



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 9, 2012

Ms. LeAnne Lundy
Rogers, Morris & Grover, L.L.P.
Counsel for the Houston Housing Authority
5718 Westheimer Road, Suite 1200
Houston, Texas 77057

OR2012-10554

Dear Ms. Lundy:

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# 458621.

The Houston Housing Authority (the "authority"), which you represent, received a request for (1) all text messages sent or received by the authority's "Vice President, General Counsel, President, Board Member, or the CEO" on an electronic device issued or reimbursed by the authority during a specified time period; (2) all e-mails sent or received by the authority's "Vice President, General Counsel, President, Board Member, or the CEO" during a specified time period that include certain words or phrases; and (3) the authority's document retention policy. You claim that the submitted information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

¹Although you raise section 552.101 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 1 (1990).

²We assume the "representative sample" of information 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.

Initially, you inform us that the authority asked the requestor for clarification of the portion of the request concerning e-mails containing the word "fire." *See* Gov't Code § 552.222 (if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010). You inform us that the requestor has not responded to this request for clarification. Thus, for the portion of the requested information for which you have sought but not received clarification, we find the authority is not required to release information in response to that portion of the request. However, if the requestor clarifies that portion of the request for information, the authority must seek a ruling from this office before withholding any responsive information from the requestor. *See 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 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).

Next, we note you did not submit information responsive to item numbers one and three of the request. To the extent such information existed and was maintained by the authority on the date it received the request for information, we presume the authority has released it. If not, the authority must do so at this time.³ *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).

We also note portions of the submitted information, which we have marked, are not responsive to the instant request because they do not include the requested words or phrases. The authority need not release nonresponsive information in response to this request, and this ruling will not address that information.

Section 552.107(1) of the Government Code 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). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at

³We note the Act does not require a governmental body to release information that did not exist when a request for information 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).

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 state the responsive information in Exhibit B consists of communications between the authority’s attorneys, outside counsel, employees, and the authority’s Board of Commissioners to facilitate the rendition of professional legal services to the authority. You identify the parties to the communications and state the communications were intended to be confidential. Further, you state the communications have remained confidential. Based on these representations and our review, we find you have established the applicability of the attorney-client privilege to most of the responsive information in Exhibit B. Accordingly, the authority may generally withhold the information at issue under section 552.107 of the Government Code.⁴ However, we note a stand-alone e-mail and its attachment was communicated with a party you have not identified. Because you have not explained how this party is privileged, the authority may not withhold this information, which we have marked, under section 552.107(1) of the Government Code.

We note the non-privileged e-mail contains the e-mail address of a member of the public. 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 owner of the e-mail address consents to its release or the e-mail address falls within the scope of section 552.137(c).⁵ *See Gov’t Code* § 552.137(a)-(c). The e-mail address we have marked does not appear to be a type specifically excluded by section 552.137(c). The authority must withhold the e-mail address we have marked under section 552.137 of the Government Code, unless the owner of the e-mail address affirmatively consents to its release.

⁴As our ruling is dispositive for this information, we need not address your remaining argument against its disclosure.

⁵The 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).

In summary, with the exception of the e-mail with the non-privileged party, which we have marked for release, the authority may withhold the responsive information in Exhibit B under section 552.107(1) of the Government Code. The authority must withhold the personal e-mail address we have marked in the non-privileged e-mail under section 552.137 of the Government Code, unless the owner affirmatively consents to its release. The authority must release the remaining responsive information.

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,



Sean Opperman
Assistant Attorney General
Open Records Division

SO/eb

Ref: ID# 458621

Enc. Submitted documents

c: Requestor
(w/o enclosures)