



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

March 7, 2017

Ms. Nneka E. Kanu
Assistant City Attorney
City of Houston
P.O. Box 368
Houston, Texas 77001-0368

OR2017-04811

Dear Ms. Kanu:

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# 648286 (GC No. 23998).

The City of Houston (the "city") received a request for all attorney-client communications pertaining to litigation involving the requestor and all records responsive to the requestor's previous applications for public information. You state the city does not have information responsive to portions of the request.¹ You claim the submitted information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code. We have

¹The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990).

considered the exceptions you claim and reviewed the submitted representative sample of information.²

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. *See* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate 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 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. *See 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 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 the submitted information consists of communications between city attorneys and city employees that were made for the purpose of providing legal services to the city. You indicate the communications were intended to be confidential and have remained

²We 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.

confidential. Based on your representations and our review, we find the submitted information consists of privileged attorney-client communications the city may generally withhold under section 552.107(1) of the Government Code.³ We note, however, these otherwise privileged e-mail strings include e-mails received from or sent to a non-privileged party. Furthermore, if the e-mails received from or sent to a non-privileged party are removed from the otherwise privileged e-mail strings in which they appear and stand alone, they are responsive to the request for information. Therefore, if these non-privileged e-mails, which we have marked, are maintained by the city separate and apart from the otherwise privileged e-mail strings in which they appear, then the city may not withhold the non-privileged e-mails under section 552.107(1). In that event, we address your remaining argument against disclosure of the non-privileged e-mails.

Section 552.103 of the Government Code provides 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 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 was 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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You state, and provide documentation showing, a lawsuit styled *Hopkins v. Turner*, Cause No. D-1GN-16-005694, to which the city is a party, was pending in the 201st Judicial

³As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

District Court of Travis County, Texas, when the city received the instant request for information. You state the information at issue is related to the pending lawsuit. Based on your representations, the submitted documentation, and our review of the submitted information, we find litigation was pending when the city received this request for information, and the information at issue is related to the pending litigation for the purposes of section 552.103. 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. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to all parties to the litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. We note the information at issue was sent to the city by the opposing party to the pending litigation. Accordingly, the city may not withhold this information under section 552.103 of the Government Code.

We note the non-privileged e-mails contain the e-mail addresses of member of the public. Section 552.137 of the Government Code 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).⁴ *Id.* § 552.137(a)-(c). The e-mail addresses at issue are not a type specifically excluded by section 552.137(c) of the Government Code. We note the information at issue includes the requestor’s e-mail address, to which the requestor has a right of access pursuant to section 552.137(b). *See id.* § 552.137(b). Thus, the city may not withhold the requestor’s e-mail address from him under section 552.137. However, the city must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their disclosure.

In summary, the city may withhold the submitted information under section 552.107(1) of the Government Code; however, if the non-privileged e-mails, which we have marked, are maintained by the city separate and apart from the otherwise privileged e-mail strings in which they appear, then the city may not withhold them under section 552.107(1) of the Government Code. In that event, the city must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their 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.

⁴The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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

Sincerely,



Kieran Hillis
Assistant Attorney General
Open Records Division

KH/sb

Ref: ID# 648286

Enc. Submitted documents

c: Requestor
(w/o enclosures)