



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 14, 2012

Mr. Jeff Ulmann
Assistant City Attorney for City of Bartlett
McKamie Krueger, LLP
223 West Anderson Lane, Suite A105
Austin, Texas 78752

OR2012-12803

Dear Mr. Ulmann:

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# 462095.

The City of Bartlett (the "city"), which you represent, received a request for eleven categories of information related to five named individuals and the requestor's law firm. You state you will release the requested minutes and recordings. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.104, 552.107, and 552.133 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information, a portion of which consists of a representative sample.² We have also received and considered comments from an interested third party. *See Gov't Code* § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

¹Although you raised sections 552.106 and 552.143 of the Government Code, you did not provide any arguments regarding the applicability of this section. Therefore, we assume you have withdrawn these exceptions. *See Gov't Code* §§ 552.301, .302.

²We assume that 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 city has only submitted e-mails and attachments for our review. To the extent any additional information responsive to the remainder of the request existed on the date the city received the request, we assume you have released it. If you have not released such information, you must do so at this time. *Id.* §§ 552.301, .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

Next, we note some of the submitted information may be subject to a previous determination issued by this office in Open Records Letter No. 2012-09846 (2012). In that ruling, we ruled, in part, the city may withhold portions of Exhibit B under section 552.103 of the Government Code, Exhibit E under section 552.107 of the Government Code, Exhibit C under section 552.133 of the Government Code, and marked e-mail addresses under section 552.137 of the Government Code, unless the owners of these addresses affirmatively consented to their release. We have no indication the law, facts, or circumstances on which this prior ruling was based have changed. Thus, with regard to the identical responsive information that was previously requested and ruled on by this office, we conclude the city must rely on the prior ruling as a previous determination and withhold or release the identical information in accordance with that decision. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes information is or is not excepted from disclosure). To the extent the submitted information is not encompassed by the previous ruling, we will consider your submitted arguments.

You raise section 552.103 of the Government Code for the information in Exhibit B. 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 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 Open Records Decision No. 551 at 4 (1990).

You state a lawsuit styled *City of Bartlett, Texas v. Deck*, Cause No. 09-505-C26, was filed in the 26th District Court of Williamson County, prior to the city's receipt of this request for the information at issue. You explain the lawsuit was pending at the time the city received the request for information. You state the information at issue relates to the lawsuit. 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 Exhibit B under section 552.103 of the Government Code.

We note once the information at issue has been obtained by all parties to the pending 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). Thus, 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), and it must be disclosed. The applicability of section 552.103(a) also 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 552.107(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) (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, 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. *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 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 claim Exhibit D is protected by section 552.107(1) of the Government Code. You state Exhibit D consists of communications involving city employees and outside counsel for the city. You state the communications were made for the purpose of facilitating the rendition of professional legal services to the city and that these communications have remained confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to most of Exhibit D under section 552.107(1). However, we note one of the submitted communications and several of the individual e-mails contained in, and attachments to, the otherwise privileged e-mail strings are communications with individuals whom you have not shown to be privileged parties. Thus, to the extent these non-privileged communications, e-mails, and attachments, which we have marked, exist separate and apart from the otherwise privileged communications and e-mail strings in which they appear, they may not be withheld under section 552.107(1) of the Government Code.

Section 552.133 of the Government Code excepts from disclosure a public power utility’s information that is “reasonably related to a competitive matter.” Gov’t Code § 552.133(b). Section 552.133 of the Government Code provides in relevant part:

(a) In this section, “public power utility” means an entity providing electric or gas utility services that is subject to the provisions of this chapter.

(a-1) For purposes of this section, “competitive matter” means a utility-related matter that is related to the public power utility’s competitive activity, including commercial information, and would, if disclosed, give advantage to competitors or prospective competitors. The term:

(1) means a matter that is reasonably related to the following categories of information:

...

(B) bidding and pricing information for purchased power, generation and fuel, and Electric Reliability Council of Texas bids, prices, offers, and related services and strategies[.]

...

(F) customer billing, contract, and usage information, electric power pricing information, system load characteristics, and electric power marketing analyses and strategies[.]

Id. § 552.133(a)-(a-1). Section 552.133(a-1)(2) provides fifteen categories of information that are not competitive matters. *Id.* § 552.133(a-1)(2).

You state the city is an electric utility provider, Bartlett Electric Cooperative (“BEC”). We understand BEC is a municipally owned utility for purposes of section 552.133. You state the information in Exhibit C relates to BEC’s competitive activity and commercial information and if released, would give competitors an advantage. The information at issue is not among the fifteen categories of information expressly excluded from the definition of “competitive matter” by section 552.133(a-1)(2). Based on your representations and our review, we find Exhibit C relates to competitive matters as defined by section 552.133(a-1). Thus, we conclude the city must withhold Exhibit C under section 552.133 of the Government Code.³

We note the non-privileged communications contain information subject to section 552.137 of the Government Code.⁴ Section 552.137 excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See id.* § 552.137(a)-(c). The e-mail addresses at issue are not excluded by subsection (c). Therefore, to the extent the non-privileged communications exist separate and apart from their otherwise privileged communications, the city must withhold the personal e-mail addresses we have marked under

³As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

⁴The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).*

section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure.⁵

In summary, to the extent the submitted information is identical to the information previously requested and ruled upon in Open Records Letter No. 2012-09846, the city must rely on the prior ruling as a previous determination and withhold or release the identical information in accordance with that decision. The city may withhold Exhibit B under section 552.103 of the Government Code. The city may generally withhold Exhibit D under section 552.107(1) of the Government Code. However, to the extent the non-privileged communications, which we have marked, exist separate and apart from the otherwise privileged e-mail strings in which they appear, they may not be withheld under section 552.107(1) of the Government Code. The city must withhold Exhibit C under section 552.133 of the Government Code. To the extent the non-privileged communications in Exhibit D exist separate and apart from their otherwise privileged communications, the city must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure.

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,



Vanessa Burgess
Assistant Attorney General
Open Records Division

VB/akg

⁵We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

Ref: ID# 462095

Enc. Submitted documents

**c: Requestor
(w/o enclosures)**

**Mr. James M. Grant
P.O. Box 57
Bartlett, Texas 76511
(w/o enclosures)**