



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 26, 2012

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

OR2012-15373

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# 466009.

Galveston County (the "county") received a request for three categories of communications from a specified time period. You inform us the county has released some of the requested information. You also inform us the county does not have some of the requested information.¹ You claim some of the submitted information is not subject to the Act. You also claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.108, 552.111, 552.117, 552.137, and 552.147 of the

¹We note the Act does not require a governmental body to release information that did not exist when it received a request, create responsive information, or obtain information that is not held by the governmental body or on its behalf. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 534 at 2-3 (1989), 518 at 3 (1989), 452 at 3 (1986), and 362 at 2 (1983).

Government Code.² We have considered the exceptions you claim and reviewed the submitted information.

Initially, you assert some of the submitted information is not subject to the Act. The Act applies to information that is “collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business by a governmental body.” Gov’t Code § 552.002(a)(1). However, a “governmental body” under the Act “does not include the judiciary.” *Id.* § 552.003(1)(B). We note information that is “collected, assembled or maintained by . . . the judiciary” is not subject to the Act but is instead “governed by rules adopted by the Supreme Court of Texas or by other applicable laws and rules.” *Id.* § 552.0035(a); *cf.* Open Records Decision No. 131 (1976) (applying statutory predecessor to judiciary exclusion under section 552.003(1)(B) prior to enactment of section 552.0035). You inform us the information you have marked consists of communications between a justice of the peace and county employees. You do not claim any of this information is held by the county on behalf of the judiciary. Therefore, we conclude the information at issue is subject to the Act and must be released unless it falls within an exception to public disclosure.

Next, we must address the county’s obligations under the Act. Section 552.301 describes the procedural obligations placed on a governmental body that receives a written request for information it wishes to withhold. Pursuant to section 552.301(b) of the Government Code, the governmental body must request a ruling from this office and state the exceptions to disclosure that apply within ten business days after receiving the request. Gov’t Code § 552.301(b). You state the county received the request for information on July 6, 2012. Accordingly, the county’s ten-business-day deadline was July 20, 2012. While you raised sections 552.101, 552.103, 552.107, 552.111, 552.117, 552.137, and 552.147 of the Government Code within the ten-business-day time period required by subsection 552.301(b), you did not raise section 552.108 of the Government Code until July 27, 2012. Consequently, we find the county failed to comply with the procedural requirements of section 552.301(b) of the Government Code with respect to its claim under section 552.108.

²Although you raise section 552.024 of the Government Code as an exception to disclosure, this section is not an exception to public disclosure under the Act. Rather, this section permits a current or former official or employee of a governmental body to choose whether to allow public access to certain personal information relating to the official or employee that is held by the employing governmental body. *See* Gov’t Code § 552.024. We note section 552.117 of the Government Code is the proper exception to assert. We also note that, although you raise section 552.101 of the Government Code in conjunction with Texas Rule of Civil Procedure 192.5 and Texas Rule of Evidence 503, this office has concluded that section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). In this instance, the proper exceptions to raise when asserting the attorney-client privilege or work product privilege for information not subject to section 552.022 of the Government Code are sections 552.107 and 552.111 of the Government Code, respectively. *See* Open Records Decision Nos. 677 (2002), 676 at 1-2. Further, although you do not raise section 552.108 of the Government Code in your briefs, we understand you to raise this exception based on your markings in the submitted information.

A governmental body's failure to comply with section 552.301 results in the waiver of its untimely claim, unless that claim is a compelling reason for withholding information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); *see also* Open Records Decision No. 630 (1994). A compelling reason to withhold information exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). Section 552.108 of the Government Code is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See Simmons*, 166 S.W.3d at 350 (section 552.108 not compelling reason to withhold information for purposes of section 552.302); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions in general), 177 at 3 (1997) (statutory predecessor to section 552.108 subject to waiver). Thus, in failing to timely raise section 552.108 for the submitted information, the county has waived its claim under that section. Accordingly, none of the submitted information may be withheld under section 552.108 of the Government Code. However, we will consider your timely raised claims under sections 552.101, 552.103, 552.107, 552.111, 552.117, 552.137, and 552.147 of the Government Code.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *See* Gov't Code § 552.107(1). 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 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 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 to only 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 to only 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, 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).

