ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 29, 2011

Ms. Angela M. DeLuca
Assistant City Attorney
City of Bryan
P.O. Box 1000
Bryan, Texas 77805-1000

OR2011-05867

Dear Ms. DeLuca:

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# 415897.

The City of Bryan (the "city") received a request for correspondence or records of interaction between any city staff or employees pertaining to any of four specified terms or three named individuals over a specified period of time. You state the city has released some of the requested information. You claim that portions of the submitted information are excepted from disclosure under sections 552.101, 552.107, and 552.110 of the Government Code. You also state release of some of the submitted information may implicate the proprietary interests of third parties. Accordingly, you state, and provide documentation showing, you notified the Care Corporation and the Brazos Animal Shelter of the request for information and of their right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have considered the submitted arguments and reviewed the representative sample of submitted information.[1] We have also received and considered

[1]We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

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

Initially, we address the requestor's assertion the city failed to comply with the procedural requirements of the Act. Section 552.301 describes the procedural obligations placed on a governmental body that receives a written request for information it wishes to withhold. Pursuant to section 552.301(b), the governmental body must ask for the attorney general's decision and state the exceptions that apply within ten business days after receiving the request. *See id.* § 552.301(a), (b). This office does not count any holidays observed by a governmental body that receives a request for information as business days for the purpose of calculating that governmental body's deadlines under the Act. In this instance, the city states it received the request for information on February 9, 2011. We note February 21, 2011, was a city holiday. Thus, the city's ten-business-day deadline to request an open records ruling was February 24, 2011. The city's request for a ruling was sent by facsimile and received by this office on February 23, 2011. Consequently, we conclude the city complied with section 552.301(b) in requesting a ruling from this office.

Next, although the city argues that the requested information is excepted under section 552.110 of the Government Code, that exception is designed to protect the interests of third parties, not the interests of a governmental body. Thus, we do not address the city's argument under section 552.110. We note that an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See id.* § 552.305(d)(2)(B). As of the date of this letter, this office has not received comments from the Care Corporation or the Brazos Animal Shelter explaining why each third party's submitted information should not be released. Therefore, we have no basis to conclude that these third parties have a protected proprietary interest in the submitted information. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, the city may not withhold any portion of the submitted information based upon the proprietary interests of the Care Corporation or the Brazos Animal Shelter.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes. The city asserts the bid proposal in Exhibit D is excepted from disclosure under section 552.101 in conjunction with section 252.049 of the Local Government Code, which provides as follows:

> (a) Trade secrets and confidential information in competitive sealed bids are not open for public inspection.

> (b) If provided in a request for proposals, proposals shall be opened in a manner that avoids disclosure of the contents to competing offerors and keeps the proposals secret during negotiations. All proposals are open for public inspection after the contract is awarded, but trade secrets and confidential information in the proposals are not open for public inspection.

Local Gov't Code § 252.049. This statutory provision merely duplicates the protection that section 552.110 of the Government Code provides to trade secret and commercial or financial information. As previously stated, we have not received any arguments from any interested third party establishing that Exhibit D qualifies as either a trade secret or confidential commercial or financial information for purposes of section 552.110. *See* Gov't Code § 552.110(a)-(b). Therefore, the city may not withhold Exhibit D under section 552.101 of the Government Code in conjunction with section 252.049 of the Local Government Code.

You assert Exhibit B is excepted from disclosure under section 552.107(1) of the Government Code. Section 552.107 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 Texas 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, 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.* 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

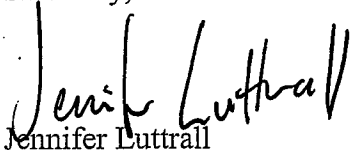
(Tex. App.—Waco 1997, no pet.). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected 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 assert the e-mails submitted as Exhibit B consist of communications between city staff and city attorneys that were made for the purpose of providing legal advice to the city. You also assert these communications were made in confidence and have maintained their confidentiality. You have identified the privileged parties to these communications. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to most of the e-mails in Exhibit B, which the city may withhold under section 552.107 of the Government Code. However, we note some of the individual e-mails in the submitted e-mail chains consist of communications with non-privileged parties and a party whom the city has not identified as a privileged party. Thus, to the extent these non-privileged e-mails, which we have marked, exist separate and apart from the submitted e-mail chains in which they appear, the city must release them to the requestor. As no further exceptions have been raised, 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,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/dls

Ref: ID# 415897

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Ms. Melissa Ball
Executive Director
Brazos Animal Shelter
2207 Finfeather Road
Bryan Texas 77801
(w/o enclosures)

Ms. Amy Holifield
President
Care Corporation
P.O. Box 9879
The Woodlands, Texas 77387
(w/o enclosures)