



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

April 26, 2004

Mr. Charles R. Kimbrough
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OR2004-3398

Dear Mr. Kimbrough:

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# 200123.

The Village of Bee Cave (the "village"), which you represent, received a request for information relating to the "Old Schoolhouse" and the "Shops NPS Pollution Control Plan." You state that the village will release or has previously released some responsive information. However, you claim that some information is excepted from disclosure under sections 552.103, 552.107, 552.110, 552.111, 552.117, and 552.137 of the Government Code. Additionally, you provide documentation showing that you have notified eight interested third parties of the village's receipt of the request for information pursuant to section 552.305 of the Government Code.¹ See Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Act in certain circumstances). We have considered the exceptions you claim and reviewed the submitted information.²

¹The interested third parties you notified are: Baldwin Interests, Inc.; CCNG Development; Cypress Realty, Inc.; Terry Boothe; Lincoln Property Company; Palisades Developers, LPD; Spanish Oaks Commercial Partnership, L.P.; and Chris Milam and associated entities ("Milam").

² You indicate that some of the submitted information is a representative sample. We assume that 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 that those records contain substantially different types of information than that submitted to this office.

Initially, we note that some of the submitted information appears to be the same information that was the subject of three previous rulings from this office.³ In Open Records Letter Nos. 2004-1134 (2004), 2004-1368 (2004), and 2004-2782 (2004), we concluded that the village could withhold portions of the information submitted in those instances under sections 552.103 and 552.107 of the Government Code and we ordered some information released. Therefore, assuming that the four criteria for a “previous determination” established by this office in Open Records Decision No. 673 (2001) have been met, we conclude that the village must rely on our decisions in Open Records Letter Nos. 2004-1134, 2004-1368, and 2004-2782 with respect to the information requested in this instance that was previously ruled upon in those decisions, except as noted below.⁴ See Gov’t Code § 552.301(f); Open Records Decision No. 673 (2001).

Additionally, we note that some of the information at issue in Open Records Letter No. 2004-2782 (2004) is the basis of a pending lawsuit between the Office of the Attorney General and the village, *Village of Bee Cave v. Abbott*, Cause No. GN401209, in the 250th District Court of Travis County, Texas. Accordingly, we do not address the information that is at issue in the pending litigation and will allow the trial court to resolve the issue of whether this information must be released.

To the extent that the information requested in this instance was not the subject of the prior rulings or at issue in the above referenced litigation, we will address your arguments for the information you have submitted. We first address your argument under section 552.103 of the Government Code. The village claims that the information you have submitted as exhibits C, E, F, G, H, J, K, L, M, N, O, P, Q, S, T, U, V, and X is excepted under section 552.103 of the Government Code. This section 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

³ We note that some of the submitted documents are dated after the date of the village’s receipt of the present request. Chapter 552 of the Government Code does not require a governmental body to release information that did not exist when it received a request for information. See *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 452 at 3 (1986), 362 at 2 (1983). Thus, these documents are not responsive to the request for information, and we need not address the applicability of the Act to them.

⁴The four criteria for this type of “previous determination” are 1) the records or information at issue are precisely the same records or information that were previously submitted to this office pursuant to section 552.301(e)(1)(D) of the Government Code; 2) the governmental body which received the request for the records or information is the same governmental body that previously requested and received a ruling from the attorney general; 3) the attorney general’s prior ruling concluded that the precise records or information are or are not excepted from disclosure under the Act; and 4) the law, facts, and circumstances on which the prior attorney general ruling was based have not changed since the issuance of the ruling. See Open Records Decision No. 673 (2001).

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 is 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.*, 958S.W.2d479, 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 inform us, and have provided documentation showing, that prior to its receipt of the present request, the village was sued by the Save Our Springs Alliance. You inform us that at the time the village received this request, the litigation was still pending. We therefore find that you have met the first prong of the section 552.103 test. In addition, we find that exhibits C, E, F, G, H, J, K, L, M, N, O, P, Q, S, T, U, V, and X are related to the pending litigation for purposes of section 552.103(a). Thus, you may withhold this information pursuant to section 552.103 of the Government Code.⁵

Generally, 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. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided all other parties in the pending 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 been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Next, you claim that the documents submitted as exhibit I are excepted under section 552.107(1) of the Government Code. This section protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body

⁵ Because our ruling is dispositive, we need not address your other claimed exceptions for these exhibits.

