



**ATTORNEY GENERAL OF TEXAS**  
**GREG ABBOTT**

October 23, 2006

Mr. Jeffrey L. Moore  
Brown & Hofmeister, L.L.P.  
Attorney for City of McKinney  
740 East Campbell Road, Suite 800  
Richardson, Texas 75081

OR2006-12471

Dear Mr. Moore:

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# 263924.

The City of McKinney (the "city"), which you represent, received a request for (1) agreements between the city and Verizon Wireless "regarding use of City property to erect, operate and maintain cell phone towers on City property, concluded on or after August 1, 2004[;]" (2) "document related to any payments made . . . pursuant to such agreements" or related to any payments by the city or Verizon Wireless related to any matter; (3) "minutes of meetings of the Planning & Zoning Commission and City Council to consider any such agreements[;]" (4) correspondence with Verizon; and (5) all documents "pertaining to the currently pending requests of Verizon Wireless to rezone certain properties in the City . . . and referred to in that certain memorandum from RF Network, Inc. to [a named individual[.]" You inform us that the city is releasing some of the requested information, but you claim that portions of the submitted information are excepted from disclosure under sections 552.107 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

When asserting the attorney-client privilege under section 552.107 of the Government Code, 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 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 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).

In this instance, you state that the information at issue consists of correspondence between the city attorney’s office, city personnel, and city consultants made for the purpose of facilitating the rendition of professional legal services to the city. You further represent that the confidentiality of this information has been maintained. Based on your arguments and our review, we find that you have established that this information is protected under the attorney-client privilege. As such, we conclude that the city may withhold the information you have marked pursuant to section 552.107 of the Government Code.<sup>1</sup>

Next, we note that the remaining information contains an e-mail address that is subject to section 552.137 of the Government Code.<sup>2</sup> Section 552.137 excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating

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<sup>1</sup>As we reach this conclusion, we need not address your argument under section 552.111 of the Government Code.

<sup>2</sup>The Office of the Attorney General will raise a mandatory exception like section 552.137 on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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). *See* Gov’t Code § 552.137(a)-(c). We note that subsection 552.137(c)(1) specifically excludes an e-mail address “provided to a government body by a person who has a contractual relationship with the governmental body[.]” *Id.* § 552.137(c)(1). The e-mail address that we have marked does not appear to be of a type specifically excluded by section 552.137(c). As such, this e-mail address must be withheld under section 552.137 unless its owner has affirmatively consented to its release. *See id.* § 552.137(b).

In summary, the city may withhold the information you have marked under section 552.107 of the Government Code. The city must withhold the e-mail address we have marked under section 552.137 of the Government Code unless its owner has consented to its release. The remaining submitted information must be released.

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 30 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).

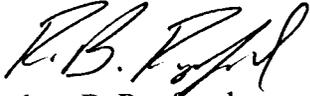
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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. 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,



Robert B. Rapfogel  
Assistant Attorney General  
Open Records Division

RBR/eb

Ref: ID# 263924

Enc. Submitted documents

c: Ms. Beth A. Mortenson  
2108 Surrey Lane  
McKinney, Texas 75070  
(w/o enclosures)