



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 25, 2009

Mr. Matthew C. G. Boyle  
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Irving, Texas 75062-2763

OR2009-08808

Dear Mr. Boyle:

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# 347208.

The Colleyville Police Department (the "department"), which you represent, received a request for all e-mails sent to or from a named employee regarding the requestor's husband and any investigation pertaining to a complaint filed by the requestor's husband.<sup>1</sup> You state the department has provided some of the requested information to the requestor. You claim the submitted e-mails are excepted from disclosure under section 552.107 of the Government Code, and privileged under rule 192.5 of the Texas Rules of Civil Procedure.<sup>2</sup> We have

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<sup>1</sup>You state the department sought, but has not received, clarification from the requestor regarding a portion of the request. See Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used). Accordingly, the department has no obligation at this time to release any information that may be responsive to the part of the request for which it has not received clarification. However, if the requestor responds to the clarification request, the department must seek a ruling from this office before withholding any responsive information from the requestor. See Open Records Decision No. 663 (1999) (10-business-day deadline tolled while governmental body awaits clarification).

<sup>2</sup>Although you also raise section 552.101 of the Government Code in conjunction with the attorney-client privilege, this office has concluded section 552.101 does not encompass discovery privileges. See Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990).

considered your submitted arguments and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, the requestor contends the department did not comply with the procedural requirements of the Act in requesting our decision because the department did not request a ruling by the statutory deadline. We understand the requestor to assert the department failed to comply with section 552.301(b) of the Government Code, which requires a governmental body to ask for a decision from this office and state which exceptions apply to the requested information by the tenth business day after receiving the request. *Id.* § 552.301(b). The department states it received the request for information on April 3, 2009, and informs us April 10, 2009, was observed as a department holiday. Accordingly, the department's ten-business-day deadline was April 20, 2009. Although the department's request for a ruling was timely submitted to this office via facsimile on April 20, 2009, the department did not raise its claim under rule 192.5 of the Texas Rules of Civil Procedure until April 27, 2009. Accordingly, we find the department failed to comply with the procedural requirements of section 552.301 with respect to its claim under rule 192.5.

Generally, a governmental body's failure to comply with section 552.301 results in the waiver of its claims under the exceptions or privileges at issue, unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Hancock v. State Bd. Of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). Generally, a compelling reason exists when third party interests are at stake or when information is confidential under other law. Open Records Decision No. 177 (1977). Although you raise rule 192.5 of the Texas Rules of Civil Procedure, this rule is discretionary in nature. It serves only to protect a governmental body's interests and may be waived; as such, it does not constitute a compelling reason to withhold information for purposes of section 552.302. Open Records Decision Nos. 677 at 10 (2002) (attorney work-product privilege under rule 192.5 is not compelling reason to withhold information under section 552.302), 665 at 2 n.5 (2000) (discretionary exceptions in general). Consequently, the department may not withhold any of the submitted information pursuant to rule 192.5 of the Texas Rules of Civil Procedure. However, we will consider your timely raised claim under section 552.107 of the Government Code.

Section 552.107(1) of the Government Code 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 a capacity other than that of attorney). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1). 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 assert the submitted e-mails consist of communications made for the purpose of facilitating the rendition of professional legal services. You state the communications were between department staff and attorneys representing the department, and were to be kept confidential among the intended parties. Finally, you indicate the confidentiality of the communications has been maintained. Based on your representations and our review, we find the department has established the applicability of section 552.107 to most of the submitted e-mails. We note, however, one of the submitted e-mails consists of a communication between only department staff. You have not explained, nor is it otherwise apparent, how this communication was made for the purpose of facilitating the rendition of professional legal services to the department. Consequently, we find you have failed to demonstrate the applicability of section 552.107 to this e-mail, which we have marked for release. Therefore, with the exception of the information marked for release, the department may withhold the submitted e-mails under section 552.107 of the Government Code.

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,



Leah B. Wingerson  
Assistant Attorney General  
Open Records Division

LBW/dls

Ref: ID# 347208

Enc. Submitted documents

c: Requestor  
(w/o enclosures)