



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 6, 2014

Mr. Zachary Nolbitt  
Counsel for the Town of Lakewood  
Messer, Rockefeller, & Fort, P.L.L.C.  
6351 Preston Road, Suite 350  
Frisco, Texas 75034

OR2014-09744

Dear Mr. Nolbitt:

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# 525225.

The Town of Lakewood Village (the "town"), which you represent, received a request for all correspondence between the town and two specified entities or three named individuals (the "third parties").<sup>1</sup> You claim the submitted information is excepted from disclosure under sections 552.107 and 552.131 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege. *See* 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. *See* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate

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<sup>1</sup>You state the town sought and received clarification of the information requested. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

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. Finally, the attorney-client privilege applies only to a confidential communication, 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. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

The town argues the submitted information consists of communications involving town attorneys, town representatives, and other town employees and officials in their capacities as clients. The town states the communications were made for the purpose of facilitating the rendition of professional legal services to the town and these communications have remained confidential. The town also explains some of the communications at issue are between town attorneys and attorneys and representatives for the third parties “concerning a common matter of interest pending therein, namely economic development negotiations.” However, the town and the third parties at issue were in negotiations at the time the communications were created. We find their interests were adverse at that time. Thus, the parties did not share a common interest with regard to the subject matter of the communications that would allow the privilege to apply. Thus, we find the third parties are not privileged parties.

Upon review, we find the town has demonstrated the applicability of the attorney-client privilege to some of the submitted information, which we have marked. Thus, the town may generally withhold the information we marked under section 552.107(1) of the Government

Code.<sup>2</sup> However, some of the otherwise-privileged e-mail strings include e-mails and attachments that were received from or sent to the non-privileged third parties. Furthermore, if these e-mails and attachments are removed from the e-mail strings and stand alone, they are responsive to the request for information. Therefore, if these non-privileged e-mails and attachments, which we have marked, are maintained by the town separate and apart from the otherwise privileged e-mail strings in which they appear, then the town may not withhold them under section 552.107(1) of the Government Code. We further find the remaining information consists of communications with the non-privileged third parties. Therefore, the town may not withhold the remaining information under section 552.107(1).

Next, you raise section 552.131 of the Government Code for the remaining information, including the marked non-privileged e-mails and attachments. Section 552.131 relates to economic development information and provides in part:

(b) Unless and until an agreement is made with the business prospect, information about a financial or other incentive being offered to the business prospect by the governmental body or by another person is excepted from [required public disclosure].

Gov't Code § 552.131(b). Section 552.131(b) protects information about a financial or other incentive that is being offered to a business prospect by a governmental body or another person. *See id.* § 552.131(b). Section 552.131(b) protects the interests of governmental bodies, not third parties. You state the information at issue relates to ongoing negotiations with a developer with regard to incentives and services to be rendered in connection with the development of land within town limits that the developer owns. Thus, you argue the information at issue contains economic development information that the town is using in its negotiations. Upon review, we find the town has demonstrated the applicability of section 552.131(b) to some of the information at issue, which we have marked. The town may withhold the information we marked under section 552.131(b). However, upon review, we find you have not demonstrated how any portion of the remaining information reveals financial or other incentives that are being offered to a business prospect. Thus, we conclude the town may not withhold any of the remaining information under section 552.131(b) of the Government Code.

In summary, the town may withhold the information we marked under section 552.107(1) of the Government Code; however, if the marked non-privileged e-mails and attachments are maintained by the town separate and apart from the otherwise privileged e-mail strings in which they appear, then the town may not withhold the marked non-privileged e-mails and attachments under section 552.107(1) of the Government Code. The town may withhold the

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<sup>2</sup>As our ruling is dispositive for this information, we need not address your remaining argument against its disclosure.

information we marked under section 552.131(b) of the Government Code. The town 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](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,



Claire V. Morris Sloan  
Assistant Attorney General  
Open Records Division

CVMS/som

Ref: ID# 525225

Enc. Submitted documents

c: Requestor  
(w/o enclosures)