



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 26, 2009

Ms. Cary Grace
Assistant City Attorney
City of Austin
P.O. Box 1088
Austin, Texas 78767-8828

OR2009-08845

Dear Ms. Grace:

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# 349617.

The City of Austin (the "city") received a request for information "from January 1, 2008, to the [date of the request]" involving four named individuals, two specified addresses, and/or "Aquaplex." You state that some of the requested information either has been or will be released. You claim that other responsive information is excepted from disclosure under sections 552.103, 552.107(1), and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the information you submitted.¹

We first note that some of the submitted information was created after the date of the city's receipt of this request for information. The Act does not require a governmental body to release information that did not exist when it received a request or create responsive

¹This letter ruling assumes that the submitted representative samples of information are truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the city to withhold any information that is substantially different from the submitted information. See Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

information.² We also note that other submitted information was created before January 1, 2008. Information that was created after the city received this request or before January 1, 2008, is not responsive to the request. This decision does not address the public availability of the non-responsive information, which we have marked, and the city need not release that information in response to this request.

Next, we consider your claims for the submitted information that is responsive to the request. Section 552.103 of the Government Code provides in 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). A governmental body that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information at issue. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See Open Records Decision No. 551 at 4 (1990).*

You state that the documents in Exhibits A and B and a document that you have marked in Exhibit D are related to pending litigation. You have provided pleadings demonstrating that the litigation was pending and that the city was a party to the litigation when it received this request for information. Based on your representations, the pleadings, and our review of the

²*See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dism'd); *Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).*

information at issue, we conclude that the city may withhold Exhibits A and B and the marked document in Exhibit D under section 552.103.

In reaching this conclusion, we assume that the opposing parties in the pending litigation have 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 relating to the litigation through discovery procedures. See ORD 551 at 4-5. If the opposing party has seen or had access to information relating to 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 also raise section 552.107(1) of the Government Code, which 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. See 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. See 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. See *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 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. See TEX. R. EVID. 503(b)(1)(A)-(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. See *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 the rest of the responsive information, which consists mostly of e-mails, under section 552.107(1). You contend that the remaining information consists of privileged communications between attorneys for and representatives of the city that were made for the purpose of facilitating the rendition of professional legal services to the city. You have identified most of the parties to the communications. You state that the communications were intended to be and remain confidential. Based on your representations and our review of the information at issue, we conclude that section 552.107(1) is applicable to most of the remaining information. We note that one of the submitted e-mails involves a non-privileged party. The information in that e-mail, which we have marked, is not protected by the attorney-client privilege under section 552.107(1) and must generally be released. We also note that some of the individual e-mails in the submitted e-mail strings consist of communications with non-privileged parties. To the extent that those e-mails, which we also have marked, exist separate and apart from the e-mail strings, we conclude that they may not be withheld under section 552.107(1) and must generally be released. Except for the marked e-mail that involves a non-privileged party and any of the other marked e-mails involving non-privileged parties that exist separate and apart from the e-mail strings, the city may withhold the rest of the responsive information under section 552.107(1).

Lastly, we note that some of the marked e-mails contain personal e-mail addresses. Section 552.137 of the Government Code provides that "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 [the Act]," unless the owner of the e-mail address has affirmatively consented to its public disclosure.³ 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 personal e-mail addresses that fall within the scope of section 552.137. To the extent that section 552.107(1) is not applicable to the marked e-mails in which they appear, the marked e-mail addresses must be withheld under section 552.137, unless the owner of an e-mail address has affirmatively consented to its public disclosure.

In summary: (1) the city may withhold Exhibits A and B and the marked document in Exhibit D under section 552.103 of the Government Code; (2) the city may withhold the rest of the

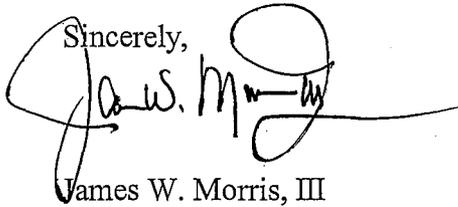
³Unlike other exceptions to disclosure under the Act, this office will raise section 552.137 on behalf of a governmental body, as this exception is mandatory and may not be waived. *See* Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

responsive information under section 552.107(1) of the Government Code, except for the marked e-mail that involves a non-privileged party and any of the other marked e-mails involving non-privileged parties that exist separate and apart from the e-mail strings; and (3) to the extent that the marked e-mails may not be withheld under section 552.107(1), the marked e-mail addresses must be withheld under section 552.137 of the Government Code, unless the owner of an e-mail address has consented to its disclosure. The remaining information in any e-mail that is not excepted from disclosure under section 552.107(1) must be released. As we are able to make these determinations, we need not address your other arguments against disclosure.

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,

A handwritten signature in black ink, appearing to read "James W. Morris, III". The signature is stylized with a large, looping initial "J" and a long horizontal stroke extending to the right.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/cc

Ref: ID# 349617

Enc: Submitted documents

c: Requestor
(w/o enclosures)