



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 4, 2007

Ms. Cathy Cunningham  
Senior City Attorney  
City of Irving  
825 West Irving Boulevard  
Irving, Texas 75060

OR2007-03713

Dear Ms. Cunningham:

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# 274640.

The City of Irving (the "city") received a request for information

related to the formation of activities of the Texas Clean Air Cities Coalition [the "coalition"], or the [city]'s interest in or consideration of any proposals to build coal-fired power plants in Texas or the environmental permitting process for any such proposals.

You state that some responsive information will be released to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code. You have also notified the other members of the coalition of the request and of their opportunity to submit comments to this office as to why the requested information should not be released to the requestor. *See generally* Gov't Code §§ 552.304 (providing that interested party may submit comments stating why information should or should not be released), 552.305(d). We have considered the claimed exceptions and reviewed the submitted information.

Section 552.103 of the Government Code 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.

Gov't Code § 552.103(a), (c). The 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.*, 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). The governmental body must meet both prongs of this test for information to be excepted under 552.103(a).

You inform us that the city is a member of the coalition, which you state is a non-profit unincorporated association of local governmental entities. You also state that the coalition is a party to a contested administrative proceeding before the Texas Commission on Environmental Quality concerning a request by TXU for a permit to build coal-fired powerplants. You indicate that the case was pending when the city received this request for information. We note that a contested case under the Texas Administrative Procedure Act (the "APA"), chapter 2001 of the Government Code, constitutes "litigation" for purposes of section 552.103(a). See Open Records Decision No. 588 (1991). Having considered your arguments, we conclude that the city was a party to pending litigation, as a member of the coalition, when the city received this request for information. See *Cox v. Thee Evergreen Church*, 836 S.W.2d 167, 169 (Tex. 1992) ("Historically, unincorporated associations were not considered separate legal entities and had no existence apart from their individual members."); *Libhart v. Copeland*, 949 S.W.2d 783, 792 (Tex. App. – Waco 1992, no pet. h.) (same); see also Bus. Org. Code § 252.007(b). We also conclude that some of the information that you seek to withhold under section 552.103 is related to the litigation. See Open Records Decision Nos. 551 at 5 (1990) (attorney general will determine whether governmental body has reasonably established that information at issue is related to litigation), 511 at 2 (1988) (information "relates" to litigation under section 552.103 if its release would impair governmental body's litigation interests). We have marked the

information that the city may withhold under section 552.103. However, the city has failed to demonstrate how the remaining information relates to the pending litigation, and it may not be withheld under section 552.103.

In reaching this conclusion, we assume that the opposing party in the pending litigation has not seen or had access to any of the information in question. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information that is related to litigation through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). If the opposing party has seen or had access to information that is related to pending litigation, through discovery or otherwise, then 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 that 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 claim that the remaining submitted information is protected from public disclosure based on the attorney-client privilege. When asserting the attorney-client privilege under section 552.107 of the Government Code, 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 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).

Here, you assert that the remaining information consists of communications among members of the coalition and its attorneys. You indicate that these communications were made for the purpose of providing legal services. Based on your representations and our review, we conclude that the information we have marked may be withheld under section 552.107 of the Government Code. *See also* TEX. R. EVID. 503(b)(1)(C) (client has privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for purpose of facilitating rendition of professional legal services to lawyer or representative of lawyer representing another party in pending action and *concerning a matter of common interest therein*) (emphasis added); TEX. R. DISCIPLINARY CONDUCT 1.05(c)(1) (lawyer may reveal confidential information when lawyer has been expressly authorized to do so in order to carry out representation); *In re Auclair*, 961 F.2d 65, 69 (5th Cir. 1992) (citing *Hodges, Grant & Kaufmann v. United States Government*, 768 F.2d 719, 721 (5th Cir. 1985)) (attorney-client privilege is not waived if privileged communication is shared with third person who has common legal interest with respect to subject matter of communication); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 76 (if two or more clients with common interest in litigated or nonlitigated matter and represented by separate lawyers agree to exchange information concerning the matter, communication of any such information that otherwise qualifies as privileged under §§ 68-72 and that relates to the matter is privileged as against third persons, and any such client may invoke privilege unless it has been waived by client that made communication). However, you have failed to demonstrate that any of the remaining information at issue constitutes a communication between parties for the purpose of providing legal services. Therefore, the remaining information at issue may not be withheld under section 552.107.

We note that some of the remaining information may be subject to section 552.117 of the Government Code.<sup>1</sup> Section 552.117(a)(1) excepts from disclosure the home address, home telephone number, social security numbers, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024 of the Government Code. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the city 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

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<sup>1</sup>The Office of the Attorney General will raise mandatory exceptions like sections 552.117, 552.136, and 552.137 on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

on which the request for this information was made. Accordingly, if the employee timely elected to keep his personal information confidential, the city must withhold the information we have marked under section 552.117(a)(1) of the Government Code. The city may not withhold this information under section 552.117(a)(1) if the employee did not make a timely election to keep his information confidential.

Section 552.136 of the Government Code states that “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136. The city must, therefore, withhold the information that we have marked under section 552.136 of the Government Code.