The county raises section 552.107(1) for some of the submitted information. The county informs us the information at issue consists of communications between county attorneys and attorney representatives, and county officials and employees in their capacities as clients and client representatives that were made in furtherance of the rendition of professional legal services to the county. The county also informs us these communications were intended to be, and have remained, confidential. Based on your representations and our review, we find the information we have marked under section 552.107(1) of the Government Code generally constitutes privileged attorney-client communications the county may withhold under that section.³ We note, however, some of the remaining information at issue was communicated with a non-privileged party. These non-privileged communications, which we have marked, may not be withheld under section 552.107(1). We also note some of the e-mail strings we have marked under section 552.107(1) include communications with a non-privileged party. Therefore, to the extent these non-privileged communications, which we have marked, exist separate and apart from an otherwise privileged e-mail string, they may not be withheld under section 552.107(1). If the non-privileged communications at issue do not exist separate and apart from a privileged e-mail string, the county may withhold them under section 552.107(1).

Section 552.103 of the Government Code provides, in relevant 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.

³As our ruling for this information is dispositive, we need not address your remaining arguments against its disclosure.

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 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 that 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.

To establish litigation is reasonably anticipated, a governmental body must provide this office “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” Open Records Decision No. 452 at 4 (1986). In the context of anticipated litigation in which the governmental body is the prospective plaintiff, the concrete evidence must at least reflect that litigation is “realistically contemplated.” See ORD 518 at 5; see also Attorney General Opinion MW-575 (1982) (finding investigatory file may be withheld if governmental body attorney determines that it should be withheld pursuant to section 552.103 and that litigation is “reasonably likely to result”). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. ORD 452 at 4.

You claim section 552.103 for the non-privileged communications we have marked. You inform us that a portion of this information is related to a criminal investigation currently being conducted by the county's sheriff's office in conjunction with the county health district and the county anticipated litigation concerning this investigation on the date the county received the request for information. Based on your representations and our review, we find litigation involving the county was reasonably anticipated when it received the request. You further assert the non-privileged communication at issue is related to the anticipated litigation. Accordingly, we conclude the county may withhold this information, which we have marked, under section 552.103 of the Government Code.⁴ However, we find the county has failed to identify any pending or reasonably anticipated litigation to which the remaining non-privileged communications we have marked relate. Thus, we find the county has failed to demonstrate how this information is related to litigation that was pending or reasonably anticipated on the date the county received the request for information. Accordingly, the county may not withhold any of the remaining information at issue under section 552.103.

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. See Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing parties in the anticipated litigation is not excepted from disclosure under section 552.103(a), and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has concluded. See Attorney General Opinion MW-575; see also Open Records Decision No. 350 (1982).

⁴As our ruling for this information is dispositive, we need not address your remaining arguments against its disclosure.

You assert section 552.111 of the Government Code for the remaining non-privileged communications. This section excepts from disclosure “[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency[.]” Gov’t Code § 552.111. Section 552.111 encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); ORD 677 at 4-8. Rule 192.5 defines work product as:

- (1) [M]aterial prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or
- (2) a communication made in anticipation of litigation or for trial between a party and the party’s representatives or among a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5(a). A governmental body seeking to withhold information under this exception bears the burden of demonstrating the information was created or developed for trial or in anticipation of litigation by or for a party or a party’s representative. *Id.*; ORD 677 at 6-8. In order for this office to conclude the information was made or developed in anticipation of litigation, we must be satisfied that:

- a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

Nat’l Tank Co. v. Brotherton, 851 S.W.2d 193, 207 (Tex. 1993). A “substantial chance” of litigation does not mean a statistical probability, but rather “that litigation is more than merely an abstract possibility or unwarranted fear.” *Id.* at 204; ORD 677 at 7.

You claim the remaining non-privileged communications we have marked disclose attorney work product. However, because this information was communicated with a non-privileged party, we find the county has failed to demonstrate the applicability of the work product privilege to it. Accordingly, the remaining non-privileged communications we have marked may not be withheld under the work product privilege of section 552.111 of the Government Code.

You also claim the remaining non-privileged communications we have marked are excepted from disclosure under section 552.101 of the Government Code, which excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory,

or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses information made confidential by other statutes, such as such as article 20.02(a) of the Code of Criminal Procedure, which provides, “[t]he proceedings of the grand jury shall be secret.” Crim. Proc. Code art. 20.02(a). In construing article 20.02 of the Code of Criminal Procedure, the types of “proceedings” Texas courts have generally stated are secret are testimony presented to the grand jury and the deliberations of the grand jury. *See In re Reed*, 227 S.W.3d 273, 276 (Tex. App.—San Antonio 2007, orig. proceeding); *see also Stern v. State*, 869 S.W.2d 614 (Tex. App.—Houston [14th Dist] 1994, no writ) (stating anything that takes place before the bailiffs and grand jurors, including deliberations and testimony, is secret). Upon review, we find you have not demonstrated any of the information at issue reveals grand jury testimony or deliberations of the grand jury. Therefore, we conclude the county may not withhold any of this information under section 552.101 of the Government Code in conjunction with article 20.02 of the Code of Criminal Procedure.

