



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 24, 2009

Ms. YuShan Chang
Assistant City Attorney
City of Houston
P.O. Box 368
Houston, Texas 77001-0368

OR2009-11874

Dear Ms. Chang:

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# 353288.

The City of Houston (the "city") received a request for all communications between or among the city Secretary's Office, Legal Department, Human Resources Department, and Mayor's Office regarding the requestor's open records requests during a specified period of time. You state some of the requested information will be made available to the requestor. You claim that the submitted information is excepted from disclosure under section 552.107 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.¹ We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit written comments regarding availability of requested information).

Initially, we note that a portion of the submitted information is not responsive to the instant request because it was created after the date the city received this request. The city need not release this non-responsive information, which we have marked, in response to this request, and this ruling will not address such information.

You assert the responsive submitted information is excepted from disclosure under section 552.107(1) of the Government Code, which protects information coming within the

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.

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). 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. 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.*, 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 the responsive submitted information consists of confidential communications between city attorneys and city employees that were made for the purpose of facilitating the rendition of professional legal services to the city. You have identified most of the parties to the communications. Based upon your representations and our review of the information at issue, we conclude that the city may withhold the responsive submitted information under section 552.107(1) of the Government Code. However, one of the e-mails contained in a privileged e-mail string is a communication with an unidentified party. Therefore, we conclude you have failed to establish how this e-mail, which we have marked, constitutes a communication between or among city attorneys and their governmental clients for the purposes of section 552.107. Thus, to the extent that this non-privileged e-mail exists separate and apart from the submitted e-mail chains, it may not be withheld under section 552.107.

We note that the non-privileged e-mail contains an e-mail address subject to section 552.137 of the Government Code, which 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).² See Gov’t Code § 552.137(a)-(c). Accordingly, if the city maintains the non-privileged e-mail separate and apart from the privileged submitted e-mail chains, the city must withhold the e-mail address we have marked under section 552.137, unless the owner of the address has affirmatively consented to its release. See *id.* § 552.137(b).

In summary, the city may withhold the responsive submitted information under section 552.107 of the Government Code; however, to the extent the marked e-mail exists separate and apart from the submitted e-mail chains, the non-privileged e-mail must be released. If the city maintains the non-privileged e-mail separate and apart from the submitted e-mail strings, the city must withhold the e-mail address we marked under section 552.137, unless the owner of the address has affirmatively consented to its release.

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,



Sarah Casterline
Assistant Attorney General
Open Records Division

SEC/eb

²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Ref: ID# 353288

Enc. Submitted documents

c: Requestor
(w/o enclosures)