Finally, we note that some of the e-mail addresses in the remaining information are excepted from disclosure under section 552.137 of the Government Code. Section 552.137 excepts from disclosure certain personal e-mail addresses of members of the public that are provided for the purpose of communicating electronically with a governmental body, unless the owner of the e-mail address has affirmatively consented to its public disclosure. *See* Gov’t Code § 552.137(a)-(b). The types of e-mail addresses listed in section 552.137(c) may not be withheld under this exception. *See id.* § 552.137(c). Likewise, section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. We have marked e-mail addresses that the city must withhold under section 552.137, unless the owner of the e-mail address has affirmatively consented to its disclosure.

In summary, we have marked the information that the city may withhold under sections 552.103 and 552.107 of the Government Code. If the employee timely elected to keep his personal information confidential, the city must withhold the information we have marked under section 552.117(a)(1) of the Government Code. We have marked the information that the city must withhold pursuant to sections 552.136 and 552.137 of the Government Code. The remaining information must be released 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).

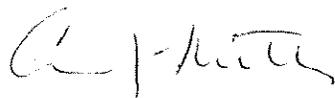
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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 10 calendar days of the date of this ruling.

Sincerely,



Cindy Nettles  
Assistant Attorney General  
Open Records Division

CN/eb

Ref: ID# 274640

Enc. Submitted documents

c: Mr. Patrick W. Lee  
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101 West Abram Street  
Arlington, Texas 76010  
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Mr. Douglas N. Stover  
City of Coppell  
255 Parkway Boulevard  
Coppell, Texas 75019  
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Mr. John F. Cook  
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Ms. Libby Watson  
City of Fort Worth  
1000 Throckmorton Street  
Fort Worth, Texas 76102  
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Mr. William D. Lanford  
City of Haltom City  
5024 Broadway  
Haltom City, Texas 76117  
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Mr. Will Lowrance  
City of Hillsboro  
214 East Elm Street  
Hillsboro, Texas 76645  
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Mr. Bill White  
City of Houston  
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Houston, Texas 77002  
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Mr. Bill Whitfield  
City of McKinney  
222 North Tennessee Street  
McKinney, Texas 75069  
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Mr. Jim Lewis  
McLennan County Courthouse  
501 Washington Avenue, Room 210  
Waco, Texas 76701  
(w/o enclosures)

Ms. Pat Evans  
City of Plano  
1520 Avenue K  
Plano, Texas 75074  
(w/o enclosures)

Mr. Samuel T. Biscoe  
Travis County Judge  
314 West 11<sup>th</sup> Street, #520  
Austin, Texas 78701  
(w/o enclosures)

Ms. Virginia DuPuy  
City of Waco  
3<sup>rd</sup> & Austin  
Waco, Texas 76702  
(w/o enclosures)

City of Athens  
Attn: Member of Texas Clean Air  
Cities Coalition  
508 East Tyler Street  
Athens, Texas 75751  
(w/o enclosures)

City of Bells  
Attn: Member of Texas Clean Air  
Cities Coalition  
203 South Broadway  
Bells, Texas 75414  
(w/o enclosures)

City of Bogata  
Attn: Member of Texas Clean Air  
Coalition  
128 North Main  
Bogata, Texas 75417  
(w/o enclosures)

City of DeSoto  
Attn: Member of Texas Clean Air  
Coalition  
211 East Pleasant Run Road  
DeSoto, Texas 75115  
(w/o enclosures)

City of Frisco  
Attn: Member of Texas Clean Air  
Coalition  
6891 Main Street  
Frisco, Texas 75034  
(w/o enclosures)

City of Hillsburg  
Attn: Member of Texas Clean Air  
Coalition  
1115 Wilbanks Drive  
Waco, Texas 76705  
(w/o enclosures)

City of Lancaster  
Attn: Member of Texas Clean Air  
Coalition  
211 North Henry  
Lancaster, Texas 75146  
(w/o enclosures)

City of Mount Vernon  
Attn: Member of Texas Clean Air  
Coalition  
109 North Kaufman  
Mount Vernon, Texas 75457  
(w/o enclosures)

City of Reno  
Attn: Member of Texas Clean Air  
Coalition  
160 Blackburn Street  
Paris, Texas 75462  
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City of Savoy  
Attn: Member of Texas Clean Air  
Coalition  
108 East Hayes Street  
Savoy, Texas 75479  
(w/o enclosures)

City of Streetman  
Attn: Member of Texas Clean Air  
Coalition  
204 East Main Street  
Streetman, Texas 75859  
(w/o enclosures)

City of Tom Bean  
Attn: Member of Texas Clean Air  
Coalition  
100 Britton Plaza, Suite B  
Tom Bean, Texas 75489  
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City of Trenton  
Attn: Member of Texas Clean Air  
Coalition  
216 Hamilton  
Trenton, Texas 75490  
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City of Whitewright  
Attn: Member of Texas Clean Air  
Coalition  
206 West Grand  
Whitewright, Texas 75491  
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City of Wylie  
Attn: Member of Texas Clean Air  
Coalition  
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Wylie, Texas 75098  
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Axtell Independent School District  
Attn: Member of Texas Clean Air  
Coalition  
308 Ottawa  
Axtell, Texas 76624  
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Bells Independent School District  
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Coalition  
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Bells, Texas 75414  
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Hallsburg ISD  
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Central Texas Clean Air Committee  
of the Capital Area Council of  
Government  
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