



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 13, 2013

Mr. Richard Vance
Counsel for the Central Heights Independent School District
Karczewski Bradshaw L.L.P
315 North Church
Nacogdoches, Texas 75961

OR2013-14099

Dear Mr. Vance:

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# 496090.

The Central Heights Independent School District (the "district"), which you represent, received a request for twenty-seven categories of information related to specified easements, correspondence, sewer services, meetings, manuals, and telephone calls, and a specified "lift station and force main[.]" We understand the district has released some of the requested information. You claim most of 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. We have also considered comments submitted by the requestor. *See Gov't Code § 552.304* (interested party may submit comments stating why information should or should not be released).

¹Although you raise section 552.101 of the Government Code in conjunction with Texas Rule of Civil Procedure 192.5 and Texas Rule of Evidence 503, 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). We also note section 552.101 does not encompass the Texas Disciplinary Rules of Professional Conduct. Further, although you raise Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5, we note the proper exceptions to raise when asserting the attorney-client privilege and the attorney work product privilege for information not subject to section 552.022 of the Government Code are sections 552.107 and 552.111, respectively. *See* Open Records Decision No. 676 at 1-2, 677 (2002). In addition, as you have not provided any arguments to support your claim under the attorney work product privilege, we assume you have withdrawn your claim under section 552.111. *See* Gov't Code § 552.301, .302.

Section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege. *See id.* § 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. *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, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *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 explain the information at issue consists of communications between attorneys for the district and district representatives that were made in furtherance of the rendition of professional legal services to the district. You also inform us these communications were intended to be confidential and their confidentiality has been maintained. The requestor indicates the attorneys at issue were not acting as legal counsel for the district when the communications were made. The requestor also contends the district cannot now claim the attorney-client privilege for the submitted information in accordance with Texas Rule of Evidence 503(d) because such information was used in the furtherance of crime or fraud. *See* TEX. R. EVID. 503(d). The questions of whether the attorneys at issue were acting in their capacity as attorneys, and whether or not the information at issue was used in the furtherance of crime or fraud, are questions of fact. This office cannot resolve disputes of fact in its decisional process. *See* Open Records Decision Nos. 592 at 2 (1991), 552

at 4 (1990), 435 at 4 (1986). Where a fact issue cannot be resolved as a matter of law, we must rely on the facts alleged to us by the governmental body requesting our opinion, or upon those facts that are discernible from the documents submitted for our inspection. ORD 552 at 4. As previously noted, the district represents the information at issue consists of communications between attorneys for the district and district representatives that were made in furtherance of the rendition of professional legal services to the district. Therefore, based on the district's representations and our review of the submitted information, we find the district has demonstrated the applicability of the attorney-client privilege to the information at issue. We note the requestor also asserts he has a special right of access to the information at issue under section 552.023 of the Government Code. This section provides that a person or a person's authorized representative has a special right of access to information that is excepted from public disclosure under laws intended to protect that person's privacy interest or by privacy principles under the Act. *See* Gov't Code § 552.023. However, section 552.107 is not intended to protect the privacy of any individual. *See id.* § 552.107 (section 552.107 intended to protect information encompassed by the attorney-client privilege); *see also id.* § 552.023(b) (governmental body may assert provisions of Act or other law that are not intended to protect person's privacy interests to withhold information to which requestor may otherwise have special right of access). As such, the requestor does not have a special right of access to any of the information at issue under section 552.023. Accordingly, the district may withhold the information you have marked under section 552.107(1) of the Government Code.

We note the remaining information contains an e-mail address that does not belong to the requestor and may be subject to section 552.137 of the Government Code.² This section provides in part:

(a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

...

(c) Subsection (a) does not apply to an e-mail address:

(1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;

²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

(2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract;

(4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public; or

(5) provided to a governmental body for the purposes of providing public comment on or receiving notices related to an application for a license as defined by Section 2001.003(2) of this code, or receiving orders or decisions from a governmental body.

Id. § 552.137(a), (c). Under section 552.137, a governmental body must withhold the e-mail address of a member of the general public, unless the individual to whom the e-mail address belongs affirmatively consents to its public disclosure. *See id.* § 552.137(b). Because we are unable to determine whether the e-mail address at issue, which we have marked, falls within the scope of section 552.137(c), we must rule conditionally. If the marked e-mail address is not excluded by subsection 552.137(c) of the Government Code, then the district must withhold this information under section 552.137, unless the individual to whom the e-mail address belongs affirmatively consents to its public disclosure. *See id.* § 552.137(b)-(c). If the marked e-mail address is excluded by subsection 552.137(c), then the district may not withhold this information under section 552.137.

In summary, the district may withhold the information you have marked under section 552.107(1) of the Government Code. If the e-mail address we have marked is not excluded by subsection 552.137(c) of the Government Code, then the district must withhold this information under section 552.137 of the Government Code, unless the individual to whom the e-mail address belongs affirmatively consents to its public disclosure. The district must release the remaining information.

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read 'KLC', with a long horizontal flourish extending to the right.

Kenneth Leland Conyer
Assistant Attorney General
Open Records Division

KLC/bhf

Ref: ID# 496090

Enc. Submitted documents

c: Requestor
(w/o enclosures)