



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 8, 2005

Ms. Helen Valkavich
Assistant City Attorney
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283-3966

OR2005-10107

Dear Ms. Valkavich:

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# 235900.

The City of San Antonio (the "city") received a request for information pertaining to a flood plain variance request for a specified location. You claim that the submitted information, which consists of e-mails with attachments, is excepted from disclosure under section 552.107 of the Government Code. We have considered your arguments and reviewed the submitted information. We have also considered comments submitted by the requestor. *See Gov't Code § 552.304* (interested party may submit comments stating why information should or should not be released).

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. Pursuant to section 552.301(b), a governmental body that receives a request for information that it wishes to withhold must ask for the attorney general's decision and state the exceptions that apply within ten business days after receiving the request. *See Gov't Code § 552.301(a), (b)*. The requestor contends the city failed to meet this deadline. You represent to this office that the city received the request on August 19, 2005. Your initial correspondence to this office asserting exceptions to the requested information bears a postmark date of September 2, the tenth business day after August 19. However, the requestor has submitted to this office a copy of a letter that appears to be an earlier request for the same information with a copy of a return receipt for certified mail, signed and dated, and indicating a date of delivery of August 1. The information submitted by the requestor indicates that this letter from the requestor was received by the city on August 1, not August 19. In the open records ruling

process, this office is unable to resolve disputes of fact; therefore, we must rule conditionally. If an earlier request for the submitted e-mails was received by the city on August 1, we conclude that the city has failed to comply with the deadline under section 552.301(b) of the Act.¹

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 requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *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. 319 (1982). A compelling reason exists when third-party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977).

Section 552.107 of the Government Code is discretionary in nature; it serves only to protect a governmental body's interests and may be waived. As such, it does not constitute a compelling reason to withhold information. *See* Open Records Decision 676 at 11-12 (2002) (claim of attorney-client privilege under section 552.107 or Texas Rule of Evidence 503 does not provide compelling reason for purposes of section 552.302 if it does not implicate third party rights); *see also* Open Records Decision No. 522 (1989) (discretionary exceptions in general). Therefore, to the extent the city failed to satisfy the procedural requirements of section 552.301, none of the submitted information is excepted from release under section 552.107.

However, to the extent the city did satisfy the procedural requirements of section 552.301, we will address your arguments. 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).² Third, the privilege applies only to communications

¹We note the requestor's letter that is dated August 1, and which the requestor purports to be an earlier request for the submitted e-mails, states "I wish to obtain all records" pertaining to the variance request at issue.

²The 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 Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client

between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). 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).

You state that the submitted e-mails, consist of confidential communications between city employees and city attorneys, and that these communications were made in furtherance of the rendition of professional legal services to the city. Upon review of your arguments and these e-mails, we conclude that they are protected by the attorney-client privilege, and thus may be withheld under section 552.107(1) of the Government Code, if the city complied with the procedural requirements of section 552.301.

To the extent the city did not comply with section 552.301, the submitted e-mails include information that is confidential and must be withheld from disclosure. Section 552.136 of the Government Code is applicable to some of the submitted information.³ This exception provides as follows:

(a) In this section, “access device” means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

(1) obtain money, goods, services, or another thing of value; or

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.

³ Unlike other exceptions to disclosure under the Act, this office will raise section 552.136 on behalf of a governmental body, as this exception is mandatory and may not be waived. *See Gov’t Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).*

(2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov't Code § 552.136. We have marked a bank account number that the city must withhold under section 552.136.

We also note that the submitted information includes a personal e-mail address. Section 552.137 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). The e-mail address at issue does not appear to be of a type specifically excluded by section 552.137(c). Therefore, to the extent the submitted information may not otherwise be withheld, the city must withhold the e-mail address we have marked under section 552.137 of the Government Code, unless the city receives consent for its release.

In summary, if the city fully complied with section 552.301, the submitted e-mails may be withheld under section 552.107 of the Government Code. Otherwise, the city must withhold the information marked pursuant to sections 552.136 and 552.137 of the Government Code and release the remainder of the e-mails.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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. 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,



L. Joseph James
Assistant Attorney General
Open Records Division

LJJ/seg

Ref: ID# 235900

Enc. Submitted documents

c: Mr. Habib H. Erkan, Jr.
Earl & Associates, P.C.
111 Soledad, Suite 1111
San Antonio, Texas 78205
(w/o enclosures)