



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

October 24, 2012

Ms. Courtney A. Kuykendall  
Counsel for the City of Wylie  
Abernathy, Roeder, Boyd & Joplin, P.C.  
P.O. Box 1210  
McKinney, Texas 75070-1210

OR2012-16981

Dear Ms. Kuykendall:

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# 468855.

The City of Wylie (the "city"), which you represent, received a request for e-mails between named city employees and officials regarding specified topics for a specified time period.<sup>1</sup> You state you have released some of the requested information. You claim that some of the submitted information is excepted from disclosure under sections 552.107, 552.117, and 552.131 of the Government Code.<sup>2</sup> We have considered the exceptions you claim and reviewed the submitted information.

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<sup>1</sup>We note that the city received clarification of the information requested. *See* Gov't Code § 552.222 (providing that 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) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad 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).

<sup>2</sup>Although you also claim the attorney-client privilege under section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503, we note section 552.101 does not encompass discovery privileges. *See* Open Records Decision No. 676 at 1-3 (2002). Additionally, although you raise Texas Rule of Evidence 503, we note section 552.107 is the proper exception to raise when asserting the attorney-client privilege for information not subject to section 552.022 of the Government Code. Further, although you raise section 552.024 of the Government Code, we note this section is not an exception to public disclosure under the Act. Rather, section 552.024 permits a current or former official or employee of a governmental body to choose whether to allow public access to certain information relating to the current or former official or employee that is held by the employing governmental body. *See id.* § 552.024. We note section 552.117 of the Government Code is the proper exception to assert.

Initially, we note a portion of the submitted information was created after the request was received. This information is not responsive to the instant request for information. This ruling does not address the public availability of non-responsive information, and the city is not required to release non-responsive information in response to this request.

Section 552.107(1) 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 in order to withhold the information at issue. *See* 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. *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)(A)-(E). 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.* 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. *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 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 in Exhibit B-1 consists of communications among attorneys for the city and city employees and officials that were made in furtherance of the rendition of professional legal services to the city. You state the communications were intended to be and remain confidential. Based on your representations and our review, we conclude the city may withhold the information you have marked in Exhibit B-1 under section 552.107(1) of the Government Code.

Section 552.117(a)(1) of the Government Code exempts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee of a governmental body who timely requests this information be kept confidential under section 552.024. *See Gov't Code* § 552.117(a)(1). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See Open Records Decision No. 530 at 5 (1989)*. Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee who did not timely request under section 552.024 the information be kept confidential. You have submitted an election form showing the employee whose information is at issue timely elected to keep her personal information confidential. Therefore, the city must withhold the information we have marked in Exhibit B-2 under section 552.117(a)(1) of the Government Code. However, you have failed to demonstrate any of the remaining information at issue consists of a home address, home telephone number, emergency contact information, social security number, or family member information for the purposes of section 552.117(a)(1) and none of it may be withheld on that basis.

You assert a portion of Exhibit B-3 is protected by section 552.131(b) of the Government Code, which relates to economic development information and provides:

(b) Unless and until an agreement is made with the business prospect, information about a financial or other incentive being offered to the business prospect by the governmental body or by another person is excepted from [required public disclosure].

Gov't Code § 552.131(b). Section 552.131(b) protects information about a financial or other incentive that is being offered to a business prospect by a governmental body or another person. *See id.* § 552.131(b). In this instance, you argue the information you have marked in Exhibit B-3 consists of financial or other incentives offered to a potential business prospect in relation to a confidential economic development project. However, the information you have marked in Exhibit B-3 does not discuss any incentives. Thus, we find you have failed to demonstrate how any of the information you have marked in Exhibit B-3 consists of information about a financial or other incentive being offered to a business prospect. Accordingly, the city may not withhold the information you have marked in Exhibit B-3 under section 552.131(b) of the Government Code.

In summary, the city may withhold the information you have marked in Exhibit B-1 under section 552.107(1) of the Government Code. The city must withhold the information we have marked in Exhibit B-2 under section 552.117(a)(1) of the Government Code. The remaining responsive 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](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 'Vanessa Burgess', with a long horizontal flourish extending to the right.

Vanessa Burgess  
Assistant Attorney General  
Open Records Division

VB/dls

Ref: ID# 468855

Enc. Submitted documents

c: Requestor  
(w/o enclosures)