ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 15, 2009

Mr. Dick H. Gregg, III
Gregg & Gregg, P.C.
16055 Space Center Boulevard, Suite 150
Houston, Texas 77062

OR2009-09757

Dear Mr. Gregg:

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# 349177.

The City of Bayou Vista (the "city"), which you represent, received a request for e-mails and written correspondence between the city's attorney and city officials regarding a specified issue. You claim that the submitted information is excepted from disclosure under section 552.107 of the Government Code.[1] We have considered the exception you claim and reviewed the submitted information.

Initially, we note that some of the submitted e-mails, which we have marked, are not responsive to the instant request for information, as they were created after the date that the city received the request. This ruling does not address the public availability of any information that is not responsive to the request, and the city need not release that information in response to this request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ dism'd); Open

[1]Although we understand you to assert the submitted information is privileged as attorney work-product, which is covered by section 552.111 of the Government Code, you provide no arguments explaining how this exception is applicable to the submitted information. Thus, the city has waived its claim under section 552.111. *See* Gov't Code § 552.301(e) (governmental body must provide comments explaining why exceptions raised should apply to information requested); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions in general).

Records Decision No. 452 at 3 (1986) (governmental body not required to disclose information that did not exist at time request was received).

Section 552.107(1) 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 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 a 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). 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.*, 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 claim the submitted information consists of communications made for the purpose of facilitating the rendition of professional legal services. You state the communications were made between the city and its attorney. You further state the communications were intended to be confidential, and the confidentiality of the communications has been maintained. Upon review, we find the city may withhold the submitted information under section 552.107 of the Government Code. We note, however, some of the individual e-mails contained in the submitted e-mail strings consist of communications with a non-privileged party.

Accordingly, to the extent these non-privileged e-mails exist separate and apart from the submitted e-mail strings, they may not be withheld under section 552.107. We have marked these non-privileged e-mails.

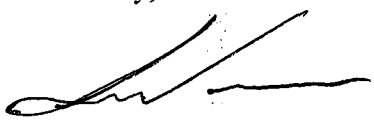
We note the marked non-privileged e-mails include e-mail addresses subject to section 552.137 of the Government Code, which excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body," unless the member 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). Accordingly, if the city maintains the non-privileged e-mails separate and apart from the submitted e-mail strings, the city must withhold the e-mail addresses we have marked under section 552.137, unless the owners of the addresses have affirmatively consented to their release. *See id.* § 552.137(b). The remainder of the non-privileged e-mails must be released to the requestor.

In summary, the city may withhold the submitted information under section 552.107 of the Government Code. However, to the extent the non-privileged e-mails we have marked exist separate and apart from the submitted e-mail strings, the separate e-mails must be released, with the exception of the e-mail addresses we have marked, which must be withheld under section 552.137 of the Government Code.

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,



Ana Carolina Vieira
Assistant Attorney General
Open Records Division

ACV/eeg

Ref: ID# 349177

Enc. Submitted documents

c: Requestor
(w/o enclosures)