 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 most of the information at issue. We note, however, some of the individual e-mails and attachments to the otherwise privileged e-mails consists of communications with non-privileged parties. Also, one e-mail contained in Exhibit 3 reflects that it was sent to an individual you have identified as a representative of the State Office of Administrative Hearings (“SOAH”), who is not a privileged party in this instance. Therefore, if these communications, which we have marked, exist separate and apart from the privileged e-mails, the city may not withhold these communications under section 552.107(1) of the Government Code. Regardless, the city may withhold the

remaining information in Exhibits 2, 3, and 4 under section 552.107(1) of the Government Code.

If the marked communications in Exhibit 3 exist separate and apart from the otherwise privileged e-mail chains, we will address your claim under section 552.103 of the Government Code for this information. Section 552.103 provides:

(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). A governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing (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. *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)*. We note contested cases conducted under the Administrative Procedure Act (the "APA"), chapter 2001 of the Government Code, are considered litigation for purposes of section 552.103. *See Open Records Decision No. 588 at 7 (1991)*. We further note a contested case before the SOAH is considered litigation for the purposes of the APA. *See id.*

You inform us the city is a party to a contested administrative hearing before the SOAH, Docket No. 458-12-0985, that was pending when the city received the present request for information. Based on your representations and our review, we determine litigation was pending on the date the city received the request for information. Furthermore, we find the remaining information contained in Exhibit 3 relates to the pending litigation. Accordingly, we find the city may generally withhold the remaining information in Exhibit 3 under section 552.103 of the Government Code.

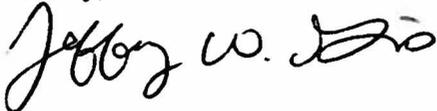
We note, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the litigation is not excepted from disclosure under section 552.103(a). In this instance, the opposing party in litigation has seen some of the information at issue, which we have marked. Therefore, because the opposing party in the pending litigation has seen this information, it may not be withheld under section 552.103 of the Government Code. You may withhold the remaining information in Exhibit 3 under section 552.103. We note the applicability of section 552.103(a) ends once the litigation has concluded or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

In summary, the city may generally withhold the submitted information under section 552.107(1) of the Government Code, but may not withhold the non-privileged communications we have marked, if they exist separate and apart from the privileged e-mails to which they were attached. If the marked communications do exist separate and apart from the otherwise privileged e-mails, the communication in Exhibit 3 that has not been seen by any opposing parties may be withheld under section 552.103. The remaining communications in Exhibit 3 that have been seen by the opposing parties 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, 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,



Jeffrey W. Giles
Assistant Attorney General
Open Records Division

JWG/dls

Ref: ID# 459916

Enc. Submitted documents

c: Requestor
(w/o enclosures)