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 state that the information in exhibit I consists of a communication between privileged parties, whom you have identified. Upon review of your arguments and the information in exhibit I, we conclude that this information is protected by the attorney-client privilege, and thus, may be withheld under section 552.107 of the Government Code.⁶

Next, you argue that portions of exhibits D and R are excepted under section 552.117 of the Government Code. Section 552.117(a)(1) excepts from disclosure the home address and telephone number, social security number, and family member information of a current or

⁶ Because our ruling is dispositive, we need not address your other claimed exceptions for this information.

former employee of a governmental body who timely requests that this information be kept confidential under section 552.024 of the Government Code. *See also* Open Records Decision No. 670 (2001) (extending section 552.117 protection to personal cellular phone number and personal pager number of employee who elects to withhold home phone number in accordance with section 552.024). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the village may only withhold information under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was received. The village may not withhold this information under section 552.117(a)(1) for an employee who did not make a timely election to keep the information confidential. After reviewing exhibits D and R, we conclude that the village must withhold the information we have marked under section 552.117, provided the employee whose information is at issue timely elected under section 552.024 to keep this information confidential.

You also argue that certain e-mail addresses are excepted under section 552.137 of the Government Code. Section 552.137 of the Government Code makes certain e-mail addresses confidential, and provides as follows:

(a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

(c) Subsection (a) does not apply to an e-mail address:

(1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;

(2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or 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

(4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.

(d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Gov't Code § 552.137. Section 552.137 requires a governmental body to withhold certain e-mail addresses of members of the public that are provided for the purpose of communicating electronically with the governmental body, unless the members of the public with whom the e-mail addresses are associated have affirmatively consented to their release. Section 552.137 does not apply to a government employee's work e-mail address or a business's general e-mail address or web address. E-mail addresses that are encompassed by subsection 552.137(c) are also not excepted from disclosure under section 552.137. Based on our review of exhibits D and R, we find that certain e-mail addresses contained within this information are excepted from disclosure under section 552.137(a). We have marked the e-mail addresses the village must withhold under section 552.137(a) of the Government Code, unless the village has received affirmative consent for their release.

Finally, we note that an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why requested information relating to that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, none of the notified third parties has submitted any comments to this office explaining how release of the requested information would affect their proprietary interests. Therefore, these companies have provided us with no basis to conclude they have a protected proprietary interest in any of the information at issue. *See* Gov't Code § 551.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 639 at 4 (1996), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Thus, none of the remaining information may be withheld to protect the proprietary interests of any third party.

In summary, the village must rely on our decisions in Open Records Letter Nos. 2004-1134 and 2004-1368 with respect to the information requested in this instance that was previously ruled upon in those decisions. Further, you must rely on Open Records Letter No. 2004-2782 with respect to the information requested in this instance that was previously ruled upon, except for the documents that are at issue in the village's pending lawsuit, which this ruling does not address. For the information not subject to the prior rulings or the pending lawsuit, we conclude that to the extent this information has not been seen by all opposing parties, the village may withhold exhibits C, E, F, G, H, J, K, L, M, N, O, P, Q, S, T, U, V, and X under section 552.103 of the Government Code. Exhibit I may be withheld under section 552.107

of the Government Code. The village must withhold the information we have marked under section 552.117 of the Government Code, provided the employee whose information at issue timely elected to keep such information confidential. The village must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the village has received affirmative consent to the release of any of these e-mail addresses. The remaining submitted information must be released.

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).

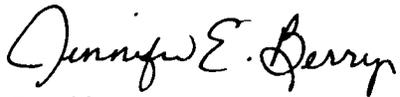
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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,



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Assistant Attorney General
Open Records Division

JEB/sdk

Ref: ID# 200123

Enc: Submitted documents

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