



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 6, 2010

Mr. Warren M. S. Ernst
Chief of the General Counsel Division
Office of the City Attorney
1500 Marilla, Room 7BN
Dallas, Texas 75201

OR2010-00229

Dear Mr. Ernst:

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# 366471.

The City of Dallas (the "city") received a request for five categories of information pertaining to the Katy Trail. You state that you have released some of the information to the requestor. You claim portions of the submitted information are excepted from disclosure under sections 552.107 and 552.137 of the Government Code.¹ You also state the release of the information in Exhibit D may implicate the proprietary interests of Harwood International ("Harwood").² You inform us, and have provided documentation showing, you have notified Harwood of the request and of its opportunity to submit comments to this office as to why the requested information should not be released to the requestor. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party

¹Although you also raise Texas Rule of Evidence 503, we note that in this instance, the proper exception-to-raise-when-asserting-the-attorney-client-privilege-for-information-not-subject-to-section-552.022 is section 552.107. *See* Open Records Decision No. 676 at 1-2 (2002).

²Although you also seek to withhold Exhibit D under section 552.305 of the Government Code, we note that section 552.305 is not an exception to disclosure. *See* Gov't Code § 552.305. Section 552.305 addresses the procedural requirements for notifying third parties that their interests may be affected by a request for information. *See id.*

to raise and explain the applicability of exception to disclose under Act in certain circumstances). We have considered the exceptions you claim and reviewed the submitted representative samples of information.³

An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why requested information relating to it should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this decision, this office has not received any correspondence from Harwood. Thus, we have no basis to conclude the release of Exhibit D would implicate Harwood's proprietary interest. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (stating that business enterprise that claims exception for commercial or financial information under section 552.110(b) must show by specific factual evidence that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret). Accordingly, the city may not withhold Exhibit D on the basis of any proprietary interest Harwood may have in the information. As you raise no exceptions to disclosure of this information, it must be released.

Section 552.107(1) 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 between or among clients, client representatives, lawyers, and lawyer representatives. *See* TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (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

³We assume the "representative samples" of records submitted to this office are 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 those records contain substantially different types of information than that submitted to this office.

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 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).

The city seeks to withhold the information in Exhibit B under section 552.107(1). You state that the information at issue constitutes privileged attorney-client communications that were made in connection with the rendition of professional legal services to the city. You have identified the parties to the communications at issue as either city attorneys or city staff. You state that the communications were intended to be confidential, and you do not indicate that confidentiality has been waived. Based on your representations and our review of the information at issue, we conclude that the commission may withhold Exhibit B under section 552.107(1).

The city seeks to withhold portions of Exhibit C under section 552.137 of the Government Code. 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). *See id.* § 552.137(a)–(c). The e-mail addresses at issue are not a type specifically excluded by section 552.137(c). Accordingly, the city must withhold the information it has marked in Exhibit C under section 552.137 of the Government Code.⁴

In summary, the city may withhold Exhibit B under section 552.107(1) of the Government Code. The city must withhold the information it has marked in Exhibit C 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.

⁴We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

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

Sincerely,



James McGuire
Assistant Attorney General
Open Records Division

JM/jb

Ref: ID# 366471

Enc. Submitted documents

c: Requestor
(w/o enclosures)