



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 25, 2010

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

OR2010-01108

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# 367854.

The City of Dallas (the "city") received a request for a named city administrator's "notes, e-mails, etc.," regarding the requestor and/or the 2009 Captain Oral Assessment. You state the city will provide some of the requested information to the requestor. You claim that portions of the submitted information are excepted from disclosure under sections 552.107, 552.111, and 552.137 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.² We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

¹Although you also raise the attorney-client privilege under rule 503 of the Texas Rules of Evidence, we note section 552.107 is the proper exception to raise for your attorney-client privilege claim in this instance. *See* Open Records Decision No. 676 (2002).

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.

Initially, you acknowledge that the city failed to meet the deadlines prescribed by section 552.301(e) of the Government Code because you submitted a representative sample of the information you claim is subject to section 552.137 beyond the fifteen day deadline. *See id.* § 552.301(e). The untimely submitted information is therefore presumed to be subject to required public disclosure and must be released, unless there is a compelling reason to withhold any of that information. *See id.* § 552.302; *City of Dallas v. Abbott*, 279 S.W.3d 806, 811 (Tex. App.—Amarillo 2007, pet. granted); *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). This statutory presumption can generally be overcome when information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3, 325 at 2 (1982). Section 552.137 of the Government Code can provide a compelling reason that overcomes the presumption of openness; therefore, we will consider your argument under section 552.137 for the untimely submitted document, as well as your arguments for the documents you timely submitted.

Section 552.107(1) of the Government Code 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. 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, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *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. *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 timely submitted information constitutes communications between city attorneys and city staff that were made for the purpose of providing legal advice to the city. You state further that these communications were made in confidence and their confidentiality has been maintained. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the timely submitted information. Accordingly, the city may withhold the timely submitted information under section 552.107 of the Government Code.³

Next, you claim that the e-mail address you marked in the remaining information is excepted under section 552.137 of the Government Code. Section 552.137 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). The e-mail address you have marked is not of the type specifically excluded by section 552.137(c). Accordingly, the marked e-mail address must be withheld under section 552.137 of the Government Code, unless the owner consents to its disclosure.⁴

In summary, the city may withhold the timely submitted information under section 552.107 of the Government Code. The city must withhold the information you have marked in the remaining information under section 552.137 of the Government Code, unless the owner of the e-mail address consents to its disclosure. The remaining information must be released.

³As our ruling for this information is dispositive, we need not address your additional argument against disclosure for portions of this information.

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 the e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

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,



Laura Ream Lemus
Assistant Attorney General
Open Records Division

LRL/jb

Ref: ID# 367854

Enc. Submitted documents

c: Requestor
(w/o enclosures)