



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 20, 2011

Mr. B. Chase Griffith
Brown & Hofmeister, L.L.P.
740 East Campbell Road, Suite 800
Richardson, Texas 75081

OR2011-07120

Dear Mr. Griffith:

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# 418354.

The City of McKinney (the "city"), which you represent, received a request for the personnel file of a former police officer. You state the city has released the majority of the requested information. You claim the submitted information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note the file for internal affairs investigation number 10-0033 was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2011-00363 (2011). In Open Records Letter No. 2011-00363, we concluded the city must withhold certain marked information within the file for internal affairs investigation number 10-0033 pursuant to section 552.101 of the Government Code in conjunction with common-law privacy, section 1701.454 of the Occupation Code, and chapter 411 of Government Code, as well as under sections 552.102, 552.130, and 552.137 of the Government Code, but must release the remaining information. You now seek to withhold the file for internal affairs investigation number 10-0033 under section 552.111 of the Government Code. Section 552.007 of the Government Code provides if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential by law. *See Gov't Code* § 552.007; *Open Records Decision No. 518 at 3 (1989)*; *see also Open Records Decision No. 400 (1983)* (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Accordingly, pursuant to section 552.007, the city may not now withhold the previously released information unless its release is expressly prohibited by law or the information is confidential by law. Section 552.111 does not prohibit the release of information or make information confidential by law. *Open Records Decision Nos. 665 at 2 n.5 (2000)*

(discretionary exceptions generally), 470 at 7 (1987) (statutory predecessor to Gov't Code § 552.111 subject to waiver). Thus, the city may not now withhold any of the previously released information in the file for internal affairs investigation number 10-0033 under section 552.111. Further, you do not inform us that there has been any change in the law, facts, and circumstances on which Open Records Letter No. 2011-00363 is based. Accordingly, we conclude the city must continue to rely on Open Records Letter No. 2011-00363 as a previous determination and withhold or release the file for internal affairs investigation number 10-0033 in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

You claim the remaining memorandum is excepted under section 552.107(1) of the Government Code, which 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 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). 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. *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 remaining memorandum consists of a communication between a city attorney and the assistant chief of police that was made for the purpose of facilitating the rendition of professional legal services to the city. You state that this information was made in confidence and its confidentiality has been maintained. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the remaining memorandum. Accordingly, the city may withhold the remaining memorandum, which we have marked, under section 552.107(1) of the Government Code.

In summary, we find the city must continue to rely on Open Records Letter No. 2011-00363 as a previous determination and withhold or release the file for internal affairs investigation number 10-0033 in accordance with that ruling. The city may withhold the remaining memorandum, which we have marked, under section 552.107(1) 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,



Sean Nottingham
Assistant Attorney General
Open Records Division

SN/bs

Ref: ID# 418354

Enc. Submitted documents

c: Requestor
(w/o enclosures)