



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 1, 2008

Mr. Steven M. Peña, Sr.
Law Offices of Davidson & Troilo, P.C.
755 West Interstate Highway 10, Suite 800
San Antonio, Texas 78229-5815

OR2008-01525

Dear Mr. Peña:

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# 301490.

The City of Helotes (the "city"), which you represent, received a request for copies of two specific memoranda prepared by current and former city attorneys. You state you will provide the requestor with a portion of the requested information. You claim that the remaining requested 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) protects information that an "attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Evidence or the Texas Disciplinary Rules of Professional Conduct[.]" Gov't Code § 552.107(1). The governmental body has the burden of providing the necessary facts to demonstrate the elements of the attorney-client privilege. Open Records Decision No. 676 at 6-7 (2002). First, the 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. *Id.* Third, the governmental body must demonstrate that the communication was between or among clients, client representatives, lawyers, and lawyer representatives. *Id.* Fourth, the governmental body must show that the communication was confidential; that is, the communication 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." TEX. R.

EVID. 503(b)(1); *see Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex.App.-Waco 1997, no pet.) (whether a communication was confidential depends on the *intent* of the parties involved at the time the information was communicated). Finally, the governmental body must demonstrate that the communication has remained confidential. Open Records Decision No. 676 at 10-11 (2002).

You state that the submitted information in Exhibit A constitutes confidential communications between the city and its attorneys, made for the purpose of facilitating the rendition of professional legal services. You also inform us the information has remained confidential. Based on your representations and our review, we conclude that the city may withhold the information in Exhibit A under section 552.107 of the Government Code.

In regard to Exhibit B, you state that the memorandum is a privileged communication between the city and its attorney. However, you acknowledge that the mayor read a portion of the submitted memorandum during open session at a city council meeting. Therefore, we must determine the extent to which the city has waived the attorney-client privilege by voluntarily disclosing otherwise privileged information to the public. Under Rule 511 of the Texas Rules of Evidence, a privilege is waived if the holder of the privilege "voluntarily discloses or consents to disclosure of any significant part of the privileged matter unless such disclosure itself is privileged." TEX. R. EVID. 511(1). Thus, the voluntary disclosure of a "significant part" of privileged information results in an implied waiver of additional information that was not disclosed. *See Terrell State Hosp. of Tex. Dept. of Mental Health & Mental Retardation v. Ashworth*, 794 S.W.2d 937 (Tex.App.-Dallas 1990, writ denied).

You explain that an attorney wrote a memorandum for the city regarding an interim development ordinance and planned development district. You state that the mayor read select portions of the memorandum at the city council meeting to discharge a statutory public duty imposed upon certain municipalities, which requires the mayor to recommend to the governing body any measure that relates to improving certain areas of the municipality. After a careful review of the submitted information, we find that the information that was disclosed at the city council meeting constitutes a "significant part" of the memorandum. *See In re Monsanto Co.*, 998 S.W.2d 917 (Tex.App.-Waco 1999). We therefore conclude the city may not withhold the information in Exhibit B under section 552.107 of the Government Code.

In summary, the city may withhold Exhibit A under section 552.107 of the Government Code. Exhibit B 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,



Chris Schulz
Assistant Attorney General
Open Records Division

CS/jb

Ref: ID# 301490

Enc. Submitted documents

c: Ms. Sarah Snyder
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(w/o enclosures)