



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 16, 2010

Ms. Jameene Yvonne Banks
Denton, Navarro, Rocha & Bernal, P.C.
For City of Windcrest
2517 North Main Avenue
San Antonio, Texas 78212

OR2010-08754

Dear Ms. Banks:

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# 382987.

The City of Windcrest (the "city"), which you represent, received a request for e-mails sent from the mayor or city manager to the members of the city council during a specified time period regarding proposed charter amendments submitted by a citizens' group.¹ You claim that the requested information is excepted from disclosure under sections 552.107, 552.109, and 552.111 of the Government Code. We have considered the exceptions 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).

You assert that the submitted e-mail communications are protected by the attorney-client privilege. 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

¹You inform us that the city sought and received clarification of the information requested. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

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, 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 assert that the submitted e-mails consist of communications made for the purpose of facilitating the rendition of professional legal services to the client, which in this case is the city. You state that the communications were between the city’s attorneys and identified city officials and staff. You explain that a city ordinance sets out the procedures that must be followed for waiver of the attorney-client privilege by the city and state that “[t]hese procedures were not taken[.]” You further state that the city has not waived the confidentiality of the information at issue. Based on your representations and our review, we find that the city has demonstrated that the attorney-client privilege is applicable to the submitted information.

We note, however, the requestor’s assertion that a member of the city council referred to one of the e-mails in an open meeting and thus waived the attorney-client privilege as to the e-mail communication at issue. While you acknowledge that the e-mail was referenced at an open meeting, you argue that such a disclosure does not constitute a waiver of the attorney-client privilege. Under Rule 511 of the Texas Rules of Evidence, a privilege is waived if the holder of the privilege “voluntarily discloses or consents to disclosure of any significant part of the privileged matter unless such disclosure itself is privileged.” TEX. R. EVID. 511(1). Thus, the voluntary disclosure of a “significant part” of privileged information

results in an implied waiver of additional information that was not disclosed. *See Terrell State Hosp. of Tex. Dept. of Mental Health & Mental Retardation v. Ashworth*, 794 S.W.2d 937 (Tex.App.-Dallas 1990, writ denied).

In this instance, you inform us that the council member only briefly referenced the e-mail at issue and did not read any substantive portion of it aloud. You provided a recording of the city council meeting for our review. You state that the city and its representatives have not taken any action that would constitute a voluntary disclosure or consent to disclose the records to individuals outside the privilege. After a careful review of your representations and the submitted information, we find that the information that was disclosed at the open meeting does not constitute a "significant part" of the e-mail communication at issue. *See In re Monsanto Co.*, 998 S.W.2d 917 (Tex.App.-Waco 1999). We therefore conclude that the city may withhold the submitted information under section 552.107 of the Government Code. As our ruling is dispositive, we do not address your remaining claims.

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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/dls

Ref: ID# 382987

Enc. Submitted documents

c: Requestor
(w/o enclosures)