



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

May 8, 2009

Mr. Jeffrey L. Moore
Attorney at Law
Brown & Hofmeister, L.L.P.
740 East Campbell Road, Suite 800
Richardson, Texas 75081

OR2009-06181

Dear Mr. Moore:

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# 342664.

The City of McKinney (the "city"), which you represent, received a request for all e-mails, memos, letters, or other correspondence sent and received by city staff and city council members between August 1, 2008 and February 18, 2009 that relate to the Dr. Pepper StarCenter project. You state that the city is releasing some of the responsive information to the requestor. You claim that portions of the submitted e-mails are 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.¹

Initially, you inform us that a portion of the requested information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2009-00472 (2009). We presume that the facts and circumstances have not changed since the issuance of this prior ruling. To the extent the information at issue is identical to the information previously requested and ruled upon by this office, the city must withhold or release the information in accordance with Open Records Letter No. 2009-00472. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that

¹We 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.

information is or is not excepted from disclosure). For the information not previously requested and ruled upon by this office, we will address your arguments for this information.

Next, we note that a portion of the submitted information, which we have marked, is not responsive as it does not fall within the dates specified by the requestor. The city need not release non-responsive information in response to this request, and this ruling will not address that information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W. 2d 266 (Tex. Civ. App. – San Antonio 1978, writ dismissed).

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. 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 a capacity other than that of attorney). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *See* TEX. R. EVID. 503(b)(1). 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, 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 state that portions of the requested information, which you have marked, consist of communications to and from the city and its attorneys. You have identified the parties to the communications. You state that these communications were made for the purpose of facilitating the rendition of professional legal services and that the confidentiality of these communications has been maintained. Based on your representations and our review, we find that the city may withhold the information you have marked under section 552.107 of the Government Code.

Section 552.137 of the Government Code makes certain e-mail addresses confidential, providing the following:

(a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

(c) Subsection (a) does not apply to an e-mail address:

(1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;

(2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract; or

(4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.

(d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Gov't Code § 552.137. Under section 552.137, a governmental body must withhold the e-mail address of a member of the general public, unless the individual to whom the e-mail address belongs has affirmatively consented to its public disclosure. *See id.* § 552.137(b). The types of e-mail addresses listed in section 552.137(c) may not be withheld under section 552.137. Likewise, this section is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. You have marked e-mail addresses under section 552.137. We note that some of the marked e-mail addresses belong to employees of entities with which the city has a contractual relationship. To the extent that any of the marked e-mails belong to employees of entities with which the city has a contractual relationship, or fall under any of the other exceptions listed under subsection 552.137(c), the city may not withhold these

e-mail addresses under section 552.137. As you state you have received no consent for the release of any of the e-mail addresses at issue, the city must withhold the remaining e-mail addresses pursuant to section 552.137 of the Government Code.

In summary, to the extent the submitted information is identical to the information previously requested and ruled on by this office in Open Records Letter No. 2009-00472, the city may continue to rely on that ruling as a previous determination and dispose of this information in accordance with that ruling. To the extent the submitted information was not previously ruled on, the city need not release the information that we have marked as non-responsive. The city may withhold the marked information under section 552.107 of the Government Code. With the exception of e-mail addresses of employees of entities with which the city has a contractual relationship, the city must withhold the marked e-mail addresses under section 552.137 of the Government Code. The remaining information must be released.

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

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Pamela Wissemann
Assistant Attorney General
Open Records Division

PFW/jb

Ref: ID# 342664

Enc. Submitted documents

c: Requestor
(w/o enclosures)