



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 5, 2013

Mr. Bradley B. Young
Bickerstaff Heath Delgado Acosta LLP
Building One, Suite 300
3711 South MoPac Expressway
Austin, Texas 78746

OR2013-21152

Dear Mr. Young:

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# 507650.

The City of Granite Shoals (the "city"), which you represent, received a request for a former city police officer's personnel records. We understand you have redacted social security numbers pursuant to section 552.147 of the Government Code.¹ You claim the submitted information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note portions of the information submitted as Exhibit B are subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

¹Section 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. *See* Gov't Code § 552.147(b).

²Although you also originally raised section 552.101 in conjunction with section 143.1214 of the Local Government Code and section 552.102 of the Government Code, you make no arguments to support these exceptions. Therefore, we assume you no longer assert section 552.101 in conjunction with section 143.1214 and section 552.102. *See* Gov't Code §§ 552.301, .302.

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108; [and]

...

(15) information regarded as open to the public under an agency's policies[.]

Gov't Code § 552.022(a)(1), (15). The submitted information includes completed performance evaluations and investigations subject to section 552.022(a)(1). The city must release the information relating to the completed investigations and performance evaluations pursuant to section 552.022(a)(1), unless they are excepted from disclosure under section 552.108 of the Government Code or expressly made confidential under the Act or other law. *See id.* § 552.022(a)(1). The submitted information also includes job descriptions, which must be released pursuant to section 552.022(a)(15) if the city considers these items to be open to the public under its policies, unless the information is expressly confidential under the Act or other law. *See id.* § 552.022(a)(15). Although you raise section 552.103 of the Government Code for Exhibit B, this is a discretionary exception to disclosure and it does not make information confidential under the Act. *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); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, none of the information subject to section 552.022, which we have marked, may be withheld under section 552.103. You also assert the submitted information is excepted from public disclosure in its entirety pursuant to a court order. Section 552.107(2) allows a governmental body to withhold information if "a court by order has prohibited disclosure of the information." Gov't Code § 552.107(2). However, section 552.022(b) provides a court may not order a governmental body to withhold from public inspection any category of information described by section (a) unless the category of information is expressly made confidential under the Act or other law. *Id.* § 552.022(b). Because section 552.022(b) prohibits a court from ordering the withholding of documents subject to section 552.022(a), we conclude the city may not withhold any of the submitted information under section 552.107(2) of the Government Code. As you raise no other exceptions to disclosure of the information subject to sections 552.022(a)(1) and 552.022(a)(15) in Exhibit B, the city must release this information to the requestor. However, we will consider your argument under section 552.103 for the remaining information in Exhibit B, which is not subject to section 552.022.

You assert section 552.103 of the Government Code for the remaining information in Exhibit B. Section 552.103 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.

...

(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 state, and provide documentation demonstrating, that a lawsuit styled *The State of Texas v. Tommy Lane Waddell*, Cause No. 41103, was pending in the 424th Judicial District Court in Burnet County, Texas, prior to the city's receipt of this request for information. You acknowledge the city is not a party to the pending lawsuit and, therefore, does not have a litigation interest in the matter for purposes of section 552.103. *See* Gov't Code § 552.103(a); Open Records Decision No. 575 at 2 (1990) (statutory predecessor to section 552.103 only applies when governmental body is party to litigation). In such a situation we require an affirmative representation from the governmental body with the litigation interest that it wants the information at issue withheld from disclosure under section 552.103. You inform us the District Attorney's Office for the 33rd Judicial District of Texas (the "district attorney's office") is a party to this litigation and you provide an affidavit from the district attorney's office requesting the information at issue be withheld from disclosure under section 552.103. You further state the information at issue relates to the pending lawsuit because the former city police officer whose information is at issue was involved in the arrest of the defendant and his credibility is being brought into question. Based on these 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 remaining information in Exhibit B under section 552.103 of the Government Code.

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).

You raise section 552.107 for the information submitted as Exhibit F. 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 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. 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)(A)-(E). 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.* 503(b)(1), 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).

We understand Exhibit F is a confidential communication between a city employee and the city's attorney that was made in furtherance of the rendition of professional legal services to the city. Based on these representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Therefore, the city may withhold Exhibit F under section 552.107(1) of the Government Code.

In summary, with the exception of the information we have marked under sections 552.022(a)(1) and 552.022(a)(15) in Exhibit B, which must be released, the city may withhold the information in Exhibit B under section 552.103 of the Government Code. The city may withhold Exhibit F under section 552.107 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,



Lana L. Freeman
Assistant Attorney General
Open Records Division

LLF/akg

Ref: ID# 507650

Enc. Submitted documents

c: Requestor
(w/o enclosures)