



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 13, 2012

Ms. Myrna S. Reingold
Legal Department
Galveston County
722 Moody, Fifth Floor
Galveston, Texas 77550-2317

OR2012-14609

Dear Ms. Reingold:

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# 464948.

The Galveston County Sheriff's Office (the "sheriff's office") received a request for e-mails sent to or received by three named individuals containing a specified word since January of 2008.¹ You state the sheriff's office does not have some of the requested information.² You state the sheriff's office has released some of the requested information but claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code.³ We have considered the exceptions you claim and reviewed the submitted information.

¹The sheriff's office received clarification and narrowing of the information requested. See Gov't Code § 552.222 (if request for information is unclear, governmental body may ask requestor to clarify request); see also *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (if governmental entity, acting in good faith, requests clarification of unclear or over-broad request, ten-day period to request attorney general ruling is measured from date request is clarified).

²The Act does not require a governmental body to disclose information that did not exist when the request for information was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

³Although you raise section 552.101 of the Government Code in conjunction with rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedure, this office has concluded that section 552.101 does not encompass discovery privileges. See Open Records Decision Nos. 676 (2002), 677 (2002). The proper exceptions to raise when asserting the attorney client and work product privileges for information not subject to section 552.022 of the Government Code are sections 552.107 and 552.111, respectively. See ORDs 676, 677.

Initially, we note some of the information you have submitted to us for review is not responsive to the request for information because it either was created after the sheriff's office received the request or does not contain the specified word. This ruling does not address the public availability of any information that is not responsive to the request, and the sheriff's office is not required to release this information, which we have marked, in response to this request. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. App.—San Antonio 1978, writ dismissed).

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. ORD 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 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 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, and lawyer representatives. TEX. R. EVID. 503(b)(1). 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). 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 inform us the submitted information consists of communications between and among employees of the sheriff's office, attorneys of Galveston County who represent the sheriff's office and the employees at issue, and a private attorney who represents the employees at issue. You indicate the sheriff's office and the private attorney share a common interest

concerning the legal matters at issue in these communications. See TEX. R. EVID. 503(b)(1)(c) (discussing privilege among parties “concerning a matter of common interest”). You state these communications were made for the purpose of facilitating the rendition of legal services. You indicate these communications were made in confidence and have remained confidential. Upon review, we find you not demonstrated some of the information at issue constitutes or documents privileged attorney-client communications. Thus, you have failed to establish this information is excepted from disclosure under section 552.107. Nevertheless, we conclude you have established the remaining information consists of attorney-client privileged communications. Accordingly, the sheriff’s office may withhold this information, which we have marked, under section 552.107(1) of the Government Code.⁴ However, we note parts of these marked e-mail strings consist of communications with nonprivileged parties. If the communications with the nonprivileged parties, which we have marked, exist separate and apart from the e-mail strings in which they appear, then the sheriff’s office may not withhold this information under section 552.107(1).

You assert the remaining responsive information, including the communications with the nonprivileged parties we have marked, is excepted from disclosure under section 552.103 of the Government Code, which provides in part 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.

Gov’t Code § 552.103(a), (c). The 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 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 from disclosure under section 552.103(a).

⁴As our ruling is dispositive, we do not address your other arguments to withhold this information.

You inform us that prior to the receipt of the request for information, litigation was pending against the sheriff's office in the United States District Court for the Southern District of Texas, Galveston Division, under Cause No. 3:11-cv-238. You explain the employees at issue are parties to the litigation as a consequence of their employment or office. Based on this representation, we find you have established litigation was pending on the date the sheriff's office received the request. Furthermore, having reviewed your arguments and representations, we find the remaining information is related to the pending proceedings for purposes of section 552.103. Thus, section 552.103 is applicable to the remaining information.

We note, however, the communications with the nonprivileged parties we have marked were sent to the opposing party to the pending. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information that relates to the litigation through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). Thus, if the opposing party to pending litigation has already seen or had access to information that relates to the litigation, through discovery or otherwise, there is no interest in now withholding such information under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Therefore, the sheriff's office may not withhold the communications with the nonprivileged parties we have marked under section 552.103. However, the sheriff's office may withhold the remaining information under section 552.103.⁵

The communications with the nonprivileged parties in Exhibits F-3 and F-4 contain information that is excepted from disclosure under section 552.137 of the Government Code.⁶ 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* Gov't Code § 552.137(a)-(c). Section 552.137 does not apply to a government employee's work e-mail address because such an address is not that of the employee as a "member of the public," but is instead the address of the individual as a government employee. The e-mail addresses at issue do not appear to be of a type specifically excluded by section 552.137(c). You do not inform us a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. Therefore, the sheriff's office must withhold the e-mail addresses we have marked under section 552.137 to the extent they are not otherwise excepted from disclosure under section 552.107.

⁵As our ruling is dispositive, we do not address your other argument to withhold this information.

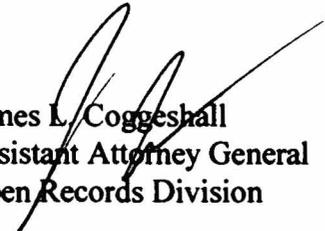
⁶The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body. *See* Open Records Decision Nos. 481 at 2 (1987), 480 at 5 (1987); *see, e.g.*, Open Records Decision No. 470 at 2 (1987) (because release of confidential information could impair rights of third parties and because improper release constitutes a misdemeanor, attorney general will raise predecessor statute of section 552.101 on behalf of governmental bodies).

To conclude, the sheriff's office may withhold from release the information we have marked under section 552.107(1) of the Government Code. However, if the communications with the nonprivileged parties we have marked exist separate and apart from the e-mail strings in which they appear, then the sheriff's office must withhold the information we have marked under section 552.137 of the Government Code, but must release the remaining information at issue to the requestor. The sheriff's office may withhold from release the remaining responsive information under section 552.103 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,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/tch

Ref: ID# 464948

Enc. Submitted documents

c: Requestor
(w/o enclosures)