



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 25, 2009

Ms. Jenny Gravley
Taylor Olson Adkins Sralla Elam, L.L.P.
Attorney for City of Southlake
6000 Western Place, Suite 200
Fort Worth, Texas 76107-4654

OR2009-08803

Dear Ms. Gravley:

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# 346995.

The City of Southlake (the "city"), which you represent, received a request for nine categories of information, including information related to multiple city employees, specific job positions, and a previous open records request made by the requestor. You claim that the submitted information is exempted from disclosure under sections 552.103, 552.107, 552.108, and 552.117 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Initially, you note that the requestor specifically excluded from her request: (1) e-mail addresses that are potentially subject to section 552.137 of the Government Code, and (2) the cellular telephone number of a specified individual. Therefore, the portions of the submitted information that relate to those two items are not responsive to the request, and the city need not release that information.

You also state, and our review confirms, that some of the information at issue was the subject of a previous request received by the city, as a result of which this office issued Open

¹Although you initially also raised section 552.137 of the Government Code, by letter dated April 30, 2009, you withdrew your claims under this section.

Records Letter No. 2009-03792 (2009). In that ruling, we concluded that the city must withhold certain information under sections 552.101 and 552.130 of the Government Code. As we have no indication that there has been any change in the law, facts, or circumstances on which the previous ruling was based, to the extent the submitted information is the identical information ruled upon in Open Records Letter No. 2009-03792, the city must rely on that ruling as a previous determination and continue to treat the previously ruled upon information in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). To the extent the submitted information is not subject to the previous determination, we will consider your arguments against disclosure.

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. 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). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *See* TEX. R. EVID. 503(b)(1). 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, 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 you have marked under section 552.107(1) consists of communications between and among attorneys for and representatives of the city, most of whom you have identified. You state that these communications were made in furtherance of the rendition of legal services to the city, and you inform this office that these communications remain confidential. Based on your representations and our review, we agree that the information you have marked under section 552.107(1) constitutes privileged attorney-client communications. Accordingly, the city may withhold this information under section 552.107(1) of the Government Code. However, we note that some of the individual e-mails and attachments in the submitted e-mail chains consist of communications with a non-privileged party. Thus, to the extent these non-privileged e-mails and attachments exist separate and apart from the submitted e-mail chains, the city must release them to the requestor.

Section 552.108(a)(2) of the Government Code excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication[.]” Gov’t Code § 552.108(a)(2). Section 552.108(a)(2) is applicable only if the information at issue relates to a concluded criminal case that did not result in a conviction or a deferred adjudication. A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why this exception is applicable to the information that the governmental body seeks to withhold. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You have not explained how the information you have marked under section 552.108(a)(2) relates to a criminal case. Thus, the city may not withhold this information under section 552.108(a)(2).

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that the information be kept confidential under section 552.024 of the Government Code. Gov’t Code § 552.117(a)(1). Furthermore, section 552.117(a)(2) excepts from disclosure the current and former home addresses and telephone numbers, social security numbers, and family member information regarding a peace officer regardless of whether the officer elected under section 552.024 or 552.1175 of the Government Code to keep such information confidential. *Id.* § 552.117(a)(2). Section 552.117 also encompasses a personal cellular telephone number, provided that a governmental body does not pay for the cell phone service. *See* Open Records Decision No. 506 at 5-6 (1988) (Gov’t Code § 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). You state that the responsive information you have marked under this exception relates to cellular telephones belonging to city employees, including a peace officer, who “receive a stipend from the [c]ity to pay for the cell phone bills.” Based on this representation that the city recompenses the employees for these telephones, we conclude the city may not withhold this information under section 552.117. *See id.*

Finally, you assert that a portion of the submitted information is excepted from disclosure under section 552.103 of the Government Code, which 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). The governmental body claiming this exception bears the burden of providing relevant facts and documents to demonstrate the applicability of the exception. 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 section 552.103(a).

You state that the city is party to a lawsuit styled *Jason Steele v. City of Southlake, Texas*, Cause No. 096-231776-08, filed in the District Court of Tarrant County, Texas. You have provided documentation showing that this lawsuit was pending on the date the city received the present request for information. You also state, and our review confirms, that the information you have marked under section 552.103 relates to disciplinary actions taken by the city against the plaintiff in this lawsuit. Thus, we agree that this information relates to the pending lawsuit. Accordingly, the city may withhold this information under section 552.103.

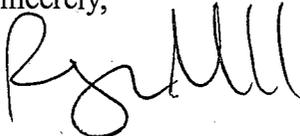
Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated 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 or is no longer reasonably anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the city: (1) must rely on Open Records Letter No. 2009-03792 as a previous determination and continue treat the previously ruled upon information in accordance with that ruling; (2) may withhold the information you have marked under section 552.107(1) of the Government Code; (3) may withhold the information you have marked under section 552.103 of the Government Code; and (4) must release the remainder of the responsive information.

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.oag.state.tx.us/open/index_orl.php, 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 must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Ryan T. Mitchell
Assistant Attorney General
Open Records Division

RTM/rl

Ref: ID# 346995

Enc. Submitted documents

cc: Requestor
(w/o enclosures)