



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 19, 2013

Ms. Paige H. Saenz
Counsel for the City of Bartlett
McKamie Krueger & Knight, L.L.P.
223 West Anderson Lane, Suite A105
Austin, Texas 78752

OR2013-20178

Dear Ms. Saenz:

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# 506122.

The City of Bartlett (the "city"), which you represent, received a request for eight categories of information relating to providers of electrical services to the city, minutes from city council meetings, three named individuals, and specified investigations. You claim the submitted information is excepted from disclosure under sections 552.103, 552.107, 552.108, 552.116, and 552.133 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

We note the information we have marked is not responsive to the instant request for information because it was created after the request was received. This ruling does not address the public availability of non-responsive information, and the city is not required to release non-responsive information in response to this request.

¹We assume 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 those records contain substantially different types of information than that submitted to this office.

Next, you inform us Exhibits D and E were the subject of two previous requests for information, as a result of which this office issued Open Records Letter Nos. 2012-20729 (2012) and 2013-02575 (2013). In Open Records Letter No. 2012-20729 we determined the following: the city (1) must continue to rely on Open Records Letter Nos. 2012-09846 (2012), 2012-12803 (2012), 2012-16204 (2012), and 2012-17494 (2012) as previous determinations and withhold or release the previously ruled upon information in accordance with those rulings; (2) may withhold some information under Texas Rule of Evidence 503 and section 552.107(1) of the Government Code, unless the non-privileged e-mails within that information were maintained separate and apart from the otherwise privileged e-mail strings in which they appear; (3) must withhold some information under section 552.101 of the Government Code in conjunction with section 182.052 of the Utilities Code if the customer whose information was at issue requested confidentiality of her personal information before the city received the request for the information at issue; (4) with the exception of basic information, may withhold some information under section 552.108(a)(1) of the Government Code; (5) must withhold some information under section 552.117(a)(1) of the Government Code if the employee at issue timely elected confidentiality of that information and if the cellular service at issue is not paid for by a governmental body; (6) must withhold account numbers under section 552.136 of the Government Code; (7) must withhold e-mail addresses under section 552.137 of the Government Code, unless the owners of the addresses affirmatively consent to their release; and (8) must release the remaining information. In Open Records Letter No. 2013-02575 we determined the city must continue to rely on Open Records Letter No. 2012-20729 as a previous determination and withhold or release the information in accordance with that ruling and the city may withhold the remaining information under Texas Rule of Evidence 503 and section 552.107 of the Government Code. We have no indication the law, facts, or circumstances on which this prior ruling was based have changed. Accordingly, we conclude the city must continue to rely on Open Records Letter Nos. 2012-20729 and 2013-02575 as previous determinations and withhold or release the information in Exhibits D and E in accordance with those rulings.² However, we will address your arguments for the remaining responsive information not subject to Open Records Letter Nos. 2012-20729 or 2013-02575.

Section 552.103 of the Government Code provides, in relevant 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.

...

²As our ruling is dispositive, we need not address your remaining arguments against disclosure for the information in Exhibits D and E.

(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 section 552.103(a) applies 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 requested information is related to that litigation. *See 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). *See* ORD 551 at 4.

You contend the information in Exhibit B is related to pending litigation to which the city is a party. You inform us, and have provided documentation demonstrating, litigation styled *City of Bartlett v. Bartlett Elec. Co-Op, Inc.*, Case No. 13-0855-C277, is pending in the District Court of Williamson County, 277th Judicial District. You state the information at issue is related to the pending lawsuit. Based on your representations, the submitted documentation, and our review of the information at issue, we find litigation was pending when the city received this request for information and the information at issue is related to the pending litigation for the purposes of section 552.103. Therefore, the city may withhold the responsive information in Exhibit B under section 552.103 of the Government Code.³

We note, however, the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to that litigation to obtain it through discovery procedures. *See* ORD 551 at 4-5. Thus, if the opposing party has seen or had access to information relating to the pending litigation through discovery or otherwise, there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). We also note the applicability of section 552.103 ends once the related litigation concludes. *See* 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

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

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). 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. *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 state the information in Exhibit C constitutes communications between attorneys for the city and city representatives that were made for the purpose of providing legal services to the city. You inform us the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information in Exhibit C. Thus, the city may withhold the responsive information in Exhibit C under section 552.107(1) of the Government Code.

In summary, we conclude the city must continue to rely on Open Records Letter Nos. 2012-20729 and 2013-02575 as previous determinations and withhold or release the information in Exhibits D and E in accordance with those rulings. The city may withhold the responsive information in Exhibit B under section 552.103 of the Government Code. The city may withhold the responsive information in Exhibit C under section 552.107(1) 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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



David L. Wheelus
Assistant Attorney General
Open Records Division

DLW/akg

Ref: ID# 506122

Enc. Submitted documents

c: Requestor
(w/o enclosures)