



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 17, 2009

Mr. Adam Falco
Senior Assistant City Attorney
City of College Station
P.O. Box 9960
College Station, Texas 77842

OR2009-16304

Dear Mr. Falco:

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# 361599.

The City of College Station (the "city") received a request for all e-mails to or from any city employee or elected official regarding red light cameras for a specified time period. You state you have released a majority of the requested information to the requestor. 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 representative sample of information.²

¹Although you also raise the attorney-client privilege under rule 503 of the Texas Rules of Evidence, we note section 552.107 is the proper exception to raise for your attorney-client privilege claim in this instance. Furthermore, you also raise sections 552.103 and 552.108 of the Government Code. However, as you have submitted no arguments in support of the applicability of these exceptions, we assume you no longer claim sections 552.103 and 552.108. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must submit written comments stating reasons why claimed exceptions to disclosure apply).

²We 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.

You raise section 552.107 of the Government Code for the submitted e-mails. 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 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, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *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. *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 e-mails consist of confidential communications between city officials, city employees, and attorneys for the city made for the purpose of rendering professional legal services to the city. You further inform us that the communications were intended to be and have remained confidential. Based on your representations and our review, we determine that the e-mails we have marked under section 552.107 constitute privileged attorney-client communications. Accordingly, the city may withhold this information under section 552.107 of the Government Code. However, we note the remaining e-mails are between city employees, city attorneys, and outside parties. Because you have not demonstrated that these outside parties are privileged parties, we find you have

failed to establish that the remaining e-mails constitute or document privileged attorney-client communications. Thus, we find that you have not established the applicability of the attorney-client privilege to any of the remaining e-mails and they may not be withheld under section 552.107 of the Government Code. *See* TEX. R. EVID. 511. As you raise no further exceptions against disclosure for the remaining information, it 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,



Christina Alvarado
Assistant Attorney General
Open Records Division

CA/rl

Ref: ID# 361599

Enc. Submitted documents

cc: Requestor
(w/o enclosures)