



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

November 4, 2016

Mr. Brian J. Knowles  
Counsel for City of Hutto  
Sheets & Crossfield, P.C.  
309 East Main Street  
Round Rock, Texas 78664

OR2016-24635

Dear Mr. Knowles:

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# 633179.

The City of Hutto (the "city"), which you represent, received a request for (1) information pertaining to a specified property, (2) e-mail communications between the city and D.R. Horton, and (3) agreements between the city and D.R. Horton's subcontractors. You state the city will release some information to the requestor upon payment of the cost estimate deposit. 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.

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* 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 "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 37, 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).

The city states the submitted information consists of communications involving attorneys for the city, city representatives, and other city employees and officials in their capacities as clients. The city states 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 information at issue. Therefore, the city may generally withhold the submitted information under section 552.107(1) of the Government Code. However, we note some of the submitted e-mail strings include e-mails and attachments received from or sent to non-privileged 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, to the extent the city maintains these non-privileged e-mails and attachments, which we have marked, separate and apart from the otherwise privileged e-mail strings in which they appear, the city may not withhold these non-privileged e-mails and attachments under section 552.107(1) of the Government Code.

To the extent the e-mails and attachments at issue exist separate and apart from the otherwise privileged e-mail strings in which they appear, we note portions of this information are

subject to sections 552.117 and 552.137 of the Government Code.<sup>1</sup> Section 552.117(a)(1) of the Government Code excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security number, and family member information of a current or former employee of a governmental body who requests this information be kept confidential under section 552.024. Gov't Code § 552.117(a)(1). We note section 552.117 also encompasses a personal cellular telephone number, unless the cellular service is paid for by a governmental body. *See* Open Records Decision No. 506 at 5-7 (1988) (statutory predecessor to section 552.117 not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. *See* Gov't Code § 552.024(b). Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee or official who did not timely request under section 552.024 the information be kept confidential. Upon review, we conclude that, to the extent the individual at issue timely requested confidentiality under section 552.024 of the Government Code, and the cellular telephone service is not paid for by a governmental body, the city must withhold the cellular telephone number we have marked under section 552.117(a)(1) of the Government Code. Conversely, to the extent the individual did not timely request confidentiality under section 552.024, or a governmental body pays for the cellular telephone service, the city may not withhold this information under section 552.117(a)(1) of the Government Code.

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* Gov't Code § 552.137(a)-(c). Section 552.137 does not apply to an institutional e-mail address, the general e-mail address of a business, an e-mail address of a person who has a contractual relationship with a governmental body, an e-mail address of a vendor who seeks to contract with a governmental body, an e-mail address maintained by a governmental entity for one of its officials or employees, or an e-mail address provided to a governmental body on a letterhead. *See id.* § 552.137(c). Upon review, we find the city must withhold the e-mail addresses in the remaining information under section 552.137 of the Government Code, unless their owners affirmatively consent to their public disclosure or subsection (c) applies.

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<sup>1</sup>The Office of the Attorney General will raise mandatory exceptions 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 submitted information under section 552.107(1) of the Government Code. However, to the extent the city maintains the non-privileged e-mails and attachments we marked separate and apart from the otherwise privileged e-mail strings in which they appear, then the city may not withhold the non-privileged e-mails and attachments under section 552.107(1) of the Government Code. To the extent the individual at issue timely requested confidentiality under section 552.024 of the Government Code, and the cellular telephone service is not paid for by a governmental body, the city must withhold the cellular telephone number we have marked under section 552.117(a)(1) of the Government Code. The city must withhold the e-mail addresses in the remaining information under section 552.137 of the Government Code, unless their owners affirmatively consent to their public disclosure or subsection (c) applies.

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,



Cristian Rosas-Grillet  
Assistant Attorney General  
Open Records Division

CRG/bw

Ref: ID# 633179

Enc. Submitted documents

c: Requestor  
(w/o enclosures)