



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 17, 2009

Mr. Ronald D. Stutes
Potter Minton PC
P.O. Box 359
Tyler, Texas 75710

OR2009-16356

Dear Ms. Stutes:

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# 361726.

The Frankston Police Department (the "department"), which you represent, received a request for all inter-office e-mails sent to or from department employees from March 9, 2009 to August 9, 2009.¹ You claim the submitted e-mails are excepted from disclosure under sections 552.103, 552.107, 552.108, 552.1175, 552.136, 552.137, and 552.139 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, you assert the submitted e-mails are excepted in their entirety under section 552.103 of the Government Code. 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

¹You provide documentation showing the department sought and received clarification from the requestor regarding this request. See Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used).

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 to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing (1) litigation is pending or reasonably anticipated on the date the governmental body receives the request for information, and (2) the information at issue is related to that litigation. *See Thomas v. Cornyn*, 71 S.W.3d 473, 487 (Tex. App.—Austin 2002, no pet.); *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). *See* ORD 551 at 4.

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. *See* Open Records Decision Nos. 555 (1990); 518 at 5 (1989) (litigation must be "realistically contemplated"). This office has also found litigation was reasonable anticipated where the opposing party threatened to sue on several occasions and hired an attorney. *See* Open Records Decision No. 288 (1981). On the other hand, this office has determined if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Further, the fact a potential opposing party has hired an attorney who makes a request for information does not establish litigation is reasonably anticipated. *See* Open Records Decision No. 361 (1983).

You assert the requestor stated his intention to bring litigation against the department, and that this intention was publicized by the news media. Additionally, the request reflects the requestor has hired an attorney. Consequently, we find the department reasonably anticipated

litigation on the date the request was received. *See* ORD 288. In your brief to this office, you acknowledge most of the submitted information is not obviously related to the anticipated litigation. However, you note the requestor's statement that he seeks the information because of the incident giving rise to the anticipated litigation. The requestor's motives do not show how the submitted information actually relates to this litigation. The department was required to present arguments demonstrating such relatedness. *See* ORD 551 at 4. We therefore conclude you failed to establish the applicability of section 552.103 to most of the submitted information. However, upon review, we find that one e-mail chain relates to the anticipated litigation. Thus, with the exception of the e-mail chain we marked, none of the submitted information may be withheld under section 552.103 of the Government Code.

You next claim the e-mails submitted in Exhibit D are subject to section 552.108 of the Government Code. Section 552.108 excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]" Gov't Code § 552.108(a)(1). A governmental body must reasonably explain how and why section 552.108 is applicable to the information at issue. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You represent the e-mails in Exhibit D relate to ongoing investigations and prosecutions of crime. Based on your representations and our review, we determine release of these e-mails would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases). Accordingly, the department may withhold Exhibit D pursuant to section 552.108(a)(1) of the Government Code.

You next assert the remaining e-mails submitted in Exhibit H are subject to section 552.107(1) of the Government Code, which protects information coming within the attorney-client privilege. Gov't Code § 552.107(1). 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 Texas 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). 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.*, 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).

We marked some of the e-mails in Exhibit H, which are confidential communications between and among parties identified as department employees and attorneys representing the City of Frankston. You represent these e-mails were made for the purpose of facilitating the rendition of legal services, and were intended to be, and have remained, confidential. Based on your representations and our review, we conclude the marked e-mails in Exhibit H may be withheld under section 552.107. However, the remaining e-mails are communications with an attorney employed by the Texas Municipal League (the “league”). Although you argue the league’s attorneys provide legal advice to its member cities, the league’s website states these attorneys only provide general legal advice, and do not actually represent member cities. Accordingly, you failed to show how the remaining e-mails in Exhibit H are communications between privileged parties, *see* ORD 676, and they may not be withheld on the basis of the attorney-client privilege.

You next raise section 552.1175 of the Government Code for some information in Exhibit F pertaining to department applicants. Section 552.1175 provides in part:

(a) This section applies only to:

(1) peace officers as defined by Article 2.12, Code of Criminal Procedure[.]

