



**ATTORNEY GENERAL OF TEXAS**  
**GREG ABBOTT**

February 4, 2013

Ms. Elaine Nicholson  
Assistant City Attorney  
City of Austin  
P.O. Box 1088  
Austin, Texas 78767-8828

OR2013-01922

Dear Ms. Nicholson:

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# 478505.

The City of Austin (the "city") received a request for five categories of information related to a former assistant city manager and Minority and Women-Owned Business Enterprise ("MWBE") certification, including a list of all firms that applied for MWBE certification during a specified time period and communications between the former assistant city manager and specified city employees and officials. You have marked some of the submitted information for release. You claim some of the submitted information is excepted from disclosure under sections 552.107 and 552.128 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information, which you state is a representative sample of the information at issue.

You have marked some of the submitted information as nonresponsive to the request for information. This ruling does not address the public availability of any information that is not responsive to the request, and the city is not required to release any non responsive information in response to this request.

You state you have submitted a representative sample of information; however, no portion of the submitted representative sample pertains to the requested list of all firms that applied for MWBE certification during a specified time period or communications between the former assistant city manager and specified city employees and officials. This ruling applies to only the types of information you have submitted for our review. Therefore, this ruling 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. *See id.*

§ 552.302 (where request for attorney general decision does not comply with requirements of section 552.301, information at issue is presumed public). To the extent any information responsive to the portions of the request for a list of all firms that applied for MWBE certification during a specified time period and communications between the former assistant city manager and specified city employees and officials existed on the date the city received the request for information, we assume the city has released it. If the city has not released any such information, it must do so at this time. *See id.* §§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 information as soon as possible).

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 the information you have marked in Exhibit A consists of communications between individuals you have identified as city attorneys and city employees. 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 the marked information. Accordingly, the city may withhold the information you have marked in Exhibit A under section 552.107(1) of the Government Code.

You seek to withhold the information submitted in Exhibit B under section 552.128 of the Government Code, which provides as follows:

(a) Information submitted by a potential vendor or contractor to a governmental body in connection with an application for certification as a historically underutilized or disadvantaged business under a local, state, or federal certification program is excepted from the requirements of Section 552.021, except as provided by this section.

(b) Notwithstanding Section 552.007 and except as provided by Subsection (c), the information may be disclosed only:

(1) to a state or local governmental entity in this state, and the state or local governmental entity may use the information only:

(A) for purposes related to verifying an applicant's status as a historically underutilized or disadvantaged business; or

(B) for the purpose of conducting a study of a public purchasing program established under state law for historically underutilized or disadvantaged businesses; or

(2) with the express written permission of the applicant or the applicant's agent.

(c) Information submitted by a vendor or contractor or a potential vendor or contractor to a governmental body in connection with a specific proposed contractual relationship, a specific contract, or an application to be placed on a bidders list, including information that may also have been submitted in connection with an application for certification as a historically underutilized or disadvantaged business, is subject to required disclosure, excepted from required disclosure, or confidential in accordance with other law.

Gov't Code § 552.128. You state the submitted information in Exhibit B consists of information submitted to the city in connection with an application for certification as a historically underutilized or disadvantaged business under a local, state, or federal certification program. You explain the release provision of subsection 552.128(b) does not apply because the requestor is not a state or local governmental entity, and the applicant or applicant's agent has not given the city written permission to release its information. You also state subsection 552.128(c) does not apply here either. Upon review of your arguments

and the information at issue, we agree the city must withhold the submitted information in Exhibit B under section 552.128 of the Government Code.

We note some of the remaining submitted information is subject to section 552.137 of the Government Code.<sup>1</sup> 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 id.* § 552.137(a)-(c). The e-mail address at issue is not excluded by subsection (c). Therefore, the city must withhold the personal e-mail address we have marked under section 552.137 of the Government Code, unless the owner affirmatively consents to its public disclosure.

In summary, the city may withhold the information you have marked in Exhibit A under section 552.107(1) of the Government Code. The city must withhold (1) the submitted information in Exhibit B under section 552.128 of the Government Code, and (2) the personal e-mail address we have marked under section 552.137 of the Government Code, unless the owner affirmatively consents to its public disclosure. 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,



Cindy Nettles  
Assistant Attorney General  
Open Records Division

CN/dls

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<sup>1</sup>The Office of the Attorney General will raise a mandatory exception like section 552.137 on behalf of a governmental body. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

**Ref: ID# 478505**

**Enc. Submitted documents**

**c: Requestor  
(w/o enclosures)**