



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 4, 2011

Mr. John T. Reynolds
Corporate Counsel
San Antonio Water System
P.O. Box 2449
San Antonio, Texas 78298-2449

OR2011-04528

Dear Mr. Reynolds:

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# 413371.

The San Antonio Water System (the "system") received a request for all documents pertaining to "requests for affirmations and/or verifications of 'Category 1' determinations received by [the system] within the last 12 months." You state the system will provide most of the requested information to the requestor. You claim the submitted e-mail string and a portion of the submitted file notes are excepted from disclosure under section 552.107 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

You claim the submitted information at issue is protected by the attorney-client privilege. 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. *See* Open Records Decision No. 676 at 6-7 (2002). 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. *See* 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. *See 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 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. 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, *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. See *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 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 e-mail string submitted as Exhibit D and the portion of the file notes you have indicated in Exhibit E consist of or document communications between a system attorney and system staff that were made in furtherance of the rendition of professional legal services. You also state the communications were made in confidence, and that confidentiality has been maintained. Based on your representations and our review of the information at issue, we find you have generally demonstrated the applicability of the attorney-client privilege to the information at issue. We note, however, one of the individual e-mail messages in the privileged e-mail string consists of a communication with a party you have not shown to be privileged. Therefore, if this individual e-mail message, which we have marked, exists separate and apart from the otherwise privileged e-mail string to which it is attached, the system may not withhold the individual e-mail message under section 552.107(1) of the Government Code. If the marked e-mail message does not exist separate and apart from the privileged e-mail string, the system may withhold it under section 552.107(1) of the Government Code. Regardless, the system may withhold the remaining information you seek to withhold under section 552.107(1) of the Government Code.

To the extent the marked individual e-mail message exists separate and apart from the otherwise privileged e-mail string, we note a portion of the message may be subject to section 552.137 of the Government Code.¹ Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating

¹The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

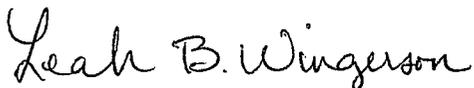
electronically with a governmental body," unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). The e-mail address at issue is not specifically excluded by section 552.137(c). As such, this e-mail address, which we have marked, must be withheld under section 552.137 of the Government Code, unless the owner of the address has affirmatively consented to its release.² *See id.* § 552.137(b).

In summary, the system may generally withhold the e-mail string and file notes at issue in Exhibits D and E under section 552.107(1) of the Government Code, but may not withhold the non-privileged individual e-mail message we have marked in Exhibit D, if it exists separate and apart from the otherwise privileged e-mail string to which it is attached. To the extent the marked individual e-mail message exists separate and apart from the otherwise privileged e-mail string, the system must withhold the e-mail address we have marked in the e-mail message under section 552.137 of the Government Code, unless the owner of the address has affirmatively consented to its release. The system 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_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,



Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/dls

²Open Records Decision No. 684 (2009) is 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# 413371

Enc. Submitted documents

c: Requestor
(w/o enclosures)