ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 12, 2010

Ms. Carol Freeman
Ross, Banks, May, Cron & Cavin, P.C.
For City of League City
2 Riverway, Suite 700
Houston, Texas 77056-1918

OR2010-10241

Dear Ms. Freeman:

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# 386193 (City# 10-189).

The City of League City (the "city"), which you represent, received a request for all e-mails sent from one named individual to another named individual during a specified time period. You claim that the submitted information is excepted from disclosure under section 552.107 of the Government Code.[1] We have considered the exception you claim and reviewed the submitted 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. 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

[1]Although you appear to raise section 552.101 of the Government Code in conjunction with section 552.107 of the Government Code, section 552.101 does not encompass other exceptions in the Act. Furthermore, you have not submitted arguments explaining how section 552.101 applies to the submitted information; therefore, we presume you have withdrawn any arguments under that exception. *See* Gov't Code §§ 552.301, .302.

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). 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)-(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 the submitted e-mails are communications between city employees and attorneys with a law firm retained by the city. You also state that these communications were made in furtherance of the rendition of legal services to the city and were not intended to be disclosed to third parties. We note, however, that the submitted e-mails were forwarded to an individual whom you have not identified. You have not explained the city's relationship with this individual or how she is a privileged party with respect to the submitted e-mails. We therefore find the city has waived its claim under section 552.107 with regard to the submitted e-mails, and they may not be withheld on that basis. *See* Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally).

We note the remaining information includes an e-mail address that is subject to section 552.137 of the Government Code, which 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).[2] *See* Gov't Code § 552.137(a)-(c). The personal e-mail address in the submitted information is not specifically excluded by section 552.137(c). As such, this e-mail address, which we have marked, must be withheld under section 552.137 unless the owner of the address has affirmatively consented to its release. *See id.* § 552.137(b).[3] As you raise no further exceptions to disclosure, the remaining information must be released to the requestor.

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,

James McGuire
Assistant Attorney General
Open Records Division

JM/dls

Ref: ID# 386193

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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[2]The Office of the Attorney General will raise a mandatory exception like section 552.137 on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

[3]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 e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.