



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

June 6, 2003

Mr. Leonard Schneider
Ross, Banks, May, Cron & Cavin, P.C.
2 Riverway, Suite 700
Houston, Texas 77056-1918

OR2003-3882

Dear Mr. Schneider:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 182310.

The City of Mont Belvieu (the "city"), which you represent, received a request for: (1) all relevant documents pertaining to the proposed sale, purchase or funding of 38 acres between SAK Investments, L.L.C. and Mont Belvieu Economic Development Corporation ("MBEDC"); (2) MBEDC's corporate charter, by-laws, organizational minutes, and minutes of any regular or special meeting since its incorporation; and (3) audio or video tapes of proceedings wherein the sale or purchase of the land is mentioned by the Mont Belvieu City Council. You state that the majority of the requested information will be released. However, you claim exception for the submitted documents under sections 552.101 and 552.107 of the Government Code, and Texas Rule of Evidence 503. You also state that you will not release any recordings or certified agendas for any properly called executive sessions wherein the proposed purchase of 38 acres from SAK was discussed. *See* Open Records Decision No. 495 (1988) (stating that the attorney general lacks the authority to review certified agendas or tapes of executive sessions to determine whether they may be withheld under the Public Information Act). You claim exception for this information under sections 552.101 and 551.104 of the Government Code. You also state that you will release minutes of open regular and special meetings of the MBEDC in which the proposed 38 acre purchase was discussed.¹ We have considered the exceptions you claim and reviewed the submitted information.

¹We note that the request was for MBEDC's minutes of *any* regular or special meeting since its incorporation, and was not limited to minutes where the proposed purchase of 38 acres from SAK was discussed. Thus, to the extent any minutes exist, other than those where the proposed purchase of 38 acres from SAK was discussed, we assume that you have released them to the requestor. If you have not released any such information, you must release it to the requestor at this time. *See* Gov't Code §§ 552.301(a), .302.

Initially, we note that this office has previously ruled on the recordings and certified agendas for any properly called executive sessions wherein the proposed purchase of 38 acres from SAK was discussed in Open Records Letter Ruling 2003-3711. You do not indicate, nor does it appear, that the facts and circumstances surrounding our prior ruling have changed since the issuance of that ruling. Consequently, we find that you may rely upon Open Records Letter Ruling 2003-3711 as a previous determination to withhold the information we ruled could be withheld. *See* Open Records Decision No. 673 (2001). As this requested information has been previously ruled upon, we only address the public nature of the submitted memoranda.

Section 552.107(1) of the Government Code protects information coming 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. 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 Texas 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, and lawyer representatives. 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. Lastly, 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 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, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that 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). After considering your arguments and reviewing the submitted information, we conclude that you have

demonstrated the applicability of section 552.107 to the submitted documents. Consequently, the city may withhold the submitted information under section 552.107 of the Government Code.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/HPR/sdk

Ref: ID# 182310

Enc: Submitted documents

c: Mr. Andrew J. Lannie
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(w/o enclosures)