



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 22, 2010

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

OR2010-01002

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# 367849.

The City of Dallas (the "city") received a request for all city correspondence with or documents or electronically stored information related to two specified companies pertaining to the McCommas Landfill. The city received a subsequent request for specified Excel files regarding gas collection at the McCommas Bluff Landfill. You state that you have released some of the requested information. You claim that the submitted information in Exhibit D is excepted from disclosure under section 552.107 of the Government Code.¹ In addition, you state that release of the submitted information in Exhibit B may implicate the proprietary interests of Dallas Clean Energy, LLC ("DCE"). Pursuant to section 552.305, you inform us, and provide documentation showing, you have notified DCE of the request and of their right to submit arguments to this office as to why the requested information should not be released. *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 to raise and explain applicability of exception to disclosure under

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).

Act in certain circumstances). We have considered the exception you claim and reviewed the submitted representative sample of information.²

We note that an interested third party is allowed ten business days from the date of its receipt of the governmental body's notice under section 552.305 of the Government Code to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this decision, this office has received no correspondence from DCE. Thus, because DCE has not demonstrated that any of the submitted information is proprietary for the purposes of the Act, the city may not withhold any of the information in Exhibit B on that basis. *See id.* § 552.110(a)-(b); Open Records Decision Nos. 552 at 5 (1990), 661 at 5-6 (1999).

We now address the city's arguments against disclosure for the information in Exhibit D. 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 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). 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)(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 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

²We 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.

(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).

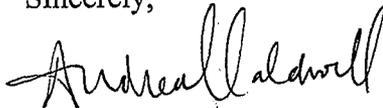
You state that the information at issue constitutes privileged attorney-client communications between the city attorney's office, city department employees, and outside legal counsel that were made in connection with the rendition of professional legal services to the city. We understand the communications were intended to be confidential, and that the communications have maintained their confidentiality. Based on your representations and our review of the information at issue, we find that the city has established that the information at issue consists of privileged attorney-client communications. Therefore, we conclude that the city may withhold the information in Exhibit D under section 552.107(1) of the Government Code.

In summary, the city may withhold the submitted information in Exhibit D under section 552.107(1) of the Government Code. Because the third party, DCE, has not demonstrated that any of the submitted information in Exhibit B is proprietary for the purposes of the Act, this 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, toll free at (888) 672-6787.

Sincerely,



Andrea L. Caldwell
Assistant Attorney General
Open Records Division

ALC/eeg

Ref: ID# 367849

Enc. Submitted documents

c: Requestor
(w/o enclosures)