



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 2, 2006

Ms. Lucinda J. Garcia
Wood, Boykin & Wolter, P.C.
615 North Upper Broadway, Suite 1100
Corpus Christi, Texas 78477-0397

OR2006-01096

Dear Ms. Garcia:

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# 241581.

The City of Orange Grove (the "city"), which you represent, received two requests from the same requestor seeking numerous categories of information pertaining to police activity reports, police schedules, certain meeting minutes, an investigation involving the police chief, terms of the police chief's employment, and use of city vehicles for personal business. You inform us that the city does not maintain some of the requested information.¹ You also state that the city is releasing some of the requested information. You claim that the submitted information is excepted from disclosure under section 552.107 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we note that item number 5 of the request dated November 16, 2005 and item numbers 14 and 15 of the request dated November 17, 2005 ask factual questions. The Act does not require a governmental body to answer factual questions, conduct legal research, or create new information in responding to a request. *See* Open Records Decision Nos. 563 at 8 (1990), 555 at 1-2 (1990). However, a governmental body must make a good-faith effort to relate a request to information held by the governmental body. *See* Open Records Decision No. 561 at 8 (1990). In this instance, we find that the city has made a good-faith effort to relate the request to the information you have submitted for our review. We will therefore address your arguments against disclosure for the submitted information.

Prior to reaching your arguments, however, you inform us that the city is redacting from responsive documents that have not been submitted to this office certain "personnel

¹The Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex.Civ.App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

information such as telephone numbers of police officers, health related information such as doctors' opinions, diagnosis and similar information authorized to be withheld by applicable law and the [Act]." We note that a governmental body may withhold the home address, home telephone number, personal cellular phone number, personal pager number, social security number, and information that reveals whether a peace officer has family members pursuant to section 552.117(a)(2) of the Government Code without necessity of requesting attorney general decision as to whether that exception applies.² See Open Records Decision No. 670 at 6 (2001) (authorizing all governmental bodies that are subject to the Act to withhold information under section 552.117(a)(2) without necessity of requesting attorney general decision); see also Gov't Code § 552.301(a); Open Records Decision No. 673 (2001) (delineating circumstances under which attorney general decision constitutes previous determination under section 552.301). Otherwise, a governmental body that receives a written request for information that it wishes to withhold from public disclosure must seek an attorney general decision "if there has not been a previous determination about whether the information falls within one of the exceptions [to public disclosure]." Gov't Code § 552.301(a). Here, you inform us that "[t]here has not been a previous determination . . . regarding these two (2) specific requests." As such, to the extent it is not subject to section 552.117(a)(2) and the previous determination issued by this office in Open Records Decision No. 670, any responsive information that the city has not submitted for our review must be released to the requestor. See *id.* §§ 552.301, .302. If the city believes any of this information is confidential and may not lawfully be released, the city must challenge this ruling in court as outlined below.

We now address your claim under section 552.107 of the Government Code with respect to the information you have submitted for our review. When asserting the attorney-client privilege under section 552.107, 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 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 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

²"Peace officer" is defined in article 2.12 of the Texas Code of Criminal Procedure.

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 seek to withhold letters, an e-mail, and a video under section 552.107. You explain that one of the letters, submitted as Exhibit 3, was prepared by the city attorney for the purpose of providing legal advice to the city’s mayor and board of aldermen. You also represent that the confidentiality of this letter has been maintained. Based on your arguments and our review, we agree that the letter submitted as Exhibit 3 constitutes a privileged attorney-client communication for purposes of section 552.107. With respect to the remaining letters, the e-mail, and the video, submitted as Exhibit 6, you explain that this information was provided by representatives of the city to the city attorney for use in an investigation that was conducted by the city attorney in her capacity of providing legal services to the city. *See Harlandale Indep. Sch. Dist. v. Cornyn*, 25 S.W.3d 328 (Tex. App.—Austin 2000, pet. denied) (concluding that attorney’s entire investigative report was protected by attorney-client privilege where attorney was retained to conduct investigation in her capacity as attorney for purpose of providing legal services and advice). Based on your arguments and our review, we find that you have established that this information is also protected under the attorney-client privilege. As such, we conclude that the city may withhold the submitted information pursuant to section 552.107 of the Government Code.

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 ten 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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within ten calendar days of the date of this ruling.

Sincerely,


Robert B. Rapfogel
Assistant Attorney General
Open Records Division

RBR/krl

Ref: ID# 241581

Enc. Submitted documents

c: Mr. Mauricio Julian Cuellar. Jr.
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(w/o enclosures)