



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 24, 2015

Mr. Mark Kennedy
General Counsel
County of Hays
Hays County Office of General Counsel
111 East San Antonio Street, Suite 202
San Marcos, Texas 78666

OR2015-12445

Dear Mr. Kennedy:

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# 568686.

Hays County (the "county") received a request for (1) correspondence, communications, and any notes and recordings of the correspondence and communications between three named individuals and twelve specified individuals and/or entities; and (2) correspondence and communications concerning seventeen specified subjects. You claim the submitted information is excepted from disclosure under sections 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 We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (permitting interested third party to submit to attorney general reasons why requested information should or should not be released).

Section 552.103 of the Government Code provides, in relevant part, as follows:

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.

(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.

Id. § 552.103(a), (c). The 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 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, orig. proceeding); *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 from disclosure under section 552.103(a).

You assert the submitted information pertains to a lawsuit styled *Wimberley Springs Partners v. Woodcreek Property Owners Association of Hays County, et. al*, Cause No. 12-0921, which was pending in the 428th Judicial District Court of Hays County on the date the county received the request. However, the requestor notes, and we agree, the county is not a party to the pending litigation. Therefore, the county does not have a litigation interest in the matter for purposes of section 552.103. *See* Gov't Code § 552.103(a); Open Records Decision No. 575 at 2 (1990) (stating that predecessor to section 552.103 only applies when governmental body is party to litigation). In such a situation, we require an affirmative representation from the governmental body with the litigation interest that the governmental body wants the information at issue withheld from disclosure under section 552.103(a). However, the county has not provided this office with an affirmative representation from a governmental body with a litigation interest explaining that it seeks to withhold the information at issue pursuant to section 552.103(a). Therefore, the county may not withhold the submitted information under section 552.103(a) of the Government Code.

Section 552.107(1) of the Government Code protects information coming 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 “to facilitate 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: (A) to whom disclosure is made to further the rendition of professional legal services to the client; or (B) reasonably necessary to transmit 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, orig. proceeding). 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 assert “many of the communications” in the submitted information were between county attorneys and county employees and officials. You assert these communications were made for the purpose of facilitating the rendition of professional legal services to the county. You state the communications have remained confidential and have not been disclosed to non-privileged parties. Based on your representations and our review, we agree the county may generally withhold the information we have marked under section 552.107(1) of the Government Code. However, we note some of the privileged e-mail strings we have marked include e-mails sent to or received from non-privileged parties. If these e-mails are removed from the privileged e-mail strings and stand alone, they are responsive to the request for information. Therefore, if the non-privileged e-mails we have marked are maintained by the county separate and apart from the otherwise privileged e-mail strings in which they appear, then the county may not withhold these non-privileged e-mails under section 552.107(1) of the Government Code. Furthermore, we note the remaining information consists of communications with individuals whom the county has not demonstrated are privileged parties or information you have not demonstrated constitutes privileged communications

made for the purpose of facilitating the rendition of legal services to the county. Thus, we find the county has not demonstrated the remaining information constitutes privileged attorney-client communications for the purposes of section 552.107(1). Therefore, the county may not withhold the remaining information under section 552.107(1).

To the extent the non-privileged e-mails we have marked are maintained by the county separate and apart from the otherwise privileged e-mail strings in which they appear, portions of the non-privileged e-mails are subject to section 552.137 of the Government Code.² The remaining information also contains information 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 of a type specifically excluded by subsection (c). Gov’t Code § 552.137(a)-(c). Section 552.137 is not applicable to an institutional e-mail address, an Internet website address, the general e-mail address of a business, an e-mail address of a person who has a contractual relationship with a governmental body, or an e-mail address maintained by a governmental entity for one of its officials or employees. The e-mail addresses we have marked are not one of the types specifically excluded by section 552.137(c). Accordingly, the county must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the addresses affirmatively consent to their release.

In summary, the county may withhold the information we have marked under section 552.107(1) of the Government Code; however, if the non-privileged e-mails we have marked are maintained by the county separate and apart from the otherwise privileged e-mail strings in which they appear, then the county may not withhold these non-privileged e-mails and attachments under section 552.107. The county must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the addresses affirmatively consent to their release. The county must release the remaining 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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, or call the Office of the Attorney General’s Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for

²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read 'Cristian Rosas-Grillet', written in a cursive style.

Cristian Rosas-Grillet
Assistant Attorney General
Open Records Division

CRG/cbz

Ref: ID# 568686

Enc. Submitted documents

c: Requestor
(w/o enclosures)