



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 26, 2013

Mr. David Ritter
Assistant City Attorney
City of Plano
P.O. Box 860358
Plano, Texas 75086-0358

OR2013-03244

Dear Mr. Ritter:

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# 479847.

The City of Plano (the "city") received two requests from the same requestor for information from two specified time periods pertaining to a specified address. You inform us the city is releasing most of the requested information. You claim the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments to this office stating why the information at issue should or should not be released).

Initially, we note the requestor has excluded names, telephone numbers, e-mail addresses, and license plate information from his requests for information. Thus, these types of information contained in the submitted information are not responsive to the instant requests. We also note portions of the information at issue, which we have marked, are not responsive to the requests because they do not relate to the specified address. This decision does not address the public availability of the non-responsive information and that information need not be released in response to the present requests.¹

¹As our ruling for this information is dispositive, we need not address your arguments against its disclosure.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *Id.* § 552.101. Section 552.101 of the Government Code encompasses information protected by the common-law informer’s privilege, which has long been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). The privilege protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law enforcement authority, provided the subject of the information does not already know the informer’s identity. Open Records Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978). The informer’s privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to “administrative officials having a duty of inspection or of law enforcement within their particular spheres.” Open Records Decision No. 279 at 2 (1981) (citing 8 John H. Wigmore, *Evidence in Trials at Common Law*, § 2374, at 767 (J. McNaughton rev. ed. 1961)). The privilege excepts the informer’s statement only to the extent necessary to protect the informer’s identity. *See* Open Records Decision No. 549 at 5 (1990). We note the informer’s privilege does not apply if the subject of the complaint knows the informer’s identity. *See* ORD 208 at 1-2.

You inform us portions of the responsive information in Exhibit B-1 identify complainants who reported possible violations of the city’s code, which is enforced by the city’s Property Standards Department (the “department”). You explain the department has the authority to enforce the violations at issue. You also explain the code imposes criminal penalties for these violations. We note, however, the requestor, who is the subject of the complaints, indicates he knows the identities of the complainants at issue. Therefore, we must rule conditionally. If the requestor does not know the identities of the complainants at issue in Exhibit B-1, then their identifying information, which we have marked, may be withheld under section 552.101 of the Government Code in conjunction with the common-law informer’s privilege. However, if the requestor knows the identities of these complainants, then this information may not be withheld under section 552.101 on that basis. Further, upon review, we find none of the remaining responsive information in Exhibit B-1 reveals the identity of an informant. Thus, the city may not withhold any of this information under section 552.101 in conjunction with the common-law informer’s privilege.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *See* 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 inform us the responsive information submitted in Exhibit B-2 consists of communications between a city attorney and city employees that were made for the purpose of facilitating the rendition of professional legal services to the city. You represent these communications were intended to be, and have remained, confidential. However, the requestor asserts the city has previously revealed the content and substance of the communications at issue to him. If these communications were disclosed to an individual who is not a client, client representative, lawyer, or lawyer representative, then the attorney-client privilege has been waived with regard to any responsive information in Exhibit B-2 that has been disclosed to the public. *See* TEX. R. EVID. 511, *Axelson, Inc. v. McIlhane*, 798 S.W.2d 550 (Tex. 1990); ORD 676 at 10-11. In this instance, however, the question of whether the attorney-client privilege has been waived with respect to any of the information at issue presents factual issues. This office cannot resolve factual issues in the opinion process. *See* Open Records Decision Nos. 592 at 2 (1991), 552 at 4 (1990), 435 at 4 (1983). Nevertheless, we find if the responsive information in Exhibit B-2 has not been disclosed to the public, then such information constitutes privileged attorney-client communications the city may withhold under section 552.107(1) of the Government Code. If the information at issue has been disclosed to the public, then such information does not constitute privileged attorney-client communications and the city may not withhold it on that basis.

In summary, if the requestor does not know the identities of the complainants at issue in Exhibit B-1, then their responsive identifying information, which we have marked, may be withheld under section 552.101 of the Government Code in conjunction with the common-law informer's privilege. If the responsive information in Exhibit B-2 has not been disclosed to the public, then such information constitutes privileged attorney-client communications the city may withhold under section 552.107(1) of the Government Code. As no further exceptions to disclosure of the remaining responsive information are raised, the city must release it.

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,



Kenneth Leland Conyer
Assistant Attorney General
Open Records Division

KLC/bhf

Ref: ID# 479847

Enc. Submitted documents

c: Requestor
(w/o enclosures)