



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

March 24, 2010

Ms. Mariví Gambini  
City Attorney's Office  
City of Irving  
825 West Irving Boulevard  
Irving, Texas 75060

OR2010-02675A

Dear Ms. Gambini:

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# 379395.

In this instance, you have asked this office to reconsider Open Records Letter No. 2010-02675 (2010). We note that a governmental body is prohibited from asking this office to reconsider a decision issued under section 552.306 of the Government Code. *See* Gov't Code § 552.301(f). Furthermore, you have not demonstrated that this office made an error in issuing the prior ruling. Nevertheless, we have determined that the prior ruling should be corrected for purposes of due process. *See id.* §§ 552.306, .352. Accordingly, we hereby withdraw the prior ruling. This decision is substituted for Open Records Letter No. 2010-02675 and serves as the correct ruling.

The City of Irving (the "city") received a request for information related to the requestor's suspension, including information related to two other named fire fighters. You state that the city will release some of the requested information. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>1</sup> We have also received and

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<sup>1</sup>This letter ruling assumes that the submitted representative samples of information are truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the city to withhold any information that is substantially different from the submitted information. *See* Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

considered comments from the requestor and another of the named fire fighters. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

You raise section 552.107 of the Government Code for some of the submitted information. 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 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 a capacity other than that of attorney). 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.* 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 claim the information you have marked consists of communications made for the purpose of facilitating the rendition of professional legal services. You state the communications were between an assistant city attorney and city employees. You further state the communications were intended to be confidential, and that the confidentiality of the communications has been maintained. Upon review, we find the city may generally withhold the information you have marked pursuant to section 552.107(1) of the Government Code. We note, however, that one of the individual e-mails contained in the submitted e-mail strings you seek to withhold under section 552.107 consists of a communication with a non-privileged party. We have marked this non-privileged e-mail. To the extent this

non-privileged e-mail exists separate and apart from the submitted e-mail strings, it may not be withheld under section 552.107.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses information protected by other statutes, including section 143.089 of the Local Government Code. You state the city is a civil service city under chapter 143 of the Local Government Code. Section 143.089 contemplates two different types of personnel files: a fire fighter’s civil service file that a city’s civil service director is required to maintain, and an internal file that the fire department may maintain for its own use. *See* Local Gov’t Code § 143.089(a), (g).

In cases in which a fire department investigates a fire fighter’s misconduct and takes disciplinary action against the fire fighter, it is required by section 143.089(a)(2) to place all investigatory records relating to the investigation and disciplinary action, including background documents such as complaints, witness statements, and documents of like nature from individuals who were not in a supervisory capacity, in the fire fighter’s civil service file maintained under section 143.089(a).<sup>2</sup> *See Abbott v. City of Corpus Christi*, 109 S.W.3d 113, 122 (Tex. App.—Austin 2003, no pet.). All investigatory materials in a case resulting in disciplinary action are “from the employing department” when they are held by or in possession of the department because of its investigation into a fire fighter’s misconduct, and the department must forward them to the civil service commission for placement in the civil service personnel file. *See id.* Such records are subject to release under the Act. *See* Local Gov’t Code § 143.089(f); Open Records Decision No. 562 at 6 (1990). However, a document relating to a fire fighter’s alleged misconduct may not be placed in his civil service personnel file if there is insufficient evidence to sustain the charge of misconduct. *See* Local Gov’t Code § 143.089(b). Information that reasonably relates to a fire fighter’s employment relationship with the fire department and that is maintained in the department’s internal file pursuant to section 143.089(g) is confidential and must not be released. *See City of San Antonio v. San Antonio Express-News*, 47 S.W.3d 556 (Tex. App.—San Antonio 2000, pet. denied); *City of San Antonio v. Tex. Attorney Gen.*, 851 S.W. 2d 946, 949 (Tex. App.—Austin 1993, writ denied).

You state that the information you have marked is maintained within the internal fire department file for one of the fire fighters concerned. We note that the information at issue includes an internal affairs investigation that originally resulted in a suspension of one of the named fire fighters. However, you state that due to an administrative error, the suspension was rescinded, so that the investigation did not result in disciplinary action. Therefore, you assert this information is properly maintained in the department’s internal files as authorized

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<sup>2</sup>Chapter 143 prescribes the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. *See* Local Gov’t Code §§ 143.051-.055. An oral or written reprimand does not constitute discipline under chapter 143.

by section 143.083(g). Based on your representations and our review of the records at issue, we agree that this information is confidential pursuant to section 143.089(g) of the Local Government Code. Therefore, the information you have marked must be withheld on that basis under section 552.101 of the Government Code.

In summary, with the exception of only non-privileged communications that exist separate and apart from the otherwise privileged e-mail strings, the city may withhold the information you have marked pursuant to section 552.107(1) of the Government Code. The remaining information is confidential under section 143.089(g) of the Local Government Code and must be withheld on that basis under section 552.101 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](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,



Tamara Wilcox  
Assistant Attorney General  
Open Records Division

TW/dls

Ref: ID# 379395

Enc. Submitted documents

c: Requestor  
(w/o enclosures)