



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 12, 2010

Mr. Leonard V. Schneider
City Attorney for City of Magnolia
Liles Parker P.L.L.C.
525 East Sam Houston Parkway N, Suite 415
Houston, Texas 77060

OR2010-10222

Dear Mr. Schneider:

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# 386226.

The City of Magnolia (the "city"), which you represent, received a request for specified e-mails, including attachments, sent and received by two named individuals during a specified time period. You state you will release some of the requested information to the requestor. You claim that portions of the submitted information are excepted from disclosure under sections 552.106 and 552.107 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Initially, you state Documents 14 through 19 were the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2010-06702 (2010). In that decision, we ruled that the city's police department must release the submitted DIC-24 and DIC-25 forms with redactions pursuant to section 552.130 of the Government Code. We further ruled that the department may withhold portions of the remaining information under section 552.108(a)(1) of the Government Code. As we have no indication that there has been any change in the law, facts, or circumstances on which the previous ruling was based, we conclude the city may continue to rely on Open Records Letter No. 2010-06702 as a previous determination and withhold or release Documents 14

¹Although you also raise sections 552.101, 552.103, 552.108, 552.111, 552.130, and 552.136 of the Government Code, you have not submitted arguments explaining how these exceptions apply to the submitted information. Therefore, we presume you have withdrawn these exceptions. Further, you raise Texas Rule of Evidence 503 for some of the submitted information. However, we note that in this instance, the proper exception to raise when asserting the attorney-client privilege for information not subject to section 552.022 is section 552.107. See Open Records Decision Nos. 677 (2002), 676 at 6 (2002).

through 19 in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). With respect to the submitted information, which was not previously ruled upon in Open Records Letter No. 2010-06702, we will address your arguments against disclosure of this information.

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. ORD 676 at 6-7. First, a governmental body must demonstrate 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, 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.*, 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 the information you have highlighted consists of communications between city attorneys, city employees, and city officials that were made for the purpose of providing legal services to the city. You indicate these communications were made in confidence and their

confidentiality has been maintained. Based on your representations and our review, we find the information you have highlighted in Documents 1 through 3, 21, 87 through 93, 95, and 98 through 115 constitute privileged attorney-client communications. Thus, the city may withhold this highlighted information under section 552.107 of the Government Code. You also state the information in Documents 80 through 86 consist of communications between an attorney for the city and attorneys of other cities. However, we find you have failed to demonstrate how this information, which we have marked for release, consists of communications between privileged parties made for the purpose of facilitating the rendition of professional legal services to the city. Accordingly, the city may not withhold the information marked for release in Documents 80 through 86 under section 552.107.

You also seek to withhold portions of the remaining information under section 552.106 of the Government Code, which excepts from disclosure “[a] draft or working paper involved in the preparation of proposed legislation[.]” Gov’t Code § 552.106(a). Section 552.106 protects advice, opinion, and recommendation on policy matters in order to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the members of the legislative body. *See* Open Records Decision No. 460 at 3 (1987). Therefore, section 552.106 is applicable only to the policy judgments, recommendations, and proposals of persons who are involved in the preparation of proposed legislation and who have an official responsibility to provide such information to members of the legislative body. *Id.* at 1. Section 552.106 does not protect purely factual information from public disclosure. *See id.* at 2. However, a comparison or analysis of factual information prepared to support proposed legislation is within the scope of section 552.106. ORD 460 at 2. This office has also concluded that the drafts of municipal ordinances and resolutions which reflect policy judgments, recommendations, and proposals are excepted by section 552.106. Open Records Decision No. 248 (1980).

You state Document 4 consists of a draft of a proposed resolution. Based on your representations and our review, we conclude that Document 4 constitutes advice, opinion, analysis, and recommendation regarding proposed legislation. Therefore, the city may withhold Document 4 under section 552.106. You also claim Documents 79 and 21 through 77, which consist of a draft of an administrative letter and drafts of proposed interlocal agreements, are excepted from public disclosure under section 552.106. However, we find you have not demonstrated how this information constitutes drafts or working papers involved in the preparation of proposed legislation. Therefore, Documents 79 and 21 through 77 may not be withheld under section 552.106.

We note the remaining information includes an e-mail address subject to section 552.137 of the Government Code.² Section 552.137 excepts from disclosure “an e-mail address of a

²The 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).

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. The e-mail address in the remaining information is not of a type specifically excluded by section 552.137(c). As such, this e-mail address must be withheld under section 552.137, unless the owner of the address has affirmatively consented to its release.³

In summary, the city may continue to rely on Open Records Letter No. 2010-06702 as a previous determination and withhold or release the identical information in accordance with that ruling. The city may withhold the information you have highlighted in Documents 1 through 3, 21, 87 through 93, 95, and 98 through 115 under section 552.107 of the Government Code. The city may withhold Document 4 under section 552.106 of the Government Code. The city must withhold the e-mail address we have marked under section 552.137 of the Government Code, unless the owner of the address has affirmatively consented to its release. 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, 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,



Christina Alvarado
Assistant Attorney General
Open Records Division

CA/tp

³We 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 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

Ref: ID# 386226

Enc. Submitted documents

c: Requestor
(w/o enclosures)