ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 9, 2013

Ms. Paige H. Saenz
Counsel for the City of Bartlett
McKamie Krueger & Knight, L.L.P.
223 West Anderson Lane, Suite A105
Austin, Texas 78752

OR2013-17535

Dear Ms. Saenz:

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# 501814.

The City of Bartlett (the "city"), which you represent, received a request for: (1) all e-mails sent or received by the city's mayor or city administrator on their city e-mail accounts not previously produced to the requestor; (2) all expense reports for the city's mayor or city administrator not previously produced to the requestor; (3) all documents or communications relating to any payments made to a named individual in the twelve months prior to the request; (4) all performance reviews for a named individual; and (5) a list of all ongoing city audits and litigation involving the city or its personnel. We understand you will make all information responsive to items two, four, and five of the request, and some information responsive to items one and three of the request, available to the requestor. You claim the remaining information responsive to items one and three of the request is excepted from disclosure under sections 552.103, 552.107, and 552.116 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.[1] We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

[1]We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Initially, we note a portion of the information you have labeled Exhibit A consists of a notice and agenda of a public meeting of the City Council. The notices, agendas, minutes, and audio recordings of a governmental body's public meetings are specifically made public under provisions of the Open Meetings Act, chapter 551 of the Government Code. *See* Gov't Code §§ 551.022 (minutes and tape recordings of open meeting are public records and shall be available for public inspection and copying on request to governmental body's chief administrative officer or officer's designee), .041 (governmental body shall give written notice of date, hour, place, and subject of each meeting), .043 (notice of meeting of governmental body must be posted in place readily accessible to general public for at least 72 hours before scheduled time of meeting). Although you seek to withhold this information under section 552.107, the exceptions to disclosure found in the Act generally do not apply to information that other statutes make public. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Accordingly, the city must release the notice and agenda of a public meeting, which we have marked, pursuant to chapter 551 of the Government Code.

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 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 claim the remaining information at issue is protected by section 552.107(1) of the Government Code. You state this information consists of communications between attorneys for the city, city staff, and an accountant hired by the city, whom you indicate is a client representative. You state the communications were made for the purpose of facilitating the rendition of professional legal services to the city and that these communications have remained confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to portions of the remaining information at issue. Thus, the city may generally withhold the remaining information at issue under section 552.107(1) of the Government Code.[2] We note, however, some of the otherwise privileged e-mail strings in Exhibit A include e-mails and an attachment received from or sent to non-privileged parties. Furthermore, if the e-mails and attachment received from or sent to non-privileged parties are removed from the otherwise privileged e-mail strings in which they appear and stand alone, they are responsive to the requests for information. Therefore, if these non-privileged e-mails and attachment, which we have marked, are maintained by the city separate and apart from the otherwise privileged e-mail strings in which they appear, then the city may not withhold these non-privileged e-mails and attachments under section 552.107(1).

To the extent the non-privileged e-mails exist separate and apart from the otherwise privileged e-mail strings, we note they contain information subject to section 552.137 of the Government Code.[3] Section 552.137 of the Government Code 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 addresses at issue are not excluded by subsection (c). Therefore, the city must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure.[4]

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[2]Because our ruling is dispositive for Exhibits A-1 and B, we need not address your remaining arguments against disclosure of those exhibits.

[3]The 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).

[4]We note Open Records Decision No. 684 (2009) is a previous determination authorizing all governmental bodies to withhold certain categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

In summary, the city must release the notice and agenda of a public meeting, which we have marked, pursuant to section 551.041 of the Government Code. The city may withhold the remaining information at issue under section 552.107(1) of the Government Code; however, the city may not withhold the non-privileged portions of the e-mails and attachment we have marked if they are maintained by the city separate and apart from the otherwise privileged e-mail strings in which they appear. To the extent the non-privileged e-mails exist separate and apart from the otherwise privileged e-mail strings, the city must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure. 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.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,

Tim Neal
Assistant Attorney General
Open Records Division

TN/dls

Ref: ID# 501814

Enc. Submitted documents

c: Requestor
(w/o enclosures)