



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

March 7, 2014

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

OR2014-04021

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# 516062.

The City of Austin (the "city") received a request for all documents involving the city's planning department pertaining to the requirements in certain sections of the Austin City Code. You indicate you will release some of the information at issue. You claim the remaining information is excepted from disclosure under section 552.107 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.<sup>1</sup> We have also considered comments from the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, we must address the requestor's assertions that the city failed to comply with section 552.301 of the Government Code. First, the requestor argues that the city failed to comply with section 552.301(d) because it sent the requestor its section 552.301(d) notification via e-mail rather than by mail or through a common or contract carrier. *Cf.* Gov't Code § 552.308 (describing rules for calculating submission dates of

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<sup>1</sup>We assume 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.

documents sent via first class United States mail, common or contract carrier, or interagency mail). Section 552.301(d) states a governmental body “must provide to the requestor within . . . the 10th business day after the date of receiving the requestor’s written request . . . a written statement that the governmental body wishes to withhold the requested information and has asked for a decision from the attorney general about whether the information is within an exception to public disclosure; and . . . a copy of the governmental body’s written communication to the attorney general asking for the decision[.]” *Id.* § 552.301(d). Section 552.308 provides one method of demonstrating timeliness when documents are sent by mail or common carrier but does not address this specific situation. In this case, the city sent notice to the requestor within the statutory deadlines. Additionally, the requestor acknowledges receipt of the notice. Accordingly, we conclude that the city complied with the requirements of section 552.301(d) of the Government Code.

The requestor also asserts the city did not comply with section 552.301(e) of the Government Code because, according to the listed enclosures on the city’s request to withhold, it did not send a copy of the requestor’s letter to this office within fifteen business days of its receipt of the request, nor did it attempt to demonstrate the information contained within the representative sample is confidential. *See id.* § 552.301(e). Upon review, we find that the city provided this office with the information required by section 552.301(e) within fifteen business days of its receipt of the request. As such, we conclude that the city complied with the requirements of section 552.301(e) of the Government Code. Accordingly, we will address its argument against disclosure.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *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. 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 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. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). 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 assert the information at issue consists of communications between two Assistant City Attorneys, a paralegal, and a senior planner in the Planning and Development Review Department. You state the communications were made for the purpose of facilitating the rendition of professional legal services. Additionally, you state the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find the city may withhold the information you have marked under section 552.107 of the Government Code.

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](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 "J. Behnke", with a long horizontal stroke extending to the right.

Joseph Behnke  
Assistant Attorney General  
Open Records Division

JB/dls

Ref: ID# 516062

Enc. Submitted documents

c: Requestor  
(w/o enclosures)