



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 30, 2004

Ms. Elizabeth Lutton  
Senior Attorney  
City of Arlington  
P.O. Box 90231  
Arlington, Texas 76004-0231

OR2004-7379

Dear Ms. Lutton:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 208158.

The City of Arlington (the "city") received a request for memoranda, e-mails, or correspondence to or from the city manager's office regarding an investigation into complaints from the Arlington Municipal Police Association. You state that some responsive information will be released to the requestor. You claim that the submitted information is excepted from disclosure under section 552.107 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Section 552.107(1) of the Government Code excepts from disclosure information protected by 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 "for the purpose of facilitating the rendition of professional legal services" to the client governmental body.<sup>1</sup> TEX. R. EVID. 503(b)(1). Third, the privilege applies only to

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<sup>1</sup> The privilege does not apply when an attorney or representative is acting in a 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). Because government attorneys often act in capacities other than that of professional legal counsel, including as administrators, investigators, or managers, the mere fact that a communication involves an attorney for the government does not demonstrate this element.

communications between or among clients, client representatives, lawyers, and lawyer representatives.<sup>2</sup> TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body seeking to establish that a communication is protected by the attorney-client privilege must inform this office of the identity and capacity of each individual involved in the communication. Finally, the attorney-client privilege applies only to a communication that is confidential. *Id.* 503(b)(1). A confidential communication is a communication that 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 the definition of a confidential communication 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) of the Government Code 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 that the submitted information consists of communications between city attorneys and city staff made for the purpose of rendering legal services to the city. You also indicate that these communications were intended to be confidential and that the confidentiality has been maintained. Upon review, we find you have established that most of the submitted information, which we have marked, consists of or documents confidential communications between privileged parties. We therefore agree that the city may withhold this portion of the submitted information under section 552.107(1) as information protected by the attorney-client privilege. We note, however, that the submitted documents contain an e-mail from the president of the Arlington Municipal Police Association to City Manager Chuck Kiefer that directly concerns the allegations and investigation at issue in the request. We find you have failed to establish that this e-mail, which we have marked, consists of or documents a confidential communication between parties subject to the attorney-client privilege. We therefore determine the city may not withhold this e-mail pursuant to section 552.107(1) of the Government Code.

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<sup>2</sup> Specifically, the privilege applies only to confidential communications between the client or a representative of the client and the client’s lawyer or a representative of the lawyer; between the lawyer and the lawyer’s representative; by the client or a representative of the client, or the client’s lawyer or a representative of the lawyer, to a lawyer or representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein; between representatives of the client or between the client and a representative of the client; or among lawyers and their representatives representing the same client. *See* TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E); *see also id.* 503(a)(2), (a)(4) (defining “representative of the client,” “representative of the lawyer.”)

The e-mail we have marked contains an e-mail address that may be excepted from disclosure under section 552.137 of the Government Code. Section 552.137 of the Government Code provides in part:

(a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code § 552.137(a), (b). Section 552.137 excepts certain e-mail addresses of members of the public who have not affirmatively consented to the release of the e-mail addresses. Section 552.137(c) provides certain conditions under which e-mail addresses of members of the public are not excepted from disclosure, which are not applicable here. *See* Gov't Code § 552.137(c) (e-mail address provided by contractor or vendor, contained in bid proposal, or on letterhead or document available to public generally not excepted under section 552.137). The e-mail address at issue appears to be the personal e-mail address of a city police officer. We find that this e-mail address is within the scope of section 552.137(a). Unless the individual at issue has consented to its release, we determine that the city must withhold the e-mail address we have marked pursuant to section 552.137(a) of the Government Code.

In summary, we have marked documents in the submitted information that the city may withhold under section 552.107(1) of the Government Code as information protected by the attorney-client privilege. The city must withhold the marked e-mail address in the remaining document under section 552.137 of the Government Code, unless the city has received affirmative consent to release it. With the exception of the marked e-mail address, the city must release the remaining document to the requestor.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within thirty calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within ten calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney

general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within ten calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within ten calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within ten calendar days of the date of this ruling.

Sincerely,



David R. Saldivar  
Assistant Attorney General  
Open Records Division

DRS/seg

Ref: ID# 208158

Enc: Submitted documents

c: Mr. Brandon Todd  
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(w/o enclosures)