



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 13, 2010

Mr. Leonard V. Schneider
Liles Parker, P.L.L.C.
For City of Huntsville
525 North Sam Houston Parkway East, Suite 415
Houston, Texas 77060

OR2010-15630

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# 397278.

The City of Huntsville (the "city"), which you represent, received a request for e-mails sent to or from a named city council member during a specified time period. You state you have released some of the requested information. You claim that the submitted information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note some of the submitted information was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2010-14668 (2010). In that ruling, we determined: (1) the city may withhold portions of the submitted e-mails under sections 552.103 and 552.107 of the Government Code; (2) the city must withhold the information we marked under section 552.117 of the Government Code if it pertains to an individual who timely elected confidentiality of his information pursuant to section 552.024 of the Government Code; and (3) the city must withhold the e-mail addresses we marked under section 552.137 of the Government Code, unless their owners consent to their disclosure. As we have no indication that there has been any change in the law, facts,

¹Although you raise section 552.101 of the Government Code in conjunction with sections 552.103 and 552.107 of the Government Code, section 552.101 does not encompass other exceptions in the Act. Furthermore, although you also raise Texas Rule of Evidence 503, 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 of the Government Code is section 552.107. See Open Records Decision Nos. 677 (2002), 676 at 6 (2002).

or circumstances on which the previous ruling was based, we conclude that the city may rely on Open Records Letter No. 2010-14668 as a previous determination and continue to withhold or release any previously ruled upon information in accordance with that ruling. See Open Records Decision No. 673 (2001) (outlining elements of first type of previous determination). However, to the extent that the submitted information is not the same information ruled upon in Open Records Letter No. 2010-14668, we will consider your arguments against disclosure.

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 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. See 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, 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 communications you have marked in the submitted e-mails are communications between city attorneys, city officials, and city employees that were made for the purpose of providing legal advice to the city.² You inform us that the

²We note the page numbers listed in the arguments set forth in the city’s brief do not exactly match the markings in the submitted information. For example, you do not mention pages 159-61 in your arguments, but you have marked portions of those pages as excepted from disclosure. In order to reconcile the discrepancy, this office applied the arguments under sections 552.103, 552.107, and 552.111 of the Government Code to the

communications at issue were intended to be and have remained confidential. You have identified the parties to the communications. Based on your representations and our review, we agree that the information you have marked constitutes privileged attorney-client communications. Accordingly, we conclude the city may withhold the information you have marked under section 552.107(1) of the Government Code.³

We note some of the remaining information may be confidential under section 552.117 of the Government Code.⁴ Section 552.117(a)(2) excepts from public disclosure a peace officer's family member information regardless of whether the peace officer made an election under section 552.024 of the Government Code. Gov't Code § 552.117(a)(2). Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. In this instance, the officer whose information we have marked is no longer employed by the city, and it is unclear whether he is currently a licensed peace officer as defined by article 2.12. Accordingly, if this former employee is currently a licensed peace officer as defined by article 2.12, then the city must withhold the information we have marked pursuant to section 552.117(a)(2) of the Government Code.

Section 552.117(a)(1) excepts from disclosure the family member information of a current or former employee of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. *See id.* § 552.117(a)(1). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. To the extent the former city police department officer whose information we have marked is no longer a licensed peace officer but timely requested confidentiality under section 552.024, the city must withhold the information we have marked under section 552.117(a)(1).

Next, we note portions of the remaining information are subject to section 552.137 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). *See id.* § 552.137(a)-(c). The e-mail addresses we have marked in the remaining submitted

portions of the submitted information you marked.

³As our ruling is dispositive, we do not address your remaining arguments against disclosure of this information.

⁴The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

information are not a type specifically excluded by section 552.137(c). Therefore, the city must withhold these e-mail addresses under section 552.137 of the Government Code, unless their owners have affirmatively consented to their disclosure.⁵

In summary, the city may continue to rely on Open Records Letter No. 2010-14668 as a previous determination and withhold or release any previously ruled upon information in accordance with that ruling. To the extent the submitted information is not encompassed by the prior ruling, the city may withhold the information you have marked under section 552.107(1) of the Government Code. If the former employee whose information we have marked is a currently licensed peace officer as defined by article 2.12, then the city must withhold this information pursuant to section 552.117(a)(2) of the Government Code. If the former employee is no longer a licensed peace officer but timely requested confidentiality under section 552.024 of the Government Code, the city must withhold his information under section 552.117(a)(1) of the Government Code. The city must withhold the e-mail addresses we have marked under section 552.137 of the Government Code unless their owners affirmatively consent to their disclosure. The city must release the remaining information.

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_or1.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

⁵In Open Records Decision No. 684 (2009), this office issued 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.

Ref: ID# 397278

Enc. Submitted documents

c: Requestor
(w/o enclosures)