



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 23, 2013

Ms. Kara E. Richardson
Counsel for the East Montgomery County Improvement District
Marks Richardson, P.C.
3700 Buffalo Speedway, Suite 830
Houston, Texas 77098

OR2013-01275

Dear Ms. Richardson:

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# 476935.

The East Montgomery County Improvement District (the "district"), which you represent, received a request for all e-mails related to district business sent by a named individual during a specified time period. You state the district released some of the requested information. You claim the submitted information is excepted from disclosure under sections 552.103, 552.104, 552.107, and 552.137 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

¹Although you also raise Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5, we note the proper exceptions to raise when asserting the attorney-client privilege and work product privilege for information not subject to section 552.022 of the Government Code are sections 552.107 and 552.111 of the Government Code, respectively. *See* Open Records Decision Nos. 676 at 1-2 (2002), 677 (2002). Additionally, although you raise sections 552.101, 552.105, and 552.111 of the Government Code, you make no arguments to support these exceptions. Therefore, we presume you no longer assert these exceptions. *See* Gov't Code §§ 552.301, .302.

²This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling does not reach, and therefore does not authorize, the withholding of any other requested information to the extent that the other information is substantially different than that submitted to this office. *See* Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

Initially, we must address the district's obligations under section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(b) requires that a governmental body ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. *See* Gov't Code § 552.301(b). You state the district received the present request for information on October 31, 2012. You inform us the district requested clarification of the request on October 31, 2012, and received clarification from the requestor on November 1, 2012. *See id.* § 552.222(b) (stating that if information requested is unclear to governmental body or if a large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); *City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding that when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date the request is clarified or narrowed). Accordingly, the district's ten-business-day deadline was November 15, 2012. While you raised sections 552.103, 552.107, and 552.137 within the ten-business-day time period as required by subsection 552.301(b), you did not raise section 552.104 until after the ten-business-day deadline had passed. Thus, the district failed to comply with the requirements mandated by subsection 552.301(b) as to your argument under section 552.104.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the information is public and must be released unless the governmental body overcomes this presumption by demonstrating a compelling reason to withhold the information. Gov't Code § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 630 (1994). A compelling reason generally exists when information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3, 325 at 2 (1982). Section 552.104 is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions in general), 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions), 592 (1991) (governmental body may waive statutory predecessor to section 552.104). Thus, in failing to comply with section 552.301, the district has waived its argument under section 552.104, and may not withhold the information at issue on that basis. However, we will consider the applicability of the timely raised exceptions to the submitted information.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. Gov't Code § 552.107(1). 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). 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 to only 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 to only 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, orig. proceeding). 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 information at issue in Exhibits A and B constitutes e-mail communications between attorneys for the district and the CEO for the district that were made for the purpose of providing legal services to the district. You state the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find the information at issue in Exhibits A and B consist of privileged attorney-client communications that the district may generally withhold under section 552.107(1) of the Government Code.³ We note, however, one of the privileged e-mail strings in Exhibit A includes an e-mail sent to non-privileged parties. Furthermore, if the e-mail sent to non-privileged parties is removed from the e-mail string in which it appears and stands alone, it is responsive to the request for information. Therefore, if this non-privileged e-mail, which we have marked, is maintained by the district separate and

³As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

apart from the otherwise privileged e-mail string in which it appears, then the district may not withhold this non-privileged e-mail under section 552.107(1) of the Government Code.

We note portions of the remaining information are subject to section 552.117 of the Government Code.⁴ Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). Section 552.117 is also applicable to cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (statutory predecessor to section 552.117 of the Government Code not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, a governmental body must withhold information under section 552.117 on behalf of a current or former employee only if the individual made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Accordingly, if the individual whose information is at issue timely requested confidentiality pursuant to section 552.024, the cellular telephone number we have marked must be withheld under section 552.117(a)(1) if the cellular telephone service is not paid for by a governmental body. The district may not withhold the marked information under section 552.117 if the individual did not make a timely election to keep the information confidential.

Section 552.137 of the Government Code 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, the general e-mail address of a business, an e-mail address of a person who has a contractual relationship with a governmental body, an e-mail address of a vendor who seeks to contract with the governmental body, or an e-mail address maintained by a governmental entity for one of its officials or employees. *See id.* § 552.137(c). Upon review, however, we note the e-mail addresses in the remaining information fall under subsection 552.137(c); therefore, the district may not withhold these addresses under section 552.137.

In summary, the district may withhold Exhibits A and B under section 552.107(1) of the Government Code. However, if the non-privileged e-mail we have marked in Exhibit A is maintained by the district separate and apart from the otherwise privileged e-mail string in which it appears, then the district may not withhold this non-privileged e-mail under

⁴The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

section 552.107(1) of the Government Code. The district must withhold the cellular telephone number we have marked under section 552.117(a)(1) of the Government Code if the individual whose information is at issue timely requested confidentiality pursuant to section 552.024 and if the cellular telephone service is not paid for by a governmental body. The district must release the remaining information.

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,



Lindsay E. Hale
Assistant Attorney General
Open Records Division

LEH/tch

Ref: ID# 476935

Enc. Submitted documents

c: Requestor
(w/o enclosures)