ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 2, 2009

Ms. Patricia A. Adams
Town Attorney
Town of Trophy Club
100 Municipal Drive
Trophy Club, Texas 76262

OR2009-15536

Dear Ms. Adams:

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# 360235.

The Town of Trophy Club (the "town") received a request for e-mails exchanged between the town and certain individuals during a specified time period and relating to upcoming bond elections. You state the town has released some of the responsive information. You claim that the submitted e-mails are excepted from disclosure under section 552.107 of the Government Code and privileged under rule 503 of the Texas Rules of Evidence.[1] We have considered the exception and privilege you claim and reviewed the submitted representative sample of information.[2]

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[1]You also raise section 552.101of the Government in conjunction with Texas Rule of Evidence 503, however, this office has concluded that section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Further, although you raise the attorney-client privilege under rule 503 of the Texas Rules of Evidence, we note that section 552.107 of the Government Code is the proper exception to raise for your attorney-client claim in this instance. *See* ORD 676.

[2]We 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(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 pet.). 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 the submitted information consists of confidential communications between the town and its attorneys made for the purpose of facilitating the rendition of professional legal services. You have identified some of the parties to the communications. You state the communications were intended to be and have remained confidential. Based on your representations, and our review, we find the town may withhold the e-mails we have marked under section 552.107 of the Government Code. However, some of the submitted e-mails are between the town attorneys and individuals that you have not identified. Therefore, we find that you have not demonstrated that this information consists of privileged attorney-client communications. Accordingly, this information may not be withheld under section 552.107 of the Government Code. We further note that some of the individual e-mails contained in the submitted e-mail strings also consist of communications with parties you have not identified. 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.

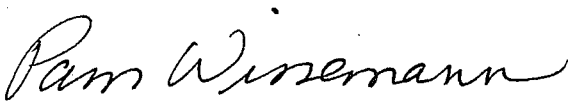
We note the remaining information contains an e-mail address subject to section 552.137 of the Government Code.[3] Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). Gov't Code § 552.137(a)-(c). Section 552.137 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. The address we have marked in the remaining information does not appear to be a type specifically excluded by section 552.137(c). Accordingly, the town must withhold the marked e-mail address under section 552.137, unless the owner of the address has affirmatively consented to its release. *See id.* § 552.137(b).

In summary, the town may withhold the information we have marked 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 e-mail chains privileged under 552.107, the town must release them. The town must withhold the e-mail address we have marked 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, toll free, at (888) 672-6787.

Sincerely,



Pamela Wissemann
Assistant Attorney General
Open Records Division

PFW/eb

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[3]The Office of the Attorney General will raise a mandatory exception like section 552.137 on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Ref: ID# 360235

Enc. Submitted documents

c: Requestor
(w/o enclosures)