



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 25, 2012

Ms. Kristen L. Hamilton
Assistant City Attorney
City of El Paso
2 Civic Center Plaza, 9th Floor
El Paso, Texas 79901

OR2012-15277

Dear Ms. Hamilton:

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# 465986.

The City of El Paso (the "city") received a request for communications between specified city employees and departments and specified entities pertaining to a AAA baseball stadium during a specified time period, and calendar entries for this time period reflecting scheduled telephone calls or meetings between the specified city departments and entities. You state you have released some information to the requestor. You claim the submitted information is excepted from disclosure under section 552.107 of the Government Code.¹ We have considered the exception you claim and reviewed the submitted information.

Section 552.107 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

¹Although you raise section 552.111 of the Government Code you make no arguments to support this exception. Accordingly, we understand the city no longer asserts this exception. *See* Gov't Code § 552.301(e) (governmental body must provide comments stating why exceptions raised should apply to information requested). Further, although you raise section 552.101 of the Government Code in conjunction with rule 503 of the Texas Rules of Evidence, this office has concluded that section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002). Additionally, we note that, in this instance, the proper exception to raise when asserting the attorney-client privilege for information not subject to section 552.022 of the Government Code is section 552.107. *See id.*

in order to withhold the information at issue. See ORD 676 at 6-7. 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, and lawyer representatives. 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, 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 section 552.107(1) of the Government Code. You state the submitted information constitutes communications between city employees, city attorneys, and outside counsel for the city. You state these communications were made for the purpose of rendering professional legal services to the city. You further state these communications 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 the information at issue. Accordingly, the city may generally withhold the submitted information under section 552.107(1) of the Government Code. However, we note these privileged e-mail strings include e-mails from parties who you have not identified as privileged. Accordingly, if these e-mails, which we have marked, exist separate and apart from the otherwise privileged e-mail strings in which they are included, then the city may not withhold the communications with the non-privileged parties under section 552.107(1) of the Government Code.

To the extent the non-privileged e-mails exist separate and apart from the privileged e-mail strings in which they are included, a portion of the non-privileged e-mails is subject to

section 552.137 of the Government Code. 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). The e-mail address we have marked is not a type specifically excluded by section 552.137(c). Accordingly, the city must withhold this e-mail address under section 552.137 of the Government Code, unless the owner of the e-mail address affirmatively consents to its release under section 552.137(b).

In summary, the city may generally withhold the submitted information under section 552.107(1) of the Government Code; however, to the extent the marked non-privileged e-mails exist separate and apart from the otherwise privileged e-mail strings, they may not be withheld under section 552.107(1) of the Government Code. To the extent the non-privileged e-mails exist separate and apart from the otherwise privileged e-mail strings, the city must withhold the e-mail address we have marked under section 552.137 of the Government Code, unless the owner affirmatively consents to disclosure.

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,



Cynthia G. Tynan
Assistant Attorney General
Open Records Division

CGT/akg

Ref: ID# 465986

Enc. Submitted documents

c: Requestor
(w/o enclosures)