



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

August 22, 2016

Ms. Leticia Brysch  
City Clerk  
City of Baytown  
P.O. Box 424  
Baytown, Texas 77522

OR2016-18907

Dear Ms. Brysch:

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# 623473 (PIR # 6715).

The City of Baytown (the "city") received a request for specified categories of information pertaining to a proposed development in the city. You state the city has released some of the information to the requestor. You claim the submitted information is excepted from disclosure under section 552.107 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we must address the city's obligations under section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(e) requires the governmental body to submit to the attorney general, not later than the fifteenth business day after the date of the receipt of the request: (1) written comments stating why the governmental body's claimed exceptions apply to the information that it seeks to withhold; (2) a copy of the written request for information; (3) a signed statement of the date on which the governmental body received the request or evidence sufficient to establish that date; and (4) the specific information that the governmental body seeks to withhold or representative samples if the information is voluminous. *See* Gov't Code § 552.301(e)(1). You state the city received the request for information after business hours on May 30, 2016. Thus, the city received the request for information on May 31, 2016 and its fifteen-business-day deadline was June 21, 2016. Although you submitted some

responsive information before the fifteen-business-day deadline, you submitted additional responsive documents on July 12, 2016. Consequently, we find the city failed to comply with the requirements of section 552.301 as to the information submitted on July 12, 2016.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the information is public and must be released unless the governmental body overcomes this presumption by demonstrating a compelling reason to withhold the information. *Id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 630 (1994). A compelling reason generally exists when information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3, 325 at 2 (1982). You assert the requested information is excepted under section 552.107 of the Government Code. Section 552.107 does not make information confidential. *See* Gov't Code § 552.007; Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107 may be waived). In failing to comply with the procedural requirements of section 552.301, you have waived your claim under section 552.107 of the Government Code with respect to the information you submitted on July 12, 2016. *See* ORD 665 at 2 n.5. Accordingly, the information submitted on July 12, 2016 may not be withheld under section 552.107. Thus, we have no choice but to order the city to release the information submitted on July 12, 2016 pursuant to section 552.302. However, we will address the applicability of section 552.107 to the information you timely submitted.

Section 552.107(1) of the Government Code protects information coming 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* 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 "to facilitate 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, and lawyer representatives. *See* TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). 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, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those: (A) to whom disclosure is made to further the rendition of professional legal services to the client; or (B) reasonably necessary to transmit 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 state the information at issue consists of communications involving city employees and officials and attorneys for the city. You assert the communications were made for the purpose of facilitating the rendition of professional legal services to the city and these communications have remained confidential. Upon review, we find the city has demonstrated the applicability of the attorney-client privilege to the timely submitted information. Therefore, the city may generally withhold the timely submitted information under section 552.107(1) of the Government Code. However, we note the communication at issue includes attachments sent from parties you have not demonstrated are privileged parties. Furthermore, if these attachments are removed from the otherwise privileged communication and stand alone, they are responsive to the request for information. Therefore, if the city maintains these non-privileged attachments, which we have marked, separate and apart from the otherwise privileged communication in which they appear, then the city may not withhold these non-privileged attachments under section 552.107(1) of the Government Code.

We note, to the extent the non-privileged attachments we have marked are maintained separate and apart from the otherwise privileged communication in which they appear, the attachments also include e-mail addresses subject to section 552.137 of the Government Code.<sup>1</sup> Section 552.137 provides, “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 [the Act],” unless the owner of the e-mail address has affirmatively consented to its release or the e-mail address is specifically excluded by subsection (c). Gov’t Code § 552.137(a)-(c). Accordingly, in the event the non-privileged attachments we have marked are maintained separate and apart from the otherwise privileged communication in which they appear, the city must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses have affirmatively consented to their release.

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<sup>1</sup>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).*

In summary, the city may generally withhold the timely submitted information under section 552.107(1) of the Government Code; however, if the city maintains the non-privileged attachments we have marked separate and apart from the otherwise privileged communication in which they appear, then the city may not withhold these non-privileged attachments under section 552.107(1) of the Government Code. In the event the non-privileged attachments we have marked are maintained separate and apart from the otherwise privileged communication in which they appear, the city must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses have affirmatively consented to their release, and must release the remaining information in the non-privileged attachments. The city 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,



Sidney M. Pounds  
Assistant Attorney General  
Open Records Division

SMP/akg

Ref: ID# 623473

Enc. Submitted documents

c: Requestor  
(w/o enclosures)