



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 18, 2007

Ms. Elaine S. Hengen
Senior Assistant City Attorney
City of El Paso
2 Civic Center Plaza, 9th Floor
El Paso, Texas 79901

OR2007-04376

Dear Ms. Hengen:

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# 275919.

The City of El Paso (the "city") received two requests for e-mail correspondence sent during public meetings between certain city council members and city employees during specified times from November 2006 to January 2007,¹ as well as specified written communications, the city council's policy on electronic communications during public meetings, and any letters sent to the Texas Attorney General's office regarding the initial request. You state that you will release most of the information to the requestors. You claim that the remaining requested information is excepted from disclosure under sections 552.107 and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.² We have also considered comments submitted by the requestor and another interested party. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

¹We note that with regard to the e-mail correspondence, the second request is encompassed by the first.

²We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Section 552.107 of the Government Code protects information coming within the attorney-client privilege. Gov't Code § 552.107. 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 Tex. 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).

You state that the e-mail correspondence in Exhibit B constitutes confidential attorney-client communications between attorneys for the city and its elected officials, their staff, and other upper echelon city employees. You further contend that these communications were made for the purpose of facilitating the rendition of professional legal services and were intended to be confidential. We note the requestor's citation of section 551.129 of the Government Code for his assertion that a waiver of the attorney-client privilege has occurred because the communications at issue took place during an open session of the city council. Section 551.129 provides that a governmental body may use communications over the internet to conduct a public consultation with its attorney in an open meeting of the governmental body.

See Gov't Code § 551.129. However, section 551.129, which is part of the Open Meetings Act, does not affect the attorney-client privilege in section 552.107 of the Act. The privilege is waived if the holder of the privilege voluntarily discloses a significant part of the privileged matter. Tex. R. Evid. 511. Although the communications were sent while the parties were in open meetings, the communications were sent to privileged parties only. We find that the city has established that the information in Exhibit B constitutes privileged attorney-client communications that may be withheld pursuant to section 552.107 of the Government Code.

The remaining submitted information contains e-mail addresses that are excepted from disclosure under section 552.137 of the Government Code. 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). Section 552.137 does not apply to a government employee's work e-mail address because such an address is not that of the employee as a “member of the public” but is instead the address of the individual as a government employee. The marked e-mail addresses are not of the type specifically excluded by section 552.137(c). Therefore, in accordance with section 552.137 of the Government Code, the city must withhold the e-mail addresses it has marked and that we have marked unless the city receives consent to release them.

In summary, the city may withhold the information in Exhibit B under section 552.107 of the Government Code. The city must withhold the marked e-mail addresses under section 552.137. The remaining information must be released.

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

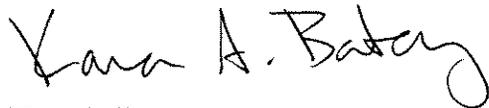
will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to 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,



Kara A. Batey
Assistant Attorney General
Open Records Division

KAB/sdk

Ref: ID# 275919

Enc. Submitted documents

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