



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 4, 2008

Ms. Patricia A. Adams
Town Attorney
Town of Trophy Club
100 Municipal Drive
Trophy Club, Texas 76262

OR2008-00146

Dear Ms. Adams:

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# 298767.

The Town of Trophy Club (the "town") received a request for all communications between six named individuals from a specified time period. You state that you will make most of the requested information available to the requestor. You claim that portions of the submitted information are excepted from disclosure under sections 552.101, 552.107, 552.117, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, we note that some of the requested information, Exhibit A-1 and pages 42-44 of Exhibit A-2, was the subject of a prior ruling of this office, issued as Open Records Letter No. 2008-00135 (2008). We presume that the pertinent facts and circumstances have not changed since the issuance of Open Records Letter No. 2008-00135. Thus, the town must continue to rely on Open Records Letter No. 2008-00135 for Exhibit A-1 and pages 42-44

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.

of Exhibit A-2.² *See* Open Records Decision No. 673 (2001) (governmental body may rely on prior ruling as previous determination when 1) the records or information at issue are precisely the same records or information that were previously submitted to this office pursuant to section 552.301(e)(1)(D); 2) the governmental body which received the request for the records or information is the same governmental body that previously requested and received a ruling from the attorney general; 3) the prior ruling concluded that the precise records or information are or are not excepted from disclosure under the Act; and 4) the law, facts, and circumstances on which the prior ruling was based have not changed since the issuance of the ruling). For the information not previously ruled upon, we will address your submitted arguments.

Next, we address your claim under section 552.107 of the Government Code. Section 552.107(1) protects information that comes 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 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. *See* 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. *See 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 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. *See* TEX. R. EVID. 503(b)(1)(A)-(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. *See 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

²As we are able to make this determination, we need not address your arguments under section 552.101 of the Government Code.

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 have marked the information that the town seeks to withhold under section 552.107(1). You state that the marked information consists of confidential communications made between the town's attorney and various members of the town's council. You state that these communications were made for the purpose of facilitating the rendition of professional legal services to the town's council. You also state that the communications were intended to be and remain confidential. Based on your representations and our review of the information at issue, we conclude that the town may withhold the information you have marked under section 552.107(1) of the Government Code.

You state that some of the information you have marked belongs to various town employees and must be withheld under section 552.117 of the Government Code. Section 552.117(a)(1) excepts from public disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024 of the Government Code. Section 552.117 also encompasses a personal cellular telephone number, provided that a governmental body does not pay for the cellular telephone service. *See Open Records Decision No. 506 at 5-6 (1988)* (Gov't Code § 552.117 not applicable to cellular mobile phone numbers paid for by governmental body and intended for official use). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See Open Records Decision No. 530 at 5 (1989)*. Thus, the information at issue may only be withheld under section 552.117(a)(1) on behalf of a current or former town official or employee who made a request for confidentiality under section 552.024 prior to the date of the town's receipt of the request for the information. Therefore, the town must withhold the cellular telephone numbers we have marked under section 552.117(a)(1) if the individuals at issue are town officials or employees who pay for the cellular telephone services, and if they requested confidentiality for their cellular telephone numbers under section 552.024 before the town received this request for information. The town must withhold the home addresses we have marked under section 552.117(a)(1) if the individuals at issue are town officials or employees and they timely elected to keep their information confidential under section 552.024. If the individuals at issue are not town officials or employees, none of the information we have marked under section 552.117(a)(1) may be withheld on that basis.

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). The marked e-mail addresses are not of a type specifically excluded by section 552.137(c). Therefore, the town

must withhold the e-mail addresses you have marked, as well as the additional e-mail address we have marked, in accordance with section 552.137 unless the town receives consent for their release.

In summary, the town must continue to rely on Open Records Letter No. 2008-00135 for Exhibit A-1 and pages 42-44 of Exhibit A-2. The town may withhold the information you have marked under section 552.107. The town must withhold the marked cellular telephone numbers under section 552.117(a)(1) of the Government Code if the individuals at issue are town officials or employees and they pay for the cellular telephone services, and they requested confidentiality for their telephone numbers under section 552.024 of the Government Code before the town received this request for information. The town must withhold the marked home addresses under section 552.117(a)(1) if the individuals at issue are town officials or employees and they timely elected to keep their information confidential under section 552.024. You must withhold the marked e-mail addresses under section 552.137 unless the town receives consent for their release. The remaining information must be released 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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 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 challenge that decision by suing the governmental body. *Id.* § 552.321(a); *Texas 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 10 calendar days of the date of this ruling.

Sincerely,



Jordan Johnson
Assistant Attorney General
Open Records Division

JJ/jb

Ref: ID# 298767

Enc. Submitted documents

c: Ms. Pauline Twomey
203 Oakmont Drive
Trophy Club, Texas 76262
(w/o enclosures)