(b) Information that relates to the home address, home telephone number, or social security number of an individual to whom this section applies, or that reveals whether the individual has family members is confidential and may

not be disclosed to the public under this chapter if the individual to whom the information relates:

- (1) chooses to restrict public access to the information; and
- (2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Id. § 552.1175(a)(1), (b). Exhibit F contains a social security number pertaining to a department applicant. To the extent this applicant is a peace officer who properly elected to restrict access to his personal information in accordance with section 552.1175, the department must withhold this social security number under section 552.1175. Otherwise, this information may not be withheld under section 552.1175 of the Government Code.

We note section 552.147 also protects social security numbers from public release. This section provides “[t]he social security number of a living person is excepted from” required public disclosure under the Act. *Id.* § 552.147. Therefore, the department may withhold the applicant's social security number in Exhibit F, which we have marked, under section 552.147 of the Government Code regardless of whether the applicant is a peace officer who properly elected to restrict access to his social security number.

We understand you also seek to withhold an applicant's Texas Commission on Law Enforcement Officer Standards and Education (“TCLEOSE”) identification number in Exhibit F. However, neither section 552.1175 nor section 552.147 contains any provision excepting identification numbers other than social security numbers. As you raise no other exceptions to release of this information, the TCLEOSE number may not be withheld. Additionally, as you raise no other exceptions to disclosure for the remaining information in Exhibit F, this remaining information must be released.

You next claim the security certificate link in Exhibit G is excepted by section 552.136 of the Government Code, which 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.” *Id.* § 552.136(b). Section 552.136(a) defines “access device” as “a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to ... obtain money, goods, services, or another thing of value [or] initiate a transfer of funds other than a transfer originated solely by paper instrument.” *Id.* § 552.136(a). The e-mail in which the security certificate link is submitted states the link can only be used once. We presume the department has already used this link to access the database to which it provides access. Accordingly, because this link can no longer be used to obtain anything of value, we

conclude you failed to show how it is an access device number protected by section 552.136, and it may not be withheld on that basis.

You also claim the security certificate link in Exhibit G is excepted under section 552.139(a) of the Government Code, which provides:

(a) Information is excepted from the requirements of Section 552.021 if it is information that relates to computer network security, to restricted information under Section 2059.055, or to the design, operation, or defense of a computer network.

Id. § 552.139(a). Although you raise section 552.139(a), you have not provided any arguments explaining the applicability of this exception. *See id.* § 552.301(e)(1) (requiring the governmental body to explain the applicability of the raised exception). Accordingly, you may not withhold this link under section 552.139 of the Government Code.

Finally, you claim Exhibit E contains an e-mail address subject to section 552.137 of the Government Code. Section 552.137 excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body,” unless the member of the public consents to its release or the e-mail address is a type specifically excluded by subsection (c). *See Gov’t Code* § 552.137(a)-(c). Subsection (c)(1) states that subsection (a) does not apply to an e-mail address “provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor’s agent” and subsection (c)(2) states that subsection (a) does not apply to an e-mail address “provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor’s agent[.]” *Id.* § 552.137(c)(1), (2). Upon review, we marked e-mail addresses in Exhibits E and I that do not appear to be excluded by section 552.137(c). The department must withhold the e-mail addresses we marked under section 552.137 of the Government Code, unless the owners of these e-mail addresses have affirmatively consented to their disclosure. The remaining private e-mail addresses appear to belong either to individuals who have a contract with the department or to vendors who are seeking a contract with the department. Accordingly, these e-mail addresses may not be withheld.

In summary, the department may withhold the e-mail chain we marked under section 552.103 of the Government Code. Exhibit D may be withheld under section 552.108(a)(1) of the Government Code, and the remaining marked e-mails in Exhibit H may be withheld under section 552.107 of the Government Code. The social security number we marked in Exhibit F may be withheld under section 552.147 of the Government Code. Finally, the e-mail addresses we marked in Exhibits E and I must be withheld under section 552.137 unless their owners have consented to their disclosure. As you raise no other exceptions to disclosure, the remaining information must be released.

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, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read "Bob Davis", with a long horizontal flourish extending to the right.

Bob Davis
Assistant Attorney General
Open Records Division

RSD/cc

Ref: ID# 361726

Enc. Submitted documents

cc: Requestor
(w/o enclosures)