



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 14, 2011

Ms. Donna M. Fairweather
Assistant City Attorney
City of Galveston
P.O. Box 779
Galveston, Texas 77552-0779

OR2011-13234

Dear Ms. Fairweather:

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# 429818 (Galveston ORR# 11-285).

The City of Galveston (the "city") received a request for all documents pertaining to the purchase of certain specified properties. You state the city has released some of the information. You claim the submitted information is excepted from disclosure under section 552.107 of the Government Code. You have also provided notice of the request to certain third parties. *See* Gov't Code § 552.304 (interested party may submit comments to this office stating why the information at issue should or should not be released). We have considered the exception you claim and reviewed the submitted representative sample of information.¹

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *Id.* § 552.107(1). 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

¹We assume 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 those records contain substantially different types of information than those submitted to this office.

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.*, 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, orig. proceeding). Section 552.107(1) generally excepts an entire communication 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). We note communications with third party consultants with which a governmental body shares a privity of interest are protected under section 552.107. Open Records Decision Nos. 464 (1987), 429 (1985). However, a governmental body does not share a privity of interest with a third party when it is involved in contract negotiations, as the parties’ interests are adverse.

You state the submitted e-mail communications were made for the purpose of providing legal services to the city. You have identified most of the parties to the communications. You state these e-mails were intended to be confidential and they have remained confidential. Based on these representations, and our review, we agree section 552.107 is generally applicable to Exhibits 5-10 and 12-14, and the city may withhold this information under section 552.107(1) of the Government Code. However, we note some of the otherwise privileged e-mail strings in these exhibits include communications with non-privileged parties. If these communications, which we have marked, exist separate and apart from the privileged e-mail strings in which they appear, then the city may not withhold the communications with the non-privileged parties under section 552.107(1) of the Government Code. In addition, we find the entire e-mail string submitted as Exhibit 11 involves a

non-privileged party. Accordingly, we find section 552.107 does not apply to this information, which we have marked, and the city may not withhold it under section 552.107 of the Government Code.

We note the communications with non-privileged parties contain e-mail addresses subject to section 552.137 of the Government Code.² Section 552.137 provides, “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act],” unless the owner of the e-mail address has affirmatively consented to its release or the e-mail address is specifically excluded by subsection (c). Gov’t Code § 552.137(a)–(c). The city must withhold the e-mail address we have marked in Exhibit 11 under section 552.137 of the Government Code, unless the owner of the e-mail address has affirmatively consented to its release. To the extent the remaining non-privileged e-mails exist separate and apart from the privileged e-mail strings in which they appear, the city must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners have consented to their release.³

In summary, the city may withhold Exhibits 5-10 and 12-14 under section 552.107(1) of the Government Code. However, to the extent the marked non-privileged e-mails exist separate and apart from the otherwise privileged e-mail strings, they may not be withheld under section 552.107(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 the owners of the e-mail addresses have consented to their release. 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.

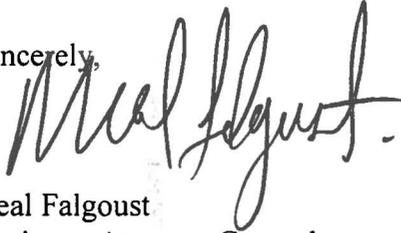
This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General’s Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public

²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

³We note this office has issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including the e-mail addresses of members of the public under 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

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,



Neal Falgoust
Assistant Attorney General
Open Records Division

NF/agn

Ref: ID# 429818

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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