



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 15, 2009

Mr. Robert E. Hager  
Nichols, Jackson, Dillard, Hager & Smith, L.L.P.  
1800 Lincoln Plaza  
500 North Akard  
Dallas, Texas 75201

OR2009-13041

Dear Mr. Hager:

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# 355401 (Reference No. 37968).

The City of Coppell (the "city"), which you represent, received a request for information relating to an exercise of eminent domain involving property at a specified address and economic development negotiations with a business prospect. You state that some of the responsive information either has been or will be released. You claim that other information encompassed by this request is excepted from disclosure under sections 552.107(1) and 552.131(b) of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the information you submitted.<sup>2</sup> We also have considered the comments we received from the requestor.<sup>3</sup>

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<sup>1</sup>Although you also raise section 552.101 of the Government Code, you have neither submitted any arguments in support of the applicability of that exception nor identified any information that you contend is encompassed by the exception. Accordingly, this decision does not address section 552.101. *See Gov't Code §§ 552.301(e)(1)(a), (e)(2), .302.*

<sup>2</sup>This letter ruling assumes that the submitted representative samples of information are truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the city to withhold any information that is substantially different from the submitted information. *See Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).*

<sup>3</sup>*See Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).*

We note that some of the submitted information was created after the date of the city's receipt of this request for information. The Act does not require a governmental body to release information that did not exist when it received a request or create responsive information.<sup>4</sup> Thus, the information that did not exist when the city received this request is not responsive to the request. This decision does not address the public availability of the non-responsive information, which we have marked, and the city need not release that information in response to this request.

Next, we address your claim under section 552.131(b) of the Government Code for the responsive information. Section 552.131(b) provides that "[u]nless and until an agreement is made with [a] business prospect, information about a financial or other incentive being offered to the business prospect by the governmental body or by another person is excepted from [required public disclosure]." *Id.* § 552.131(b). The city seeks to withhold all of the responsive information under this exception. You state that the information at issue is related to ongoing negotiations with a business prospect. You indicate that an agreement had yet to be reached with the prospect when the city received this request for information. Based on your representations and our review of the information at issue, we have marked information relating to financial and other incentives that the city may withhold under section 552.131(b). We note that the applicability of section 552.131(b) to the marked information ends once the city finalizes an agreement with the business prospect. As you have not demonstrated that the remaining information at issue reveals financial or other incentives that are being offered to the prospect, we conclude that the city may not withhold any other information under section 552.131(b).

You also raise section 552.107(1) of the Government Code, which 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. *See* 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 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

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<sup>4</sup>*See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

between or among clients, client representatives, lawyers, and lawyer representatives. See TEX. R. EVID. 503(b)(1)(A)-(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. 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 have marked the remaining information that the city seeks to withhold under section 552.107(1). You state that some of the information at issue contains an attorney’s hand-written notes, comments, and recommendations to the client. Based on your representations and our review of that information, we conclude that the information in question may be withheld under section 552.107(1). We have marked that information accordingly. We find that you have not demonstrated that any of the remaining information at issue either constitutes or documents a confidential attorney-client communication between or among privileged parties. We therefore conclude that the city may not withhold any of the remaining information under section 552.107(1).

We note that section 552.137 of the Government Code is applicable to some of the remaining information.<sup>5</sup> This section provides that “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act],” unless the owner of the e-mail address has affirmatively consented to its public disclosure. Gov’t Code § 552.137(a)-(b). The types of e-mail addresses listed in section 552.137(c) may not be withheld under this exception. See *id.* § 552.137(c). Likewise, section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. The city must withhold the e-mail addresses we have marked under section 552.137, unless the owner of an e-mail address has affirmatively consented to its public disclosure.

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<sup>5</sup>Unlike other exceptions to disclosure under the Act, this office will raise section 552.137 on behalf of a governmental body, as this exception is mandatory and may not be waived. See Gov’t Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

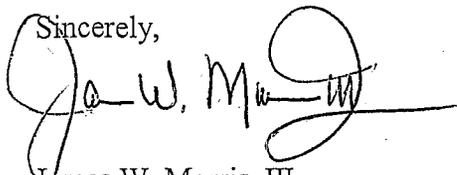
Lastly, we note that some of the remaining information may be protected by copyright. A governmental body must allow inspection of copyrighted information unless an exception to disclosure applies to the information. *See* Attorney General Opinion JM-672 (1987). An officer for public information also must comply with copyright law, however, and is not required to furnish copies of copyrighted information. *Id.* A member of the public who wishes to make copies of copyrighted information must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 at 8-9 (1990).

In summary: (1) the city may withhold the information we have marked under sections 552.131(b) and 552.107(1) of the Government Code; and (2) the city must withhold the marked e-mail addresses under section 552.137 of the Government Code, unless the owner of an e-mail address has consented to its disclosure. The city must release the rest of the responsive information, but may only release information that is protected by copyright in accordance with copyright law.

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, toll free, at (888) 672-6787.

Sincerely,



James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/cc

Ref: ID# 355401

Enc: Submitted documents

c: Requestor  
(w/o enclosures)