



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 16, 2011

Ms. Constance K. Acosta  
Ross, Banks, May, Cron & Cavin, P.C.  
2 Riverway, Suite 700  
Houston, Texas 77056

OR2011-18559

Dear Ms. Acosta:

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# 439458.

The City of Friendswood (the "city"), which you represent, received three requests from the same requestor for the following information: (1) all communications sent and received by a named individual during a specified time period mentioning or pertaining to ten items and all communications for specified dates, (2) all documents from an investigation by a named individual pertaining to the requestor's client after May 19, 2011, (3) the city's policy on internal affairs investigations conducted by the city's Human Resource Department, (4) a copy of the Friendswood Police Department's policies and procedures that were in effect at the time the requestor's client was terminated, (5) a complete copy of a named individual's report pertaining to the requestor's client, (6) a copy of the homeowner's statement referenced at a specified hearing, (7) a copy of the form filed with the Texas Commission on Law Enforcement Office Standards and Education for the Friendswood Municipal Court Police Department, (8) the city's policy and procedures regarding how appeals are handled by the City Manager, and (9) the entire Kimmons Investigative Report conducted on the requestor's client during a specified time period.<sup>1</sup> You indicate you do not have information

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<sup>1</sup>You state the city sought and received clarification from the requestor regarding the requests. *See* Gov't Code § 552.222(b) (providing that if request for information is unclear, governmental body may ask requestor to clarify the request); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or

responsive to a portion of category one of the requests.<sup>2</sup> You state the city will release some information to the requestor. You claim the submitted information is excepted from disclosure under section 552.107 of the Government Code and privileged under Texas Rule of Evidence 503.<sup>3</sup> We have considered your arguments and reviewed the submitted information.

Initially, we note you have not submitted any information pertaining to categories two through nine of the requests. To the extent such information existed and was maintained by the city on the date the city received the request for information, we presume the city has released it. If not, the city must do so at this time. *See* Gov't Code §§ 552.301, .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to the requested information, it must release the information as soon as possible).

Next, we note some of the submitted information is not responsive to the present requests because it was not created during the specified time periods. The city need not release this non-responsive information, which we have marked, and this ruling will not address that information.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. Gov't Code § 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 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.

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overbroad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

<sup>2</sup>We note the Act does not require a governmental body to disclose information that did not exist at the time the request was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

<sup>3</sup>Although you raise section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503, this office has concluded section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). In addition, although you raise sections 552.103 and 552.111 of the Government Code and Texas Rule of Civil Procedure 192.5, you have not submitted any arguments explaining how these exceptions and rule apply to the submitted information. Therefore, we assume you have withdrawn these arguments. *See* Gov't Code §§ 552.301, .302.

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 to only communications between or among clients, client representatives, lawyers, and lawyer representatives. 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 to only 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 state the submitted responsive information constitutes confidential attorney-client communications between city employees, its legal counsel, and consultants of the city that were made for the purpose of providing professional legal services to the city. You also state the communications were intended to be and, have remained, confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Accordingly, the city may withhold the submitted responsive information under section 552.107 of the Government Code.<sup>4</sup>

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

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<sup>4</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure.

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,

A handwritten signature in black ink, appearing to read "Melanie J. Villars". The signature is fluid and cursive, with a long horizontal stroke at the end.

Melanie J. Villars  
Assistant Attorney General  
Open Records Division

MJV/ag

Ref: ID# 439458

Enc. Submitted documents

c: Requestor  
(w/o enclosures)