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ATTORNEY GENERAL OF TEXAS

April 24, 2019

Ms. Mandie M. Cash
Counsel for Chambers County
Germer, P.L.L.C.
2929 Allen Parkway, Suite 2900
Houston, Texas 77019

OR2019-10871

Dear Ms. Cash:

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# 761711 (ORR# 96432).

Chambers County (the "county"), which you represent, received a request for all information related to claim number P020185116-1. The county claims the submitted information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions the county claims and reviewed the submitted information.

Initially, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108; [and]

...

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(1), (17). The submitted information includes completed reports and investigations that are subject to section 552.022(a)(1). The county must release the completed reports and investigations pursuant to section 552.022(a)(1) unless they are excepted from disclosure under section 552.108 of the Government Code or are made confidential under the Act or other law. *See id.* § 552.022(a)(1). The submitted information also contains documents that were filed with a court. The court-filed documents are subject to section 552.022(a)(17) and must be released unless they are made confidential under the Act or other law. *See id.* § 552.022(a)(17). The county seeks to withhold the information subject to section 552.022 under section 552.103 of the Government Code. However, section 552.103 is discretionary in nature and does not make information confidential under the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the county may not withhold the information subject to section 552.022, which we have marked, under section 552.103 of the Government Code. However, we will consider the county's argument under section 552.103 for the information not subject to section 552.022.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *See* 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 "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). 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).

The county states the information submitted as Exhibit E consists of communications involving attorneys for the county and county employees and officials in their capacities as clients. The county states these communications were made in furtherance of the rendition of professional legal services to the county. The county states these communications were intended to be, and have remained, confidential. Based on these representations and our review, we find the county has demonstrated the applicability of the attorney-client privilege to the information at issue. Accordingly, the county may withhold Exhibit E under section 552.107(1) of the Government Code.¹

Section 552.103 of the Government Code provides, in relevant 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). The governmental body claiming section 552.103 has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information it seeks to withhold. To meet this burden, the governmental body must demonstrate: (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

¹As our ruling is dispositive for this information, we need not address the remaining argument against its disclosure.

related to that litigation. See *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, orig. proceeding); *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).

The county states, and provides documentation showing, prior to its receipt of the instant request, a lawsuit styled *Callicotte v. Hawthorne*, Case No. 3:18-CV-00331, was filed and is currently pending against the county in the United States District Court for the Southern District of Texas. Therefore, we agree litigation was pending on the date the county received the present request for information. The county also states the information at issue pertains to the substance of the lawsuit claims. Based on these representations and our review, we find the information at issue is related to the pending litigation. Therefore, we conclude section 552.103 of the Government Code is generally applicable to the remaining information not subject to section 552.022 of the Government Code.

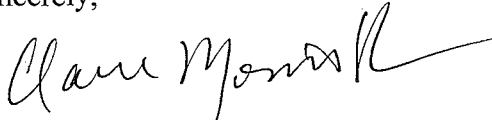
We note, however, the purpose of section 552.103 of the Government Code is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to the litigation to obtain such information through discovery procedures. See ORD 551 at 4-5. Thus, once the opposing party in pending litigation has seen or had access to information that is related to the litigation, there is no interest in withholding such information from public disclosure under section 552.103. See Open Records Decision Nos. 349 (1982), 320 (1982). Therefore, the county may withhold under section 552.103 only those portions of the remaining information at issue that the opposing party to the litigation has not seen or had access to. In this instance, the opposing party has seen or had access to some of the information at issue. This information, which we have marked for release, may not be withheld under section 552.103. Accordingly, with the exception of the information we marked for release, the county may withhold the remaining information at issue under section 552.103 of the Government Code. We note 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).

In summary, the county may withhold Exhibit E under section 552.107(1) of the Government Code. With the exception of the marked information subject to section 552.022 of the Government Code and the information we marked for release, the county may withhold the remaining information under section 552.103 of the Government Code. 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 providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/mo

Ref: ID# 761711

Enc. Submitted documents

c: Requestor
(w/o enclosures)