



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 7, 2013

Mr. Leo J. Welder, Jr.
Counsel for the Port of Corpus Christi Authority
Welder Leshin, LLP
800 North Shoreline Boulevard, Suite 300 North
Corpus Christi, Texas 78401

OR2013-00343

Dear Mr. Welder:

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# 475418.

The Port of Corpus Christi Authority of Nueces County (the "authority") received a request for information relating to the sale of the former Naval Station Ingleside to Canyon Port Holdings, LLC ("Canyon") or Occidental Petroleum Corporation ("Occidental"), including information related to Canyon's bankruptcy proceeding and its claims against the authority. You claim the requested information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note portions of the submitted information, which we have marked, are not responsive to the instant request because they were created after the date the request was received. The authority need not release nonresponsive information in response to this request, and this ruling will not address that information.

¹We note that although you raise sections 552.101, 552.104, and 552.111 of the Government Code, you make no arguments to support these exceptions. Therefore, we assume you have withdrawn your claim these sections apply to the submitted information.

Next, we note the responsive information submitted to this office includes a previous request for public information dated March 29, 2012. We note the March 29, 2012, request seeks information that is responsive to the present request for information. Pursuant to section 552.303 of the Government Code, we requested additional information from you as to whether the authority responded to the March 29, 2012, request for information and in what way the authority responded to the March 29, 2012, request.² In response to our inquiry, you inform this office that, on March 30, 2012, the authority released a “flash drive containing copies of letters, emails, and other documentation associated with the purchase of property at the former Naval Station Ingleside by [Occidental]” in response to the March 29, 2012, request. Section 552.007 of the Government Code provides if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential by law. See Gov’t Code § 552.007; Open Records Decision No. 518 at 3 (1989); see also Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Accordingly, pursuant to section 552.007, the authority may not now withhold any previously released information unless its release is expressly prohibited by law or the information is confidential by law. Although you raise sections 552.103 and 552.107(1), we note these are discretionary exceptions to disclosure that protect a governmental body’s interests and may be waived. See *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov’t Code § 552.103); Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Accordingly, to the extent any of the responsive information was previously released, the authority may not withhold it pursuant to section 552.103 or section 552.107(1) of the Government Code but must release it to this requestor. To the extent the responsive information was not previously released, we will address your arguments against disclosure.

We also note some of the responsive information, which we have marked, contains a check and executed contracts relating to the receipt or expenditure of authority funds that are subject to section 552.022(a)(3) of the Government Code. Section 552.022(a)(3) provides “information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body” is subject to required public disclosure unless it is made confidential under the Act or “other law.” Gov’t Code § 552.022(a)(3). Although you raise section 552.103 of the Government Code for this information, this section is a discretionary exception that may be waived and does not make information confidential

²See Gov’t Code § 552.303(c)-(d) (if attorney general determines information in addition to that required by section 552.301 is necessary to render decision, written notice of that fact shall be given to governmental body and requestor, and governmental body shall submit necessary additional information to attorney general not later than seventh calendar day after date of receipt of notice).

under the Act. *See Dallas Area Rapid Transit*, 4 S.W.3d at 475-476; ORDs 665 at 2 n.5, 663 at 5. As such, section 552.103 does not make information confidential for the purposes of section 552.022(a)(3), and the information subject to section 552.022 may not be withheld under this section. However, we note portions of this information are subject to section 552.136 of the Government Code.³ Because this section makes information confidential under the Act, we will address the applicability of section 552.136 to the information subject to section 552.022.

Section 552.136 of the Government Code states “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136. Accordingly, we find the authority must withhold the bank account and routing numbers we have marked under section 552.136 of the Government Code. The remaining information subject to section 552.022(a)(3) must be released.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *Id.* § 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*

³The 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).

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).

You assert Exhibit C consists of communications between authority attorneys, authority officials, and authority employees that were made for the purpose of providing legal advice to the authority. You also assert these communications were made in confidence and have maintained their confidentiality. 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. Thus, the authority may generally withhold Exhibit C under section 552.107(1) of the Government Code. We note, however, two of the e-mail strings within Exhibit C include e-mail received from non-privileged parties and one of the communications includes an attachment received from a non-privileged party. Furthermore, if the e-mails and attachment received from the non-privileged parties are removed from the e-mail strings and communication and stand alone, they are responsive to the request for information. Therefore, if the non-privileged e-mails and attachment, which we have marked, are maintained by the authority separate and apart from the otherwise privileged communications in which they appear, then the authority may not withhold the non-privileged e-mails and attachment under section 552.107(1) of the Government Code.

To the extent the non-privileged e-mails and attachment are maintained by the authority separate and apart from the otherwise privileged communications in which they appear, we will address your argument for this information and the remaining information under section 552.103 of the Government Code. Section 552.103 of the Government Code provides 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). A 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 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. *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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You contend the remaining information is related to a pending lawsuit to which the authority is a party. You inform us, and have provided documentation demonstrating, that litigation styled *In Re: Canyon Port Holdings, LLC* is pending in the United States Bankruptcy Court for the Southern District of Texas, Corpus Christi Division, Case No. 12-20314. You explain Canyon includes in its list of real property and personal property assets an executory contract to purchase portions of the former Naval Station Ingleside (the “property”) and certain claims against the authority. You explain this claim has delayed the closing of the sale of the property to a third party, and, consequently, the authority filed a Motion Concerning Automatic Stay to secure a legal determination by the court to allow the authority to proceed with the sale of the property. You state the bankruptcy proceedings and the authority’s motion were pending on the date the authority received the present request for information. You explain the responsive information is related to the pending litigation because it pertains to the contract with Canyon and the sale of the property to the third party. Based on your representations, the submitted documentation, and our review of the information at issue, we find the authority was a party to pending litigation when the authority received the present request for information and the information at issue is related to the pending litigation for the purposes of section 552.103. Therefore, we find the remaining information is generally subject to section 552.103 of the Government Code.

However, we note the opposing party in the pending litigation, or the opposing party’s legal counsel, has seen or had access to some of the information at issue. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. See ORD 551 at 4-5. Thus, if the opposing party has seen or had access to information relating to litigation, through discovery or otherwise, then there is no interest in withholding such information from public disclosure under section 552.103. See Open Records Decision Nos. 349 (1982), 320 (1982). Therefore, the authority may not withhold the information the opposing party has seen or accessed, which we have marked for release, under section 552.103. Accordingly, with the exception of the information we have marked for release, the authority may withhold the remaining information under section 552.103. We also note the applicability of section 552.103 ends once the related litigation concludes or is no longer reasonably anticipated. See Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, to the extent the authority previously released any of the responsive information, it must be released to this requestor. Except for the information we have marked that must be withheld under section 552.136 of the Government Code, the authority must release the information that is subject to section 552.022(a)(3) of the Government Code. The authority may generally withhold Exhibit C under section 552.107(1) of the Government Code. However, if the marked non-privileged e-mails and attachment are maintained by the authority separate and apart from the otherwise privileged communications in which they appear, then the authority may not withhold the non-privileged e-mails and attachment under section 552.107(1) of the Government Code. With the exception of the information we have marked for release, the authority may withhold the remaining 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,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/som

Ref: ID# 475418

Enc. Submitted documents

c: Requestor
(w/o enclosures)