



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 9, 2006

Mr. Rashaad V. Gambrell
Assistant City Attorney
City of Houston
P.O. Box 368
Houston, Texas 77001-0368

OR2006-13311

Dear Mr. Gambrell:

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# 264205.

The City of Houston (the "city") received a request for information related to Tax Increment Reinvestment Fund 17 ("TIRZ 17") and Metro-National, a copy of a specified letter from the manager of TIRZ 17 to the city's mayor, and the mayor's reply. You state that you have released some of the requested information but claim that the submitted information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code. We have considered the exceptions you claim 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, you note that the requested information was the subject of a previous ruling issued by this office. In Open Records Letter No. 2006-08690 (2006), this office determined that the Memorial City Management District (the "district") and the Memorial City Redevelopment Authority (the "authority") could withhold the submitted information under section 552.107 of the Government Code. You assert that "the [c]ity believes it should be able to rely on [Open Records Letter No. 2006-08690]" as a "previous determination." We note that the authority administers TIRZ 17 subject to the city's supervision. In Open Records Decision No. 673 (2001), this office concluded that a governmental body could withhold information pursuant to a "previous determination" where 1) the records or information at issue are precisely the same records or information that were previously submitted to this office pursuant to section 552.301(e)(1)(D) of the Government Code; 2) the governmental body which received the request for the records or information is the same governmental body that previously requested and received a ruling from the attorney

general; 3) the attorney general's prior ruling concluded that the precise records or information are or are not excepted from disclosure under the Act; and 4) the law, facts, and circumstances on which the prior attorney general ruling was based have not changed since the issuance of the ruling. In this instance, the requestor contends that the submitted information has been released to the Superintendent of the Spring Branch Independent School District (the "school district") and the Chairman of TIRZ 17. While Open Records Letter No. 2006-08690 concluded that TIRZ 17 and the authority share a common interest, that ruling did not conclude that the authority and the school district share such a common interest. Therefore, to the extent the submitted information has been disclosed to the school district, we find that the facts and circumstances on which Open Records Letter No. 2006-08690 was based have changed. Consequently, to the extent the submitted information has been disclosed to the school district, the city may not rely on Open Records Letter No. 2006-08690 as a "previous determination" and we will consider your arguments against the disclosure of the submitted information. To the extent the submitted information has not been disclosed to the school district, the city must continue to rely on Open Records Letter No. 2006-08690 as a previous determination and withhold the submitted information in accordance therewith.

To the extent the submitted information has been disclosed to the school district, we address your arguments under sections 552.107 and 552.111 of the Government Code. Section 552.107(1) of the Government Code protects information that comes 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. *See* 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. *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 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 of the attorney-client privilege. 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.

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. *See 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 assert that the submitted information is excepted from disclosure under section 552.107(1). However, if the submitted information was released to a party who is not a client, client representative, lawyer, or lawyer representative, then the attorney-client privilege has been waived with regard to any submitted information that has been so disclosed. *See* TEX.R.EVID. 511; *Axelson, Inc. v. McIlhaney*, 798 S.W.2d 550 (Tex. 1990); Open Records Decision No. 676 at 10-11 (2002). Therefore, to the extent the submitted information has been disclosed to someone other than the city representatives, city lawyers, or city lawyer representatives, then such information is not protected by the attorney-client privilege under section 552.107(1) and must be released to the requestor.

The city also asserts that the submitted information is excepted from disclosure under section 552.111 of the Government Code. Section 552.111 excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” This section encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). However, as stated above, to the extent the city voluntarily disclosed the submitted information to the school board, it has also waived the attorney work product privilege. Therefore, to the extent the submitted information has been disclosed to a non-privileged party, it may not be withheld under section 552.111.

In summary, to the extent the submitted information has not been disclosed to someone other than the city’s representatives, the city’s attorneys, or representatives of the city’s attorneys, the city may rely on Open Records Letter No. 2006-08690 as a previous determination and withhold the submitted information in accordance therewith. If the submitted information has been disclosed to someone other than the city’s representatives, the city’s attorneys, or representatives of the city’s attorneys, then the submitted information must be released to the requestor.

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/dh

Ref: ID# 264205

Enc. Submitted documents

c: Ms. Donna Freedman
11930 Surrey Lane
Houston, Texas 77024
(w/o enclosures)