You raise sections 552.117, 552.137, and 552.147 of the Government Code for some of the remaining information. Section 552.117(a)(2) of the Government Code excepts from public disclosure the home addresses and telephone numbers, emergency contact information, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with sections 552.024 or 552.1175 of the Government Code. Gov’t Code § 552.117(a)(2). Section 552.117(a)(2) adopts the definition of peace officer found at article 2.12 of the Code of Criminal Procedure. We note section 552.117 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See Open Records Decision No. 506 at 5-6 (1988)* (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). Upon review, we have marked a cellular telephone number the county must withhold under section 552.117(a)(2) of the Government Code if the cellular telephone service is not paid for by a governmental body.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee or official of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. Gov’t Code § 552.117(a)(1). As noted above, section 552.117 is applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See ORD 506 at 5-6*. Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body’s receipt of the request for the information. *See Open Records Decision No. 530 at 5 (1989)*. Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former employee or official who made a request for confidentiality under section 552.024 prior to the date of the governmental body’s receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee or official who did not timely request under section 552.024 the information be kept confidential. Therefore, to the extent the individuals whose information you have marked and we have marked timely requested confidentiality under

section 552.024 of the Government Code, the county must withhold this information under section 552.117(a)(1) of the Government Code; however, the marked cellular telephone numbers may be withheld only if a governmental body does not pay for the cellular telephone service. Conversely, to the extent the individuals at issue did not timely request confidentiality under section 552.024, the county may not withhold the information at issue under section 552.117(a)(1).

Section 552.137 of the Government Code 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). Gov’t Code § 552.137(a)-(c). Section 552.137 is not applicable to an institutional e-mail address, an Internet website address, the general e-mail address of a business, an e-mail address of a person who has a contractual relationship with a governmental body, an e-mail address in information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract, or an e-mail address maintained by a governmental entity for one of its officials or employees. *See id.* § 552.137(c). We note some of the e-mail addresses you have marked fall under subsection 552.137(c); therefore, the county may not withhold these addresses, which we have marked for release. Accordingly, with the exception of the e-mail addresses we have marked for release, the county must withhold the e-mail addresses you have marked and we have marked under section 552.137 of the Government Code, unless their owners affirmatively consent to their release under section 552.137(b) of the Government Code.

Section 552.147(a) of the Government Code provides “[t]he social security number of a living person is excepted” from required public disclosure under the Act. *See id.* § 552.147(a). Thus, to the extent section 552.117(a)(1) of the Government Code does not apply to the social security number we have marked, the county may withhold it under section 552.147(a) of the Government Code.⁵

In summary, the county may withhold the information we have marked under section 552.107(1) of the Government Code. The county may withhold the non-privileged communication we have marked under section 552.103 of the Government Code. The cellular telephone number we have marked under section 552.117(a)(2) of the Government Code must be withheld if the cellular telephone service is not paid for by a governmental body. To the extent the individuals whose information you have marked and we have marked timely requested confidentiality under section 552.024 of the Government Code, the county must withhold this information under section 552.117(a)(1) of the Government Code; however, the marked cellular telephone numbers may be withheld only if a governmental body does not pay for the cellular telephone service. Conversely, to the extent the individuals at issue did not timely request confidentiality under section 552.024 of the

⁵Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person’s social security number from public release without the necessity of requesting a decision from this office under the Act. *See Gov’t Code* § 552.147.

Government Code, the county may not withhold the information at issue under section 552.117(a)(1) of the Government Code. With the exception of the e-mail addresses we have marked for release, the county must withhold the e-mail addresses you have marked and we have marked in under section 552.137 of the Government Code, unless their owners affirmatively consent to their release under section 552.137(b) of the Government Code. To the extent section 552.117(a)(1) of the Government Code does not apply to the social security number we have marked, the county may withhold it under section 552.147(a) of the Government Code. The county 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,



Kenneth Leland Conyer
Assistant Attorney General
Open Records Division

KLC/bhf

Ref: ID# 466009

Enc. Submitted documents

c: Requestor
(w/o enclosures)