



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

March 3, 2009

Ms. Molly Shortall  
Assistant City Attorney  
City of Arlington  
P.O. Box 90231  
Arlington, Texas 76004

OR2009-07612

Dear Ms. Shortall:

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# 344884.

The City of Arlington (the "city") received a request for two categories of information. The first category consists of documents pertaining to a specified Building Code Board of Appeals case, a specified landowner, and a specified address. The second category consists of information pertaining to a retaining wall at another address. You state that the city has released 138 responsive pages to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.107 and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

You claim that the e-mails submitted in Exhibit B are excepted from disclosure under section 552.107(1) of the Government Code. Section 552.107(1) protects information coming 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. 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 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, lawyer representatives, and lawyers representing another party in a pending action concerning a matter of common interest therein. 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).

You state that the e-mails in Exhibit B are communications between city attorneys and city employees, and that these communications were made in furtherance of the rendition of legal services and advice for the city. You identify, in Exhibit D, the city attorneys, clients, and client representatives who are parties to these communications. You further state that all of these communications were made in confidence, intended for the sole use of the city and its attorneys, and have not been shared or distributed to others. Based on your representations and our review, we find that you have demonstrated the applicability of the attorney-client privilege to most of the e-mails in Exhibit B. These e-mails may be withheld under section 552.107. However, a few of the individual e-mails contained in the e-mail strings are communications with parties not listed in Exhibit D. You do not identify these parties or otherwise describe their relationship with the city. Therefore, we conclude you have failed to establish how these e-mails, which we have marked, constitute communications between or among city representatives and attorneys for the purposes of section 552.107. Thus, to the extent that these non-privileged e-mails exist separate and apart from the submitted e-mail chains, they may not be withheld under section 552.107 and we consider them with the remaining information.

The remaining information contains e-mail addresses that are excepted from disclosure under section 552.137 of the Government Code, which requires a governmental body to withhold the e-mail address of a member of the general public, unless the individual to whom the e-mail address belongs has affirmatively consented to its public disclosure. *See* Gov't Code § 552.137(b). You do not inform us that the owners of the e-mail addresses at issue have affirmatively consented to their release. Therefore, the city must withhold the e-mail addresses you have marked in Exhibit C, as well as those we have marked in Exhibit B, under section 552.137.

In summary, to the extent they exist separate and apart from the submitted e-mail chains, the city may not withhold the non-privileged e-mails we have marked within Exhibit B under section 552.107. The remaining information in Exhibit B may be withheld under section 552.107. The city must withhold the e-mail addresses you have marked in Exhibit C, as well as those we have marked in Exhibit B, under section 552.137. As you raise no other exceptions to disclosure, the remaining submitted information must be released.

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.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), 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 must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Bob Davis  
Assistant Attorney General  
Open Records Division

RSD/cc

Ref: ID# 344884

Enc. Submitted documents

cc: Requestor  
(w/o enclosures)