



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 1, 2011

Mr. Lisa M. Biediger  
Assistant City Attorney  
City of San Antonio  
P.O. Box 839966  
San Antonio, Texas 78283-3966

OR2011-16047

Dear Ms. Biediger:

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# 434936 (COSA File No. W002823-081511).

The City of San Antonio (the "city") received a request for any documents regarding the cable television program "Top Chef" or the production company Magical Elves, Inc. ("Magical Elves"), from all city departments or affiliates. You state the city has released some of the requested information. You claim that portions of the submitted information are excepted from disclosure under section 552.107 of the Government Code. You also inform us release of the submitted information may implicate the proprietary interests of Magical Elves. Accordingly, you notified this company of the request for information and of its 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 received comments from an attorney who represents Magical Elves. We have considered the submitted arguments and reviewed the submitted information.

You raise section 552.107 of the Government Code for portions of the submitted information. 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 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 inform us the information you have marked under section 552.107 consists of communications between the city’s attorney and city staff that were made in furtherance of the rendition of professional legal services to the city. You also inform us these communications were not intended to be disclosed to any third parties. You state the city and its representatives have not taken any action that would constitute a voluntary disclosure or consent to disclosure of the communications to any individual or entity outside the city. Based on your representations and our review, we conclude the city has established the information at issue is protected by the attorney-client privilege. Therefore, the city may withhold the information you marked under section 552.107(1).

Magical Elves contends some of the submitted remaining information, including pricing information, should be withheld under section 552.110(b) of the Government Code. Section 552.110 of the Government Code protects the proprietary interests of private parties with respect to two types of information: “[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision” and “commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was

obtained.” Gov’t Code § 552.110(a)-(b). We note a claim under section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *See* Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause substantial competitive harm). We also note the pricing aspects of a contract with a governmental entity are generally not excepted from disclosure under section 552.110(b). *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors); *see generally* Dept of Justice Guide to the Freedom of Information Act 344-345 (2009) (federal cases applying analogous Freedom of Information Act exemption reason that disclosure of prices charged government is a cost of doing business with government). Moreover, the terms of a contract with a governmental body are generally not excepted from public disclosure. *See* Gov’t Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); Open Records Decision No. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency). Having considered all of Magical Elves’s arguments and reviewed the information at issue, we find Magical Elves has not made the specific factual or evidentiary showing required by section 552.110(b) that release of the information at issue would cause the company substantial competitive harm. We therefore conclude the city may not withhold any of the remaining information under section 552.110.

Magical Elves has also marked certain e-mail addresses under section 552.137 of the Government Code. This section states “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 public disclosure or the e-mail address falls within the scope of section 552.137(c). Gov’t Code § 552.137(a)-(c). We note section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. Magical Elves states that the owners of the e-mail addresses at issue have not consented to the disclosure of this information. Accordingly, the city must withhold the e-mail addresses Magical Elves has marked under section 552.137. Furthermore, we have marked additional e-mail addresses that do not fall within the scope of section 552.137(c). The city must withhold these e-mail addresses under section 552.137, unless the owners of the e-mail addresses have affirmatively consented to their release.<sup>1</sup>

In summary, the city may withhold the information you marked under section 552.107(1) of the Government Code. The e-mail addresses Magical Elves marked under section 552.137

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<sup>1</sup>We note Open Records Decision No. 684 (2009) is a previous determination issued by this office authorizing all governmental bodies to withhold ten categories of information without the necessity of requesting an attorney general decision, including an e-mail address of a member of the public under section 552.137 of the Government Code.

of the Government Code must be withheld under this section. The additional e-mail addresses we marked must be withheld under section 552.137 of the Government Code, unless the owners of these e-mail addresses have affirmatively 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](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,



Kenneth Leland Conyer  
Assistant Attorney General  
Open Records Division

KLC/agn

Ref: ID# 434936

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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