



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 17, 2003

Ms. Jennifer McClure
Assistant District Attorney
Dallas County - Civil Section
411 Elm Street, 5th Floor
Dallas, Texas 75202

OR2003-9118

Dear Ms. McClure:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 192992.

The County Clerk of Dallas County (the "County Clerk") received a request for three items of information. You state that the County Clerk has provided the requestor information responsive to items 1 and 2. As for the information responsive to item 3, "[a]ny letters, emails, or other correspondence concerning ACS' litigation against the Texas Attorney General's Office," you claim that certain e-mails are excepted from disclosure under section 552.107(1) of the Government Code. You notified an attorney for Affiliated Computer Services, Inc. ("ACS") of this request for information. *See Gov't Code* § 552.304. ACS argues that the requested information is excepted from disclosure under sections 552.103 and 552.107(1) of the Government Code. We have considered your claim and the claims of ACS and reviewed the submitted information.

We begin with the County Clerk's claim that section 552.107(1) applies to certain e-mails you submitted to this office as Exhibit B. 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 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)(A), (B), (C), (D), (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. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). 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 argue that the e-mails at issue concern confidential communications, legal advice, and legal strategy discussed between the County Clerk and the Dallas County District Attorney’s Office. After review of the e-mails, we agree that section 552.107(a) applies. Accordingly, the County Clerk may withhold the e-mails from the requestor based on section 552.107(1).

We turn now to for Exhibit C, which consists of correspondence between ACS representatives, the County Clerk, and the Dallas County District Attorney’s Office. The County Clerk raises no exceptions to the disclosure of this information. However, ACS argues section 552.103, the litigation exception, and section 552.107(1) apply.

Section 552.103 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.

ACS contends that section 552.103 applies because the information relates to *Government Records Services, Inc. v. Greg Abbott, Attorney General of Texas*, No. GN302465 (201st Dist. Ct. Travis County, Tex, filed July 14, 2003). The County Clerk is not a party to this litigation. The exception applies only when the governmental body is a party to pending or reasonably anticipated litigation. *See* Open Records Decision No. 393 (1983). ACS argues that it is reasonable to conclude that the County or the County Clerk may be joined as a party to this litigation. However, even if we agreed that it is reasonable to conclude that the County or the County Clerk may be joined as a party to the pending litigation, section 552.103 protects the governmental body's litigation interest and can only be raised by the governmental body who is a party or a potential party to the litigation. The exception is waived if the governmental body does not assert it. *See* Open Records Decision No. 541 (1990). Section 552.301 gives a governmental body the right to assert an exception to disclosure, including section 552.103. Section 552.103 does not grant another party a right to assert the exception. Thus, ACS has no standing to claim section 552.103 on the County Clerk's behalf. Furthermore, the information has been disclosed to the attorney general during settlement negotiations. Section 552.103 cannot be invoked when the information has been disclosed. *See* Open Records Decision No. 454 (1986). Consequently, for many reasons, section 552.103 does not apply in this situation.

Section 552.107(1) protects a governmental body's interest in preserving the confidentiality of attorney-client communications and is waived if not asserted by the governmental body. *See* Open Records Decision No. 630 (1994). Again, the County Clerk does not raise this exception for Exhibit C and so, on that basis alone, the exception cannot apply here. Moreover, the correspondence does not consist of confidential communication of attorney advice to the County Clerk or other client of the District Attorney's Office, but rather your communication with an attorney for ACS, who is not your client. Thus, there is no attorney-client relationship between the communicants in the correspondence. *See* Open Records Decision No. 518 (1989). Furthermore, the information has been shared with a third party, this office, during settlement negotiations. Clearly, this information was not intended by either the County Clerk or ACS to be maintained as confidential. Accordingly, the County Clerk may not withhold Exhibit C based on section 552.107(1).

In summary, the County Clerk may withhold Exhibit B based on section 552.107(1). The County Clerk must release exhibit C to the requestor.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code

§ 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Kay Hastings
Assistant Attorney General
Open Records Division

KH/seg

Ref: ID# 192992

Enc: Submitted documents

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