



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 21, 2012

Ms. Lisa D. Mares  
Attorney for City of Crowley  
Taylor Olson Adkins Sralla Elam, LLP  
6000 Western Place, Suite 200  
Fort Worth, Texas 76107-4654

OR2012-15066

Dear Ms. Mares:

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# 467831.

The City of Crowley (the "city"), which you represent, received a request for information pertaining to the investigation, termination, and appeal of a named former city employee. You state some information will be released. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.107 of the Government Code.<sup>1</sup> We have considered the claimed exceptions and reviewed the submitted information, a portion of which is a representative sample.<sup>2</sup>

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<sup>1</sup>We note you also raise section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503. However, 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). Although Texas Rule of Evidence 503 does make information confidential for purposes of section 552.022 of the Government Code, the submitted information is not subject to section 552.022. Therefore, section 552.107 is the proper exception to raise in order to assert the attorney-client privilege for the information at issue. *See* ORD 676 at 1-2, Open Records Decision No. 677 (2002).

<sup>2</sup>We 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.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses information made confidential by other statutes, such as section 1703.306 of the Occupations Code, which provides in relevant part:

(a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:

- (1) the examinee or any other person specifically designated in writing by the examinee;
- (2) the person that requested the examination;
- (3) a member, or the member’s agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner’s activities;
- (4) another polygraph examiner in private consultation; or
- (5) any other person required by due process of law.

(b) The [Texas Department of Licensing and Regulation] or any other governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information.

Occ. Code § 1703.306(a)-(b). You state Exhibit C contains a polygraph examination report and information acquired from such report. It does not appear the requestor falls into any of the categories of individuals authorized to receive the polygraph information under section 1703.306(a). Upon review, we find portions of Exhibit C, which we have marked, are subject to section 1703.306. The city must withhold the marked information under section 552.101 in conjunction with section 1703.306. However, you have not demonstrated how the remaining information was acquired from a polygraph examination, and it may not be withheld under section 552.101 on that basis.

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 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). Third, the privilege applies only to 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 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. *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 state Exhibit B consists of communications between individuals you have identified as city employees and city attorneys. You state the communications were made for the purpose of facilitating the rendition of legal services, and 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 Exhibit B. Accordingly, the city may withhold Exhibit B under section 552.107(1).

In summary, the city must withhold the information we have marked in Exhibit C under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code and may withhold Exhibit B under section 552.107(1) of the Government Code. The remaining information in Exhibit C 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](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,



Misty Haberer Barham  
Assistant Attorney General  
Open Records Division

MHB/som

Ref: ID# 467831

Enc. Submitted documents

c: Requestor  
(w/o enclosures)