



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 16, 2013

Mr. Aaron Leal and Ms. Anita Burgess
City Attorney's Office
City of Denton
215 East McKinney
Denton, Texas 76201

OR2013-12169

Dear Mr. Leal and Ms. Burgess:

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# 493277.

The City of Denton (the "city") received a request for all information provided to or by J. Stowe & Co., L.L.C. ("Stowe") for a specified review pertaining to gas permit and inspection fees. You claim the submitted information is excepted from disclosure under sections 552.106, 552.107, and 552.111 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments submitted by a representative of the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit written comments regarding why information should or should not be released).

Initially, we address the requestor's contention the city has previously released some of the information at issue to the public. The Act does not permit the selective disclosure of information. *See id.* §§ 552.007(b), .021; Open Records Decision No. 463 at 1-2 (1987). If

¹Although you raise section 552.101 of the Government Code in conjunction with rule 503 of the Texas Rules of Evidence, 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 Texas Rule of Evidence 503, we note the proper exception to raise when asserting the attorney-client privilege for information not subject to section 552.022 of the Government Code is section 552.107 of the Government Code. *See* ORD 676 at 1-2.

information has been voluntarily released to any member of the public, then that exact same information may not subsequently be withheld from another member of the public, unless public disclosure of the information is expressly prohibited by law or the information is confidential under law. *See* Gov't Code § 552.007(a); Open Records Decision Nos. 518 at 3 (1989), 490 at 2 (1988); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). However, section 552.007 does not prohibit an agency from withholding similar types of information that are not the exact information that has been previously released. We note the city contends it has not released any of the submitted information. Whether the information at issue was previously released to the public is a question of fact that this office cannot resolve through the open records ruling process. *See* Open Records Decision Nos. 554 (1990), 552 (1990). Therefore, we must rule conditionally. The city raises sections 552.106, 552.107, and 552.111 of the Government Code for the submitted information, which are discretionary exceptions to disclosure that do not make information confidential under the Act. *See* Gov't Code § 552.007; Open Record Decision Nos. 676 at 10-11 (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 470 at 7 (1987) (governmental body may waive statutory predecessor to section 552.111 deliberative process). Thus, to the extent the city has previously released any of the submitted information, the city has waived its claims under sections 552.106, 552.107, and 552.111 and may not withhold the information on any of these bases. However, to the extent the information at issue has not been previously released, we will consider the city's claims under sections 552.106, 552.107, and 552.111.

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. ORD 676 at 6-7. 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

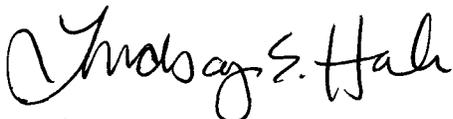
disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5). Whether a communication meets this definition depends on the intent 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 submitted information constitutes notes and communications between city attorneys, city staff, and a consultant hired by the city that were made for the purpose of providing legal services to the city. You explain the city hired Stowe as a consultant to review and analyze the city’s gas well permitting process, as a result of which the city amended its ordinance setting fees. You state the communications were intended to be and have remained confidential. Based on your representations and our review, we find the submitted information consists of privileged attorney-client communications the city may withhold under section 552.107(1). As our ruling is dispositive, we need not address the remaining arguments against disclosure.

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to 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# 493277

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Robert Miklos
Counsel for the Requestor
Milby, P.L.L.C.
1909 Woodall Rodgers, Suite 500
Dallas, Texas 75201
(w/o enclosures)