



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 16, 2011

Ms. Tiffany N. Evans
Assistant City Attorney
City of Houston
P.O. Box 368
Houston, Texas 77001-0368

OR2011-18561

Dear Ms. Evans:

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# 439182 (GC# 19025).

The City of Houston (the "city") received a request for information pertaining to meetings and lobbyists' filings regarding a specified proposed ordinance. You state some of the requested information will be released. You further state you have no information responsive to a portion of the request.¹ You claim the submitted information is excepted from disclosure under sections 552.106 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

Section 552.107(1) of the Government Code 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

¹The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

²We 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 that submitted to this office.

in order to withhold the information at issue. *See* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate 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. *See* 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. *See 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 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. *See 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 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 information submitted as Exhibit 2 consists of communications involving city attorneys, legal staff, and employees in their capacities as clients. You state these communications were made in furtherance of the rendition of professional legal services to the city. You state these communications were confidential, and you state the city has maintained the confidentiality of the information at issue. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to most of the information in Exhibit 2. Accordingly, with the exception of the information we have marked for release, the city may generally withhold Exhibit 2 under section 552.107(1) of the Government Code. However, we note several of the individual e-mails contained in the otherwise privileged e-mail strings are communications with individuals whom you have not shown to be privileged parties. Thus, to the extent these non-privileged e-mails, which we have marked, exist separate and apart from the submitted e-mail strings, they may not be withheld under section 552.107(1). Upon review, we find some of the information you seek to withhold in Exhibit 2 has been shared with individuals

whom you have not demonstrated are privileged parties. Therefore, we conclude you have failed to establish how this information, which we have marked for release, constitutes communications between or among city employees and attorneys for the purposes of section 552.107(1), and it may not be withheld on that basis.

Section 552.106 of the Government Code excepts from disclosure “[a] draft or working paper involved in the preparation of proposed legislation.” Gov’t Code § 552.106(a). Section 552.106(a) ordinarily applies only to persons with a responsibility to prepare information and proposals for a legislative body. *See* Open Records Decision No. 460 at 1 (1987). The purpose of this exception is to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the members of the legislative body; therefore, section 552.106 encompasses only policy judgments, recommendations, and proposals involved in the preparation of proposed legislation and does not except purely factual information from public disclosure. *Id.* at 2. This office has concluded drafts of municipal ordinances and resolutions that reflect policy judgments, recommendations, and proposals are excepted by section 552.106. Open Records Decision No. 248 (1980).

You state the remaining information includes e-mails between the city and members of the public who are stakeholders and business owners who may be affected by the proposed regulations. You do not inform us any of these members of the public had any official responsibility to provide legislative advice to the city. Likewise, you have not established the city and these members of the public share a privity of interest or common deliberative process with respect to any potential city ordinance. We therefore conclude the e-mails exchanged between the city and members of the public, including attached drafts of the ordinance, may not be withheld under section 552.106. We also find you have not demonstrated how any of the remaining information constitutes recommendations, opinions, or advice for purposes of section 552.106. We therefore conclude the city may not withhold any of the remaining information under section 552.106 of the Government Code.

We note the remaining information contains e-mail addresses that may be subject to section 552.137 of the Government Code.³ Section 552.137 excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body,” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). Gov’t Code § 552.137(a)-(c). 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. *Id.* § 552.137(c). Under section 552.137, a governmental body must withhold the e-mail address of a member of the general public, unless the individual to whom the e-mail address belongs affirmatively consents to its public disclosure. *See id.* § 552.137(b). Some of the e-mail addresses at issue may belong to agents of companies with

³The 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).

contractual relationships with the city. *See id.* § 552.137(c)(1), (2). Because we are unable to discern whether the e-mail addresses we have marked fall within the scope of section 552.137(c), we must rule conditionally. To the extent the marked e-mail addresses belong to members of the public, the city must withhold the e-mail addresses under section 552.137, unless the individuals to whom the e-mail addresses belong affirmatively consent to their release.⁴ *See id.* § 552.137(b). However, to the extent the marked e-mail addresses belong to agents of companies with contractual relationships with the city, the e-mail addresses may not be withheld under section 552.137 of the Government Code.

In summary, with the exception of the information we have marked for release, the city may generally withhold Exhibit 2 under section 552.107(a) of the Government Code; however, to the extent the marked non-privileged e-mails exist separate and apart from the submitted e-mail strings, they may not be withheld under section 552.107(1). The city must withhold the e-mail addresses we have marked in the remaining information under section 552.137 of the Government Code, unless the owners of the addresses affirmatively consent to their release or the e-mail addresses belong to agents of companies with contractual relationships with the city. 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,



Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

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⁴We note Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

Ref: ID# 439182

Enc. Submitted documents

c: Requestor
(w/o enclosures)