ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 1, 2010

Ms. Cara Leahy White
Taylor Olson Adkins Sralla Elam, L.L.P.
Attorney for the City of Ovilla
6000 Western Place, Suite 300
Fort Worth, Texas 76107-4654

OR2010-04634

Dear Ms. White:

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# 374602.

The City of Ovilla (the "city"), which you represent, received a request for all documents prepared by city staffers, the mayor, and city council regarding a specified settlement agreement between the city and Triumph Development Corporation. You claim a portion of the submitted information is not subject to the Act. You claim that portions of the remaining submitted information are excepted from disclosure under sections 552.107 and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

You contend that Exhibit B is not public information subject to the Act. The Act applies to "public information," which is defined under section 552.002 of the Government Code as:

> information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:
>
> (1) by a governmental body; or
>
> (2) for a governmental body and the governmental body owns the information or has a right of access to it.

Gov't Code § 552.002; *see also id.* § 552.021. Information is generally subject to the Act when it is held by a governmental body and it relates to the official business of a governmental body, or is used by a public official or employee in the performance of official duties. Thus, virtually all of the information in a governmental body's physical possession constitutes public information and thus is subject to the Act. *Id.* § 552.002(a)(1). You assert Exhibit B consists of e-mail communications of current city council members that were created after the council members were elected, but prior to the individuals taking office. Thus, you argue that these e-mails do not relate to the official business of the city and were not collected, assembled, or maintained by the city pursuant to law or in connection with the transaction of official business. *See* Open Records Decision No. 635 (1995) (statutory predecessor not applicable to personal information unrelated to official business). However, we note that one of the e-mails at issue was sent to a city official after he had taken office and relates to official city business. Accordingly, this e-mail is subject to the Act and must be released unless it falls within the scope of an exception to disclosure. *See* Gov't Code §§ 552.002, .006, .021. The remaining information in Exhibit B, which we have marked, does not constitute public information as defined by section 552.002 of the Government Code and the city is not required to release this information under the Act.

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 (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 states the information in Exhibit C consists of communications between attorneys for the city and representatives of the city. You have identified most of the parties to the communications. Furthermore, you state that these communications were made for the purpose of facilitating the rendition of professional legal services and that the confidentiality of these communications has been maintained. Based on your representations and our review, we find that most of the submitted information consists of attorney-client privileged communications. However, some of the submitted communications were sent to a non-privileged party. Therefore, we find that these communications, which we have marked for release, do not constitute privileged attorney-client communications and may not be withheld under section 552.107 of the Government Code. In addition, we note that some of the individual e-mails contained in the submitted e-mail strings consist of communications with a non-privileged party or unidentified parties. To the extent these non-privileged e-mails, which we have marked, exist separate and apart from the otherwise privileged e-mail strings, they may not be withheld under section 552.107. Accordingly, with the exception of the communications marked for release and the marked non-privileged e-mails that exist separate and apart from the otherwise privileged e-mail strings, the city may withhold Exhibit C under section 552.107 of the Government Code.

Section 552.137 of the Government Code 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). Gov't Code § 552.137(a)-(c). The e-mail addresses you have marked in the remaining information, and the additional e-mail addresses we have marked, do not appear to be of types specifically excluded by section 552.137(c) of the Government Code. Therefore, the city must withhold the marked e-mail addresses under section 552.137 of the Government Code, unless the city has received consent for their release.[1]

In summary, except where we have marked for release, and except for the marked non-privileged e-mails that exist separate and apart from the otherwise privileged e-mail strings,

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[1]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.

the city may withhold Exhibit C under section 552.107 of the Government Code. The city must withhold the e-mail addresses you have marked, and the additional e-mail addresses we have marked under section 552.137 of the Government Code, unless the city has received consent for their release. The remaining responsive 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,

Jonathan Miles
Assistant Attorney General
Open Records Division

JM/cc

Ref: ID# 374602

Enc. Submitted documents

c: Requestor
(w/o enclosures)