



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 28, 2009

Mr. Jonathan T. Koury
Assistant City Attorney for the City of Dripping Springs
Bovey & Bojorquez, L.L.P.
12325 Hymeadow Drive
Austin, Texas 78750

OR2009-10395

Dear Mr. Koury:

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# 350347.

The City of Dripping Springs (the "city"), which you represent, received a request for information relating to a proposed municipal management district and a planned regional park. You state the city has released some of the requested information. You claim the submitted information is excepted from disclosure under sections 552.106, 552.107, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that an e-mail address has been redacted from the submitted information. Pursuant to section 552.301 of the Government Code, a governmental body that seeks to withhold requested information must submit to this office a copy of the information, labeled to indicate which exceptions apply to which parts of the copy, unless the governmental body has received a previous determination for the information at issue. *See* Gov't Code §§ 552.301(a), .301(e)(1)(D). You do not assert, nor does our review of our records indicate, that the city is authorized to withhold the redacted information without first seeking a ruling from this office. *See id.* § 552.301(a); Open Records Decision No. 673 (2000). In this instance, we can discern the nature of the redacted information; thus, being deprived of that information does not inhibit our ability to make a ruling. In the future, however, the city should refrain from redacting any information for which it is not authorized.

Section 552.107(1) of the Government Code 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. 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 a capacity other than that of attorney). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *See* 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, 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 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 a portion of the submitted information, which you have marked, consists of confidential communications to and from the city and its attorneys. You have identified the parties to the communications. You indicate these communications were made for the purpose of facilitating the rendition of professional legal services. Based on your representations and our review, we find the city may generally withhold the information you have marked under section 552.107 of the Government Code.¹ We note, however, that one of the individual e-mails contained in the submitted e-mail strings consists of communications with non-privileged parties or parties that you have not identified. To the

¹We note that three of the e-mails excepted from disclosure under section 552.107 are identical to certain e-mails you seek to withhold under section 552.106. These e-mails, which we have marked, may also be withheld under 552.107. Thus, we need not address your argument under 552.106 for this information.

extent this non-privileged e-mail, which we have marked, exists separate and apart from the submitted e-mail string, it may not be withheld under section 552.107.

Next, you contend that a portion of the submitted information is excepted from disclosure under section 552.106 of the Government Code. Section 552.106 of the Government Code excepts from disclosure "[a] draft or working paper involved in the preparation of proposed legislation[.]" Gov't Code § 552.106(a). The purpose of section 552.106 is to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the members of the legislative body. *See* Open Records Decision No. 460 at 2 (1987). Therefore, section 552.106 is applicable only to the policy judgments, recommendations, and proposals of persons who are involved in the preparation of proposed legislation and who have an official responsibility to provide such information to members of the legislative body. *See id.* at 1; *see also* Open Records Decision No. 429 at 5 (1985) (statutory predecessor to section 552.106 not applicable to information relating to governmental entity's efforts to persuade other governmental entities to enact particular ordinances); 367 at 2 (1983) (statutory predecessor applicable to recommendations of executive committee of State Board of Public Accountancy for possible amendments to Public Accountancy Act). Furthermore, section 552.106 does not protect purely factual information from public disclosure. *See* Open Records Decision No. 460 at 2; *see also* Open Records Decision No. 344 at 3-4 (1982) (for purposes of statutory predecessor, factual information prepared by State Property Tax Board did not reflect policy judgments, recommendations, or proposals concerning drafting of legislation). However, a comparison or analysis of factual information prepared to support proposed legislation is within the scope of section 552.106. *See* Open Records Decision No. 460 at 2.

You inform us that the information at issue consists of drafts and working papers of a proposed bill amending state law. However, this information includes communications with a third party that you have not identified. Furthermore, you have not explained, nor is it apparent to this office, how this information constitutes internal city documents that were prepared by persons with an official responsibility to prepare the materials for the legislature. *See* Open Records Decision Nos. 460 (1987), Open Records Decision No. 429 (1985) (exception not applicable to materials prepared by person or agency who has no official responsibility to do so but only acts as interested party who wishes to influence legislative process). We therefore conclude that the city may not withhold this information under section 552.106 of the Government Code.

You have marked an e-mail address as confidential under section 552.137 of the Government Code. This section 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). *See* Gov't Code § 552.137(a)-(c). We agree that the city must withhold the e-mail address it has marked, and the additional e-mail addresses we

have marked, unless the city receives consent from the owners of the e-mail addresses for their release. *See id.* § 552.137(b).

In summary, the city may withhold the information it has marked under section 552.107 of the Government Code. However, to the extent the non-privileged e-mails we have marked exists separate and apart from the submitted e-mail chains, the city must release them. The city must withhold the marked e-mail addresses under section 552.137 of the Government Code. The remaining 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, 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,



Pamela Wissemann
Assistant Attorney General
Open Records Division

PFW/cc

Ref: ID# 350347

Enc. Submitted documents

c: Requestor
(w/o enclosures)