ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 12, 2014

Mr. Richard A. McCracken
Counsel for the City of Watauga
Evans, Daniel, Moore, Evans & Lazarus
115 West Second Street, Suite 202
Fort Worth, Texas 76102

OR2014-02635

Dear Mr. McCracken:

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# 513714 (Request Nos. 13-221 and 13-223).

The City of Watauga (the "city"), which you represent, received two requests from the same requestor for a specified packet pertaining to Planning & Zoning case number 13-02 and e-mails concerning Planning & Zoning case number 13-02 over a specified period of time. You state you have released some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.107 and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, you inform us Exhibits C through L were the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2014-01145 (2014). In that ruling, we determined the city may withhold the information you have marked under section 552.107(1) of the Government Code. We understand the law, facts, and circumstances on which the previous ruling was based have not changed. Therefore, to the extent the information at issue is identical to the information ruled on in that ruling, we conclude the city may rely on Open Records Letter No. 2014-01145 as a previous determination and withhold the identical information in accordance with that ruling. *See* Open Records Decision No. 673 at 6-7 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists

where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). However, because the remaining information at issue is not encompassed by the previous determination, we will consider your arguments.

Section 552.107(1) of the Government Code protects information that comes 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. *See* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate 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. *See* 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. *See 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 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). 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.*, 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. *See 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 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 you have highlighted under section 552.107(1) constitutes communications between the city's outside legal counsel, the city attorney's office, and city officials and employees that were made for the purpose of providing legal services to the city. You also state the communications were intended to be confidential and the city has

maintained the confidentiality of these communications. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information you have highlighted. Accordingly, the city may generally withhold the information at issue under section 552.107(1) of the Government Code. However, we note portions of the e-mail strings include e-mails sent to or received from individuals who you have not demonstrated are privileged parties. Furthermore, if the e-mails sent to or received from the non-privileged parties are removed from the e-mail strings and stand alone, they are responsive to the present request for information. Therefore, to the extent the non-privileged e-mails, which we have marked, are maintained by the city separate and apart from the otherwise privileged e-mail strings in which they appear, they may not be withheld under section 552.107(1) of the Government Code.

We note the non-privileged e-mails, and the remaining information, contain e-mail addresses that are subject to section 552.137 of the Government Code. Section 552.137 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). *See* Gov't Code § 552.137(a)-(c). The e-mail addresses at issue are not excluded by subsection (c). Therefore, the city must withhold the personal e-mail addresses you have marked in Exhibit II, and the e-mail addresses we have marked, under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure.

In summary, the city may generally withhold the information you have highlighted under section 552.107(1) of the Government Code. To the extent the non-privileged communications we have marked exist separate and apart from the otherwise privileged communications, the city may not withhold them under section 552.107(1) of the Government Code. In releasing the remaining information, and any non-privileged e-mails, the city must withhold the e-mail addresses you have marked in Exhibit II, and the e-mail addresses we have marked, under section 552.137 of the Government Code, unless the owners affirmatively consent to their release. The city must release the remaining information.[1]

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.

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[1]We note the information being released contains the requestor's e-mail address to which he has a right of access. *See* Gov't Code § 552.137(b). However, if the city receives another request for this information from a different requestor, we note Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

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,

Thana Hussaini
Assistant Attorney General
Open Records Division

TH/som

Ref: ID# 513714

Enc. Submitted documents

c: Requestor
(w/o enclosures)