



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 6, 2013

Ms. Twanda Somerville
Records Management Coordinator
City of Harker Heights
305 Miller's Crossing
Harker's Heights, Texas 76548

OR2013-03855

Dear Ms. Somerville:

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# 480537.

The City of Harker Heights (the "city") received a request for the following information related to a specified property: (1) "drawings showing sewer lines, easements, and/or utilities"; and (2) "public hearings, ordinances, city counsel agendas, minutes, code enforcement issues, reports, memoranda, articles, investigative summaries, staff reports[, e-mails,] and/or complaints[.]"¹ You claim the submitted information is excepted from disclosure under section 552.107 of the Government Code.² We have considered the exception you claim and reviewed the submitted information.

Initially, we note you have not submitted any drawings showing sewer lines, easements, and utilities, nor any public hearings, ordinances, minutes, or articles related to the specified property. To the extent this information existed on the date the city received the request, we assume you have released it. If you have not released this information, you must do so at this time. *See* Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000)

¹We note 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).

²Although you raise section 552.101 of the Government Code in conjunction with the attorney-client privilege encompassed by 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), 575 at 2 (1990). Furthermore, we note section 552.107 of the Government Code is the proper exception to raise when asserting the attorney-client privilege for information not subject to section 552.022 of the Government Code.

(if governmental body concludes no exceptions apply to 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. Gov't Code § 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 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. 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 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).

We note you have failed to identify the parties to the communications. *See* ORD 676 at 8 (2002) (governmental body must inform this office of identities and capacities of individuals to whom each communication at issue has been made; this office cannot necessarily assume that communication was made only among categories of individuals identified in rule 503). *See generally* Gov't Code § 552.301(e)(1)(A); *Strong v. State*, 773 S.W.2d 543, 552 (Tex. Crim. App. 1989) (burden of establishing attorney-client privilege is on party asserting it). Nevertheless, upon review, we are able to discern from the face of the documents that certain individuals are privileged parties. Accordingly, we conclude the city may generally withhold

the information we have marked on the basis of the attorney-client privilege under section 552.107(1).

However, we note some of this information includes communications with a non-privileged party and attachments received from or sent to non-privileged parties. Furthermore, if these non-privileged communications are removed from the otherwise privileged communications and stand alone, they are responsive to the request for information. Therefore, if these non-privileged communications and attachments, which we have marked, are maintained by the city separate and apart from the otherwise privileged communication to which they are attached, then the city may not withhold these non-privileged communications or attachments under section 552.107(1).

In addition, the remaining information concerns communications with non-privileged parties or individuals you have not demonstrated are privileged parties, does not reveal the content of a communication, or reveals the creation of a document but does not reflect whether the document was communicated. Thus, you have failed to provide this office with the necessary facts to demonstrate the elements of the attorney-client privilege with respect to the remaining information, and the city may not withhold it under section 552.107(1).

To summarize: The city may withhold the information we have marked on the basis of the attorney-client privilege under section 552.107(1) unless the non-privileged communications and attachments, which we have marked, are maintained by the city separate and apart from the otherwise privileged communication to which they are attached. 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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/dls

Ref: ID# 480537

Enc. Submitted documents

c: Requestor
(w/o enclosures)