



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 18, 2009

Mr. David M. Feldman
Feldman, Rogers, Morris & Grover, L.L.P.
5718 Westheimer Road Suite 1200
Houston, Texas 77057

OR2009-11572

Dear Mr. Feldman:

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# 352626.

The City of Nassau Bay (the "city"), which you represent, received a request for information relating to the requestor and the city's termination of her employment, including her personnel file, notice of separation, and check-out form; a memo from human resources; a form showing her benefit package on dismissal; and a particular payroll check. You state that some of the requested information has been released. You claim that other responsive 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 information you submitted.

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 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. See TEX. R. EVID. 503(b)(1)(A)-(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).

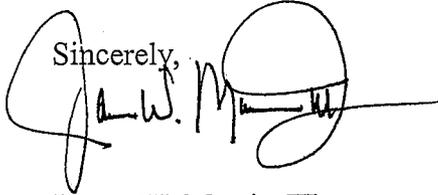
You seek to withhold all of the submitted information, which consists mostly of e-mails, under section 552.107(1). You inform us that the information at issue either consists of or documents communications involving representatives of and an attorney for the city. You state that the communications in question occurred in connection with the rendition of professional legal services to the city. You also state that the communications were intended to be confidential, and you do not indicate that their confidentiality has been waived. Based on your representations and our review of the information at issue, we conclude that most of the submitted information is protected by the attorney-client privilege. The city may generally withhold that information, which we have marked, under section 552.107(1) of the Government Code.¹ We find that the rest of the submitted information neither consists of nor documents a privileged attorney-client communication. Therefore, the remaining information may not be withheld under section 552.107(1) and must be released. We also note that one of the submitted e-mail strings that we have marked under section 552.107(1) includes a communication with a non-privileged party. If that e-mail, which we have marked, exists separate and apart from the e-mail string, then it may not be withheld under section 552.107(1) and must also be released.

¹As we are able to make this determination, we need not address your claim 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,

A handwritten signature in black ink, appearing to read 'James W. Morris, III', with a large, stylized flourish at the end.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/cc

Ref: ID# 352626

Enc: Submitted documents

c: Requestor
(w/o enclosures)