



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 2, 2010

Mr. Dennis J. Eichelbaum
Schwartz & Eichelbaum
Wardell Mehl and Hansen, P.C.
For Lovejoy Independent School District
5300 Democracy Drive, Suite 200
Plano, Texas 75024

OR2010-16566

Dear Mr. Eichelbaum:

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# 398803.

The Lovejoy Independent School District (the "district") received a request for 1) documents and correspondence regarding wastewater services between the district and the North Texas Municipal Water District ("NTMWD") from April 2010 to the date of the request; 2) documents and correspondence regarding wastewater services between the district and citizens from April 2010 to the date of the request; 3) the wastewater service agreement and related documents between the district and NTMWD; and 4) the district's e-mail server logs for May, June, and July 2010.¹ You indicate e-mail attachments related to category two of the request have been or will be released to the requestor. You claim the submitted information is excepted from disclosure under section 552.107 of the Government Code.² We have considered the exception you claim and reviewed the submitted information. We

¹You state, and provide documentation showing, the district sought and received clarification from the requestor regarding the request. *See* Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used).

²Although you 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.

have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note the requestor excludes from his request e-mail addresses of members of the public. Thus, any such information within the submitted documents is not responsive to the instant request. In addition, we note a portion of the submitted information, which we have marked, is not responsive because it consists of correspondence that does not relate to wastewater services. Our ruling does not address this non-responsive information, and the district need not release it in response to the request.

Next, we note you have only submitted information pertaining to category two of the request. We note the requestor contends the requested wastewater agreement has not been released. Thus, to the extent any information responsive to the remainder of the request existed and was maintained by the district on the date the district received the request, we assume you have released it. If you have not released any such information, you must do so at this time. *See id.* §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

Next, we address the requestor's assertion that the district failed to comply with the procedural requirements of section 552.301(b) of the Government Code. Pursuant to section 552.301(b), a governmental body that receives a request for information that it wishes to withhold must ask for the attorney general's decision and state the exceptions that apply within ten business days after receiving the request. *See* Gov't Code § 552.301(b). In this instance, the district received the original request for information on August 3, 2010. The district sought and received clarification of the request on August 10, 2010. The district again sought and received clarification of the request on August 16, 2010. The requestor contends the district's second request for clarification posed a question but did not constitute a good-faith request for clarification. We note the district's second request for clarification poses a question and requests clarification regarding the portion of the request related to the district's e-mail server logs. As we have no indication that the district acted in bad faith in seeking clarification in this instance, we consider the district's ten-business-day period for requesting a decision under section 552.301(b) to have begun on August 16, 2010, the date of the district's receipt of the requestor's response to the request for clarification. *See City of Dallas v. Abbott*, 304 S.W.3d 380, 384 (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). Thus, the district's ten-business-day deadline was August 30, 2010. The district's request for a ruling from this office was postmarked August 27, 2010. *See* Gov't Code § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Accordingly, we find the district met its procedural

obligations under section 552.301(b). Therefore, we will address the district's arguments against disclosure of the responsive 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 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 state the submitted information was communicated between district employees and the district's attorneys. You further state the communications were made to facilitate the rendition of legal advice and services to the district. You state these communications were made in confidence and have maintained their confidentiality. Based on your representations and our review, we conclude the district may withhold the submitted responsive information under section 552.107 of the Government Code.

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,

A handwritten signature in black ink, appearing to read "Jennifer Burnett", with a horizontal line extending to the right.

Jennifer Burnett
Assistant Attorney General
Open Records Division

JB/dls

Ref: ID# 398803

Enc. Submitted documents

c: Requestor
(w/o enclosures)