



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

February 8, 2010

Ms. Cary Grace  
Assistant City Attorney  
City of Austin Law Department  
P.O. Box 1088  
Austin, Texas 78767-8828

OR2010-01860

Dear Ms. Grace:

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# 369617.

The City of Austin (the "city") received a request for five categories of information pertaining to the property described in agenda item number seven of the August 7, 2009, city council meeting. You state most of the requested information will be released. You claim that the remaining requested 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.<sup>1</sup>

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,

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<sup>1</sup>We 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.

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.*, 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 submitted e-mails and their attachments constitute communications between city staff, city attorneys, and outside counsel hired to represent the city. You state these communications were made for the purpose of providing legal advice to the city. You have identified some of the parties to the communications and we are able to discern other privileged parties from the submitted information. You state the communications were intended to be and have remained confidential. Based on your representations and our review, we find the city may generally withhold the submitted information under section 552.107 of the Government Code. However, you have failed to explain how some of the parties to the submitted e-mails are privileged parties. Accordingly, we find that you have failed to demonstrate that one of the submitted e-mails, which we have marked, consists of an attorney-client communication for the purposes of section 552.107, and it may not be withheld on that basis. In addition, several of the submitted e-mail strings include e-mails that are between city attorneys, city staff, and non-privileged parties. Accordingly, to the extent these non-privileged e-mails and attachments, which we have marked, exist separate and apart from their respective e-mail strings, they may not be withheld under section 552.107.

We note that the information we have marked contains information that is subject to section 552.137 of the Government Code.<sup>2</sup> 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.

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<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. *See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).*

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 addresses we have marked are not of the type specifically excluded by section 552.137(c). Accordingly, to the extent they are not otherwise excepted under section 552.107, the marked e-mail addresses must be withheld under section 552.137 of the Government Code, unless their owners consent to their disclosure.<sup>3</sup>

In summary, except for the e-mail we have marked as non-privileged, the city may generally withhold the submitted information under section 552.107 of the Government Code. However, to the extent the remaining non-privileged e-mails and attachments, which we have marked, exist separate and apart from the submitted e-mail strings, they may not be withheld under section 552.107. In that case, the city must withhold the marked e-mail addresses under section 552.137 of the Government Code, unless the owners consent to their disclosure. As no further exceptions are claimed, 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 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,



Laura Ream Lemus  
Assistant Attorney General  
Open Records Division

LRL/jb

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<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 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.

Ref: ID# 369617

Enc. Submitted documents

c: Requestor  
(w/o enclosures)