



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 31, 2009

Mr. David M. Swope
Assistant County Attorney
Harris County
1019 Congress, 15th Floor
Houston, Texas 77002

OR2009-12279

Dear Mr. Swope:

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# 353974 (C.A. File No. 09GEN1013).

The Harris County Tax Office (the "county") received three requests from the same requestor for all documents produced by three named individuals after December 1, 2008 regarding Texas voter ID legislation, deputy voter registrar training, pending litigation against the county, or purging of voting records; a schedule of all public and private meetings held by each individual regarding these issues; all correspondence regarding these issues between certain named individuals, including a named State Representative or his staff after January 1, 2003; any documents produced by each individual regarding Campaign Data Systems or Decide Consulting after January 1, 2003; any documents produced by each individual mentioning or directed to the Harris County Republican Party, the Texas Democratic Party, or the Lone Star Project after October 1, 2008; and any invoices sent to Campaign Data Systems by the county. You state you have released some of the requested information in redacted form. You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.103, and 552.107 of the Government

Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

You assert the information at issue on the submitted DVDs is excepted from disclosure under section 552.103 of the Government Code, which provides in relevant part 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). A governmental body has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) that the information at issue is related to that 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.); *see also* Open Records Decision No. 551 at 4 (1990). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See* ORD 551 at 4.

You state, and provide documentation showing, that litigation styled *Texas Democratic Party, et al. vs. Paul Bettencourt, in his capacity as Harris County Tax Assessor Collector and Harris County Voter Registrar*, Civil Action No. H-08-3332, was pending in the United States District Court for the Southern District of Texas prior to the date of the requests. The plaintiffs in this lawsuit allege the defendant improperly processed voter registration applications and provisional ballot affidavits; thus you assert the information at issue is

¹We 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.

related to the pending litigation. Based on your representations and our review of the submitted information, we conclude the county was involved in litigation at the time it received the requests and that the information at issue on the submitted DVDs relates to the litigation. Therefore, the county may withhold the information at issue on the submitted DVDs under section 552.103 of the Government Code.²

We note, however, that 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). Further, the applicability of section 552.103(a) ends once the litigation has concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Section 552.107(1) protects information falling 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. 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. 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; *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 Huiè v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

²As our ruling is dispositive, we need not address your other arguments against disclosure of this information.

In this instance, you state the information in Exhibit E consists of communications between the Harris County Attorney's Office and its client, the county. You further assert the documents were created for the express purpose of facilitating legal services and giving or seeking legal advice and were not made in any other capacity than as legal counsel for the county. In addition, you state these communications were not disclosed to third parties. Upon review, we find the information in Exhibit E constitutes privileged attorney-client communications for the purpose of section 552.107. Therefore, the county may withhold the information in Exhibit E under section 552.107 of the Government Code.

In summary, the county may withhold the information at issue on the submitted DVDs under section 552.103 of the Government Code. The county may withhold the information in Exhibit E under section 552.107 of the Government Code.

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,



Mack T. Harrison
Assistant Attorney General
Open Records Division

MTH/eeg

Ref: ID# 353974

Enc. Submitted documents

c: Requestor
(w/o enclosures)