



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

June 11, 2010

Mr. Joshua A. Skinner
Fanning Harper Martinson Brandt & Kutchin
Two Energy Square
4849 Greenville Avenue, Suite 1300
Dallas, Texas 75206

OR2010-08542

Dear Mr. Skinner:

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#382227.

The Arts of Collin County Commission, Inc. (the "commission"), which you represent, received a request for the contribution agreement that was referenced in the agenda of a March 11, 2010, board meeting, as well as all e-mails and other correspondence related to this agreement. You state that a finalized contribution agreement did not exist when you received the request. We note that a governmental body is not required to disclose information that did not exist at the time the request was received. *See Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 563 at 8 (1990), 555 at 1-2 (1990). You state you will provide some of the responsive information to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments submitted by the requestor. *See Gov't Code § 552.304* (interested party may submit written comments regarding availability of requested information).

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 commission is a local government corporation founded by the cities of Allen, Frisco, and Plano to create a performing arts center in Collin County, Texas. You state the submitted e-mails are confidential communications between commission attorneys, attorneys for the cities of Allen Frisco, and Plano, and commission employees regarded the anticipated contribution agreement. You inform us that the communications at issue were intended to be and have remained confidential. Based on your representations and our review, we agree that the information at issue constitutes privileged attorney-client communications. Accordingly, the commission may withhold the information at issue under section 552.107(1) of the Government Code.¹ We note, however, that one of the individual

¹As our ruling is dispositive, we need not address your section 552.111 argument against disclosure.

e-mails and attachments 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 and its associated attachment exists separate and apart from the submitted e-mail strings, this e-mail and its attachment may not be withheld under section 552.107(1) of the Government Code and 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,



Vanessa Burgess
Assistant Attorney General
Open Records Division

VB/jb

Ref: ID#382227

Enc. Submitted documents

c: Requestor
(w/o enclosures)