



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 1, 2014

Ms. Elaine Nicholson
Assistant City Attorney
City of Austin
P.O. Box 1088
Austin, Texas 78767-8828

OR2014-05388

Dear Ms. Nicholson:

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# 518314.

The City of Austin (the "city") received a request for the following information: 1) documents regarding Town & Country Village Projects C8-79-079 through C8-79-079-5A (the "projects"); 2) any communications between the city and representatives of the applicants for the projects, including attorneys and engineers; 3) audio tapes of specified presentations regarding the projects; 4) communications between the Texas Department of Transportation and the city related to flooding and flooding relief adjacent to a specified property during a specified time period; 5) communications between the city and a specified developer related to flooding and flooding relief adjacent to a specified property during a specified time period; and 6) communications between city employees and city employees' notes regarding a proposed subdivision and the applicability of chapter 245 of the Government Code to the subdivision. You indicate you will release some information to the requestor. You claim the remaining requested information is excepted from disclosure under section 552.107 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.¹

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Initially, we note you have marked some information not responsive to the present request for information. This ruling does not address the public availability of non-responsive information, and the city need not release any such information in response to the present request for information.

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)(A)-(E). 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. *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 claim the responsive information is protected by section 552.107(1) of the Government Code. You state the information at issue consists of communications between the city’s attorneys and city employees. You state the communications were made for the purpose of facilitating the rendition of professional legal services to the city and that these communications have remained confidential. Based on your representations and our

review, we find you have demonstrated the applicability of the attorney-client privilege to the responsive information. Thus, the city may generally withhold the e-mails under section 552.107(1) of the Government Code. We note, however, one of the e-mail strings includes an attachment received from a non-privileged party. Furthermore, if this attachment is removed from the e-mail string and stands alone, it is responsive to the request for information. Therefore, if the non-privileged attachment, which we have marked, is maintained by the city separate and apart from the otherwise privileged e-mail string in which it appears, then the city may not withhold the non-privileged attachment under section 552.107(1) of the Government Code.

In summary, the city may generally withhold the responsive e-mails under section 552.107(1) of the Government Code. However, if the non-privileged attachment, which we have marked, is maintained by the city separate and apart from the otherwise privileged e-mail string in which it appears, then the city may not withhold the non-privileged attachment under section 552.107(1) of the Government Code and 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.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,



Kristi L. Wilkins
Assistant Attorney General
Open Records Division

KLW/tch

Ref: ID# 518314

Enc. Submitted documents

c: Requestor
(w/o enclosures)