



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 21, 2012

Ms. Michelle T. Rangel
Assistant County Attorney
Fort Bend County
301 Jackson Street, Suite 728
Richmond, Texas 77469

OR2012-15094

Dear Ms. Rangel:

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# 466436.

The Fort Bend County Attorney's Office (the "county attorney's office") received a request for (1) all the letters and documents submitted by the Fort Bend County Sheriff's Office (the "sheriff's office") relating to the exempt positions under Civil Service, (2) any documents submitted from the sheriff's office to the Civil Service Commission since its inception, (3) information pertaining to the selected Civil Service Coordinator, the interview process, and all candidates for the position, and (4) information pertaining to the selection process for the current members of the Civil Service Board. You indicate the county attorney's office has released some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.107 and 552.122 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note some of the submitted information in Exhibit B, which we have marked, is not responsive because it was created after the date the county attorney's office received the instant request. The district attorney's office need not release non-responsive information in response to this request, and this ruling will not address that information.

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 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 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).

The county attorney’s office states the responsive information in Exhibit B consists of communications between attorneys in the county attorney’s office and officials of Fort Bend County (the “county”) that were made in connection with the rendition of professional legal services to the county. Furthermore, the county attorney’s office states the communications were intended to be confidential, and the confidentiality of the communications has been maintained. Upon review, we find the county attorney’s office may withhold the responsive information in Exhibit B under section 552.107 of the Government Code.

Section 552.122 of the Government Code excepts from public disclosure “a test item developed by a ... governmental body [.]” Gov’t Code § 552.122(b). In Open Records Decision No. 626 (1994), this office determined the term “test item” in section 552.122 includes “any standard means by which an individual’s or group’s knowledge or ability in a particular area is evaluated,” but does not encompass evaluations of an employee’s overall

job performance or suitability. Open Record Decision 626 at 6 (1994). The question of whether specific information falls within the scope of section 552.122(b) must be determined on a case-by-case basis. *Id.* Upon review, we find the submitted information in Exhibit C evaluates the applicants' individual experience and abilities, professional opinions, and subjective abilities to respond to particular situations and does not test any specific knowledge of an applicant. Thus, you have failed to demonstrate the applicability of section 552.122 of the Government Code to any of the submitted information in Exhibit C, and the county attorney's office may not withhold it on that basis.

In summary, we find the county attorney's office may withhold the responsive information in Exhibit B under section 552.107 of the Government Code. The county attorney's office must release the remaining information.

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,



Sean Nottingham
Assistant Attorney General
Open Records Division

SN/bhf

Ref: ID# 466436

Enc. Submitted documents

c: Requestor
(w/o enclosures)