



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

January 9, 2004

Ms. Elaine S. Hengen  
Assistant City Attorney  
City of El Paso  
2 Civic Center Plaza  
El Paso, Texas 79901-1196

OR2004-0200

Dear Ms. Hengen:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"). Your request was assigned ID# 193965.

The City of El Paso (the "city") received a request for "all documents, related to Instant Messaging (IM), dated within the past six months." You claim that some of the requested 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.

We begin by addressing the scope of this request. You state that "[i]t is not clear to [the city] whether [the requestor] is seeking the electronic data from the conduct of any instant messaging, or whether he wants documents concerning the subject of instant messaging, or both." You indicate that you have interpreted the request to seek both data and records regarding the topic. To the extent that you interpret this request as seeking any document concerning the topic of instant messaging, you have submitted some information for our review and asked the requestor to clarify or narrow his request. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information). You indicate that, as of the date you requested this ruling, the city had not received a response to its letter. Because the city is awaiting a response, its deadline for seeking a ruling from this office as to any other information responsive to this aspect of the request has been tolled. *See* Open Records Decision No. 663 (1999) (determining that during interval in which governmental body and requestor communicate in good faith to narrow or clarify request, the Act permits tolling of deadlines imposed by section 552.301). We note, however, that "the ten-day deadline is tolled during the [clarification or narrowing] process but resumes, upon receipt of the clarification or narrowing response, on the day that the clarification is received." ORD 663 at 5. Thus, the city's deadlines for requesting a

ruling from this office with respect to any other responsive information that the city maintains will resume upon the city's receipt of the requestor's response.

To the extent the request seeks data from instant messaging sessions, you state that

the City is not aware of any existing electronic data from the conduct of any instant messaging that may have taken place on any computers owned by the City of El Paso, as such data could not exist. The City does not install instant messaging programs on its computers. The City's Information Technology Director, Tony Montoya, has advised me that if any employees or officials have installed instant messaging programs on their computers or otherwise have developed access to any instant messaging, any such instant messaging that may have taken place would not be electronically recorded or saved on the computers. Mr. Montoya has advised me that with instant messaging programs and services, once the participant logs out or ends the session, the information is gone and it is not saved on the computer. Consequently, the City would have no data recorded on any City computer in the event that any official or employee has ever conducted any instant messaging on a City computer.

Based on the quoted language, we understand you to represent that the city does not maintain information that is responsive to this request to the extent that it seeks data from instant messaging sessions. It is implicit in several provisions of the Act that the Act applies only to information in existence at the time a request for information is received. *See* Gov't Code §§ 552.002, .021, .227, .351. A governmental body need not release information that did not exist when it received a request or create new information in response to a request. *See Economic Opportunities Dev. Corp. of San Antonio v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed). However, a governmental body that receives a request has a duty to make a good faith effort to relate the request to information that it holds or to which it has a right of access. *See* Open Records Decision No. 561 at 8 (1990). Based on your representations, we find that the city need not comply with this request to the extent that it seeks data from instant messaging sessions.<sup>1</sup>

We turn now to the submitted documents, which relate to the topic of instant messaging. You contend that this information is excepted from disclosure under section 552.107 of the Government Code. This exception protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden

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<sup>1</sup>We note, however, that our own information technology department has informed us that the settings of some instant messaging programs can be set to keep a record of data from the instant messaging sessions. To the extent a governmental body's computers contain instant messaging data in such programs, the information exists and is being "maintained" by the governmental body for purposes of the Act and may constitute "public information." *See* Gov't Code § 552.002(a).

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 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). Having considered your representations and reviewed the information at issue, we find that you have established that the submitted information consists of privileged attorney-client communications and may be withheld pursuant to section 552.107.

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).

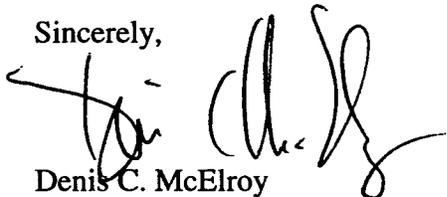
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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,



Denis C. McElroy  
Assistant Attorney General  
Open Records Division

DCM/lmt

Ref: ID# 193965

Enc. Submitted documents

c: Mr. Emanuel Anthony Martinez  
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(w/o enclosures)