



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 24, 2009

Ms. Jenny Gravley
Taylor, Olson, Adkins, Sralla & Elam, L.L.P.
6000 Western Place, Suite 200
I-30 at Bryant-Irvin Road
Fort Worth, Texas 76107-4654

OR2009-11889

Dear Ms. Gravley:

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# 353087.

The City of Lake Worth (the "city"), which you represent, received a request for information presented to the economic development committee prior to meetings on specific dates. You state you are releasing most of the requested information. You claim that portions of the submitted information are excepted from disclosure under sections 552.107, 552.136, and 552.137 of the Government Code. You take no position with respect to the public availability of the remaining requested information, but believe that the request may implicate the proprietary interests of Eagle Remediation Services, Inc. ("Eagle") and HP EnviroVision ("HP"). Accordingly, you notified these entities of this request for information and of their right to submit arguments to this office as to why the information should not be released. *See Gov't Code § 552.305(d); see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments

from Eagle or HP explaining why their submitted information should not be released. Therefore, we have no basis to conclude that either of these third parties have a protected proprietary interest in the submitted information. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, the city may not withhold any portion of the submitted information based upon the proprietary interests of these third parties.

Section 552.107(1) of the Government Code 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 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 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 state that the information you have highlighted consists of communications between city employees and attorneys. You state that these communications were made for the purpose of facilitating the rendition of professional legal services. You also state the confidentiality of these communications has been maintained. Based on your representations and our review, we conclude section 552.107 is applicable to the information at issue. Thus, the city may withhold the information you have highlighted under section 552.107 of the Government Code.

Section 552.136 of the Government Code states that “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136. An access device number is one that may be used to (1) obtain money, goods, services, or another thing of value; or (2) initiate a transfer of funds other than a transfer originated solely by paper instrument. *Id.* The city must withhold the information we have marked under section 552.136 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). *Id.* § 552.137(a)-(c). Subsection (c)(2) states that subsection (a) does not apply to an e-mail address “provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor’s agent[,]” and subsection (c)(3) does not apply to an e-mail address “contained in a response to a request for bids or proposals[.]” *Id.* § 552.137(c)(2), (3). We note that some of the highlighted e-mails are provided by a vendor who seeks to contract with the city and contained within responses to a request for proposal. Thus these e-mail addresses, which we have marked for release, may not be withheld under section 552.137. *Id.* § 552.137(c)(1), (2). Accordingly, with the exception of the e-mail addresses we have marked for release, the city must withhold the remaining e-mail addresses you marked under section 552.137 except to the extent the owners of the e-mail addresses have consented to disclosure.

In summary, the city may withhold the information you have marked under section 552.107 of the Government Code. The city must withhold the information we have marked under section 552.136 of the Government Code. With the exception of the information we have marked for release, the city must withhold the e-mail addresses you marked under section 552.137 except to the extent the owners of the e-mail addresses have consented to disclosure. The remaining information must be released.¹

¹ We note that this requestor has a special right of access to some of the information being released. See Gov’t Code § 552.023(a). Therefore, if the city receives another request for this information from a person who does not have a special right of access to this information, the city should resubmit this same information and request another decision from this office. See *id.* §§ 552.301(a), .302; Open Records Decision No. 673 (2001).

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,



Chris Schulz
Assistant Attorney General
Open Records Division

CS/cc

Ref: ID# 353087

Enc. Submitted documents

cc: Requestor
(w/o enclosures)