



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 30, 2012

Ms. Cheryl Elliott Thornton
Assistant County Attorney
Harris County
1019 Congress, 15th Floor
Houston, Texas 77002

OR2012-11874

Dear Ms. Thornton:

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# 460271 (CAO File No. 12PIA0242).

The Harris County Attorney's Office (the "county attorney's office") received a request for e-mails sent or received by a named employee during a specified time period. You claim the submitted information is excepted from disclosure under sections 552.107 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note the county attorney's office has redacted portions of the submitted information. We note Open Records Decision No. 684 (2009) serves as a previous determination to all governmental bodies allowing them to withhold the e-mail address of a member of the public under section 552.137 of the Government Code without requesting a decision from this office. Accordingly, the county attorney's office had the authority to redact e-mail addresses without first seeking a decision. You do not assert, nor does our review of our records indicate, the county attorney's office has been authorized to withhold any of the remaining redacted information, including the names of the owners of the e-mail addresses at issue, without seeking a ruling from this office. *See* Gov't Code § 552.301(a); Open Records Decision No. 673 (2000) (previous determinations). As such, this type of information must be submitted in a manner that enables this office to determine whether the information comes within the scope of an exception to disclosure. Because we can discern

the nature of the information that has been redacted, being deprived of this information does not inhibit our ability to make a ruling in this instance. Nevertheless, be advised a failure to provide this office with requested information generally deprives us of the ability to determine whether information may be withheld and leaves this office with no alternative other than ordering the redacted information be released. See Gov't Code §§ 552.301(e)(1)(D) (governmental body must provide this office with copy of "specific information requested"), .302.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *Id.* § 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 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 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 claim the submitted information is protected by the attorney-client privilege and excepted under section 552.107(1) of the Government Code. You state the submitted e-mails

consist of attorney-client communications between the county attorney's office and client representatives for the purpose of rendering professional legal services to the county. You state these communications were intended to be and remain confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information we have marked. Accordingly, the county attorney's office may withhold the information we have marked under section 552.107 of the Government Code. However, the remaining e-mails consist of communications with non-privileged parties or were not made for the purpose of rendering professional legal services to the county. Thus, the county attorney's office has failed to demonstrate the attorney-client privilege applies to the remaining information. Therefore, the remaining information may not be withheld under section 552.107(1).

Section 552.108(a)(1) of the Government Code excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]" Gov't Code § 552.108(a)(1). A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why this exception is applicable to the requested information. *See id.* §§ 552.108(a)(1), .301 (e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state some of the remaining e-mails relate to a criminal investigation which the county attorney's office anticipates will lead to litigation. You state release of this information would impair and interfere with the county attorney's office's ability to properly investigate this matter. However, the remaining information pertains to several unrelated issues and the county attorney's office has not marked or otherwise indicated to which information section 552.108 applies. Accordingly, we find you have failed to explain how release of any portion of the remaining information would interfere with a particular criminal investigation or prosecution. Thus, you have not established section 552.108(a)(1) applies, and none of the remaining information may be withheld under section 552.108(a)(1) of the Government Code.

We note some of the remaining information consists of personal e-mail addresses subject to section 552.137 of the Government Code.¹ 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). *See* Gov't Code § 552.137(a)-(c). The e-mail addresses at issue are not a type specifically excluded by section 552.137(c). Accordingly, the county attorney's office must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their disclosure.

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

In summary, the county attorney's office may withhold the information we have marked under section 552.107(1) of the Government Code. The county attorney's office must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their disclosure. 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,

A handwritten signature in black ink, appearing to read "Michelle R. Garza", with a long horizontal flourish extending to the right.

Michelle R. Garza
Assistant Attorney General
Open Records Division

MRG/tch

Ref: ID# 460271

Enc. Submitted documents

c: Requestor
(w/o enclosures)