



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

February 4, 2010

Mr. Mark D. Kennedy  
ADA, Chief - Civil Division  
Hays County Criminal District Attorney  
Hays County Courthouse  
111 East San Antonio Street, Suite 204  
San Marcos, Texas 78666

OR2010-01732

Dear Mr. Kennedy:

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# 369342.

The Hays County Criminal District Attorney's Office (the "district attorney") received a request for all information produced by or relied upon by a named individual regarding public nuisance enforcement. You claim that the submitted information is 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 interested party may submit comments stating why information should or should not be released).

Initially, we address the requestor's comments that the district attorney possesses responsive information that it did not submit to this office. The district attorney states that it possesses only three responsive e-mails, which the district attorney has submitted to this office. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dism'd) (governmental body not required to disclose documents no longer in its possession); Open Records Decision No. 555 at 1-2 (1990) (governmental body not required to disclose information that did not exist at time request was received). Whether the district attorney has additional information that it has not provided is a question of fact. This office cannot resolve factual disputes in the opinion process. *See* Open Records

Decision Nos. 592 at 2 (1991), 552 at 4 (1990), 435 at 4 (1986). Where fact issues are not resolvable as a matter of law, we must rely on the facts alleged to us by the governmental body requesting our decision, or upon those facts that are discernible from the documents submitted for our inspection. *See* ORD 552 at 4. Accordingly, we must accept the district attorney's representation that it has no additional responsive information that it has not already provided to this office.

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. *See* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *See 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 claim that the information at issue consists of communications in which employees of Hays County (the "county") are seeking legal advice from an attorney representing the county. You state that the communications were intended to be confidential, and that the

confidentiality of the communications has been maintained.<sup>1</sup> Upon review, we find that the district attorney may withhold the information at issue under section 552.107(1) of the Government Code. We note, however, that one of the individual e-mails you seek to withhold under section 552.107 contained in one of the submitted e-mail strings consists of a communication with a non-privileged party. We have marked this non-privileged e-mail. To the extent this non-privileged e-mail exists separate and apart from the submitted e-mail string, it may not be withheld under section 552.107.

We note that the marked non-privileged e-mail includes an e-mail address subject to section 552.137 of the Government Code.<sup>2</sup> 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* Gov't Code § 552.137(a), (b). The e-mail address at issue is not of a type specifically excluded by section 552.137(c). *See id.* § 552.137(c). Therefore, the district attorney must withhold the e-mail address we have marked under section 552.137 of the Government Code, unless the owner of the e-mail address consents to its release.<sup>3</sup>

In summary, the district attorney may withhold the submitted information under section 552.107(1) of the Government Code; however, to the extent the non-privileged e-mail we have marked exists separate and apart from the submitted e-mail string, it may not be withheld under section 552.107. If the district attorney maintains the non-privileged e-mail separate and apart from the submitted e-mail string, the district attorney must withhold the e-mail address we have marked under section 552.137 of the Government Code and release the remaining information in the non-privileged e-mail.

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.

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<sup>1</sup>We note that the requestor asserts that the contents of the communications at issue have been disclosed to individuals who are not privileged parties. As previously noted, this office cannot resolve questions of fact in the open records process, but instead must rely on the representations of the governmental body requesting our opinion. *See* ORD 435.

<sup>2</sup>The 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).

<sup>3</sup>We 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 an 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 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,



Christopher D. Sterner  
Assistant Attorney General  
Open Records Division

CDSA/eeg

Ref: ID# 369342

Enc. Submitted documents

c: Requestor  
(w/o enclosures)