ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 28, 2012

Ms. Michelle L. Villarreal
Assistant City Attorney
City of Waco
P.O. Box 2570
Waco, Texas 76702-2570

OR2012-10023

Dear Ms. Villarreal:

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# 457635 (Reference #: LGL-12-557).

The City of Waco (the "city") received a request for (1) legal expenses from 2007 related to archaeological work and specified litigation; (2) correspondence from 2011 among city staff or council regarding a settlement with American Archaeology Group, L.L.C. ("AAG"); and (3) records of any money received, paid, or promised under the 2011 settlement with AAG. You claim the submitted information is excepted from disclosure under section 552.107 of the Government Code. You also believe release of some of the submitted information may implicate the interests of AAG. Accordingly, you state, and provide documentation demonstrating, the city notified AAG of the request for information and of its right to submit arguments stating why its information should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in certain circumstances). We have considered the exception you claim and reviewed the submitted 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. 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). 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.*, 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). 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 information you have marked constitutes communications between city attorneys, city council, and outside legal counsel for the city that were made for the purpose of providing legal services to the city. You state the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find the some of the information at issue, which we have marked, consists of privileged attorney-client communications that the city may withhold under section 552.107(1) of the Government Code. However, we find some of the remaining e-mails you have marked consist of communications with non-privileged parties or parties you have not identified and whose identities we are not able to discern as privileged parties. Thus, the city may not withhold this information under section 552.107(1). Further, some of the privileged e-mail strings include communications with individuals whom you have not shown to be privileged parties. Consequently, to the extent these non-privileged e-mails, which we have marked, exist separate and apart from the privileged e-mail strings in which they are included, the city may not withhold these e-mails under section 552.107(1). If these e-mails do not exist separate and apart from the privileged e-mail stings in which they are included, the city may withhold them as privileged attorney-client communications under section 552.107(1).

We note that an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received correspondence from AAG. Thus, AAG has not demonstrated that it has a protected proprietary interest in any of the remaining information. *See id.* § 552.110(a)-(b); Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, the city may not withhold the remaining information on the basis of any proprietary interests AAG may have in the information.

We note the remaining information contains information that may be subject to section 552.117 of the Government Code and information subject to sections 552.136 and 552.137 of the Government Code.[1] Section 552.117(a)(1) excepts from disclosure the current and former home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a). We further note section 552.117 also applies to the personal cellular telephone number of a current or former official or employee of a governmental body, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). Whether information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). The city may only withhold information under section 552.117(a)(1) on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Therefore, if the individual whose information is at issue timely requested confidentiality under section 552.024 of the Government Code, the city must withhold the information we have marked under section 552.117(a)(1); however, the marked cellular telephone number may be withheld only if a governmental body does not pay for the cellular telephone service. Conversely, if either the individual at issue did not timely request confidentiality under section 552.024 or a governmental body pays for the marked cellular telephone service, the city may not withhold the marked cellular telephone number under section 552.117(a)(1) of the Government Code.

Section 552.136(b) of the Government Code states that "[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is

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

collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136(b); *see id.* § 552.136(a) (defining "access device"). Therefore, the city must withhold the information we have marked pursuant to section 552.136 of the Government Code.

Section 552.137 of the Government Code 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). *Id.* § 552.137(a)-(c). Section 552.137 is not applicable to an e-mail address provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent. *See id.* § 552.137(c)(1). Because we are unable to discern whether some 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.[2] *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, the city may withhold the information we have marked under section 552.107(1) of the Government Code. To the extent the non-privileged e-mails we have marked exist separate and apart from the privileged e-mail strings in which they were included, the city may not withhold these records under section 552.107(1) of the Government Code. If the individual whose information is at issue timely requested confidentiality, the city must withhold the information we have marked under section 552.117(a)(1) of the Government Code; however, the marked cellular telephone number may be withheld only if a governmental body does not pay for the cellular telephone service. If the individual at issue did not timely request confidentiality or a governmental body pays for the marked cellular telephone service, the city may not withhold the marked information under section 552.117(a)(1) of the Government Code. The city must withhold the information we have marked under section 552.136 of the Government Code. To the extent the marked e-mail addresses belong to members of the public and not agents of companies with contractual relationships with the city, the city must withhold the e-mail addresses under section 552.137 of the Government Code, unless the individuals to whom the e-mail addresses belong affirmatively consent to their release. The remaining information must be released.

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[2]We note this office issued Open Records Decision No. 684 (2009), 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.

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,

Nneka Kanu
Assistant Attorney General
Open Records Division

NK/bhf

Ref: ID# 457635

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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