



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 16, 2009

Mr. Jeffrey L. Moore
Brown & Hofmeister, LLP
Attorneys for City of Crandall
740 East Campbell Road, Suite 800
Richardson, Texas 75081

OR2009-14652

Dear Mr. Moore:

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# 358475.

The City of Crandall (the "city"), which you represent, received a request for several categories of information pertaining to a proposed zoning ordinance and the contact information for past and present members of the city council and city park board since January 1, 2007. You state some of the requested information will be released. You claim portions of the submitted information are excepted from disclosure under section 552.107 of the Government Code. We have considered the exception you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that an interested party may submit comments stating why information should or should not be released).

Initially, we note the requestor contends that she was not properly notified of the city's request for a ruling from this office as required by section 552.301(d)(2) of the Government Code. Section 552.301(d)(2) states:

(d) A governmental body that requests an attorney general decision [under the Act] must provide to the requestor within a reasonable time but not later than the 10th business day after the date of receiving the requestor's written request:

- ...
- (2) a copy of the governmental body's written communication to the attorney general asking for the decision[.]

See id. § 552.301(d)(2). Pursuant to section 552.302, a governmental body's failure to timely provide the requestor with a copy of its written communication to this office results in the presumption that the information is public. *Id.* § 552.302. The request submitted by the city indicates that the city received the written request for information on July 27, 2009. Thus, the city was required to request a ruling from this office and provide the requestor with a copy of its written communication with this office by August 10, 2009. The city's request for a ruling from this office, which was copied to the requestor, was postmarked August 10, 2009. *See id.* § 552.308(a) (prescribing standards for timeliness of action by United States or common or contract carrier). This office is unable to resolve disputes of fact in the open records ruling process. Accordingly, we must rely upon the facts alleged to us by the governmental body requesting our opinion, or upon those facts that are discernable from the documents submitted for our inspection. *See* Open Records Decision No. 522 at 4 (1990). Based on the submitted information and the city's representations, we find the city complied with the procedural requirements of section 552.301 in requesting this ruling. Accordingly, we will address the city's arguments against disclosure.

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 pet.). 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 you have marked constitute communications between city staff and city attorneys that were made for the purpose of providing legal advice to the city. You have identified the parties to the communications. You state that these communications were made in confidence and have maintained their confidentiality. Based on your representations and our review of the submitted information, we find that you have demonstrated the applicability of the attorney-client privilege to the information you have marked. Accordingly, the city may withhold this information under section 552.107 of the Government Code.

We note portions of the remaining information are subject to section 552.137 of the Government Code.¹ Section 552.137 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). Gov’t Code § 552.137(a)-(c). The e-mail addresses we have marked do not appear to be of types specifically excluded by section 552.137(c) of the Government Code. Therefore, the city must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the city has received consent for their release.

In summary, the city may withhold the information you marked under section 552.107 of the Government Code. The city must withhold the e-mail addresses we marked under section 552.137(c) of the Government Code, unless you have received consent for their release. 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

¹The 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).

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

Sincerely,



Matt Entsminger
Assistant Attorney General
Open Records Division

MRE/dls

Ref: ID# 358475

Enc. Submitted documents

c: Requestor
(w/o enclosures)