



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 26, 2014

Ms. Christina Weber
Assistant City Attorney
City of Arlington
P.O. Box 90231
Arlington, Texas 76004-3231

OR2014-10916

Dear Ms. Weber:

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# 527045 (WO15072-041014).

The City of Arlington (the "city") received a request for "any/all written public/private comments and/or complaints regarding the 2014 lottery." You state the city sent a cost estimate letter to the requestor for the cost of providing copies of portions of the requested information for which the city does not claim an exception to disclosure. You claim the submitted information is excepted from disclosure under sections 552.101, 552.106, 552.107, and 552.111 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Section 552.107(1) of the Government Code protects information that comes 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

¹Although you also raise section 552.101 of the Government Code in conjunction with rule 503 of the Texas Rules of Evidence, this office has concluded section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). 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.

demonstrate the elements of the privilege in order to withhold the information at issue. *See* ORD 676 at 6-7.

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 at issue consists of e-mail communications and attachments to those e-mails sent between city attorneys and city employees. You also state the communications were made for the purpose of facilitating the rendition of professional legal services to the client, the city. You state the communications were confidential when made and have remained confidential. Upon review of the information at issue and consideration of your arguments, we find you have demonstrated the applicability of the attorney-client privilege to portions of the information at issue we have marked. Accordingly, the city generally may withhold the marked submitted information under section 552.107(1) of the Government Code.

However, some of the otherwise privileged e-mail strings include e-mail communications received from or sent to a non-privileged party. Furthermore, if these e-mail communications received from the non-privileged party are removed from the e-mail strings and stand alone, they are responsive to the request for information. Therefore, if the non-privileged communications, which we have marked, are maintained by the city separate and apart from the otherwise privileged communications in which they appear, then the city may not withhold the non-privileged communications under section 552.107(1) of the Government Code.

To the extent section 552.107(a) is not applicable to the submitted information because the non-privileged communications are maintained by the city separate and apart from the otherwise privileged communications in which they appear, we address section 552.137 of the Government Code for certain e-mail addresses in the submitted information.² Section 552.137 makes certain e-mail addresses confidential. Gov't Code § 552.137. Under section 552.137, a governmental body must withhold the e-mail address of a member of the general public, unless the individual to whom the e-mail address belongs has affirmatively consented to its public disclosure. *See id.* § 552.137(b). You do not inform us the individuals to whom the e-mail addresses belong have affirmatively consented to their release. The city must, therefore, withhold the e-mail addresses of members of the public under section 552.137(a). We have marked the information accordingly.

Section 552.111 excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.). Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 160; ORD 615 at 4-5. The preliminary draft of a policymaking document that has been released or is intended for release in final form is excepted from disclosure in its entirety under section 552.111 because such a draft necessarily represents the advice, recommendations, or opinions of the drafter as to the form and content of the final document. Open Records Decision No. 559 at 2 (1990).

After review of the information at issue and consideration of your arguments, we agree portions of the information, which we have marked, are excepted from disclosure under

²The Office of the Attorney General will raise mandatory exceptions like section 552.137 on behalf of a governmental body. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

section 552.111. Thus, the city may withhold the information we marked based on section 552.111. However, we find the city has not shown the remaining portions of the information at issue consist of advice, recommendations, opinions, and other material reflecting the city's policymaking processes. Thus, the city may not withhold any portion of the remaining information based on section 552.111.

Section 552.106(a) excepts from disclosure "[a] draft or working paper involved in the preparation of proposed legislation." Gov't Code § 552.106(a). Section 552.106 ordinarily applies only to persons with a responsibility to prepare information and proposals for a legislative body. Open Records Decision No. 460 (1987). The purpose of section 552.106 is to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the members of the legislative body, and therefore, it does not except from disclosure purely factual information. *Id.* at 2. However, a comparison or analysis of factual information prepared to support proposed legislation is within the ambit of section 552.106. *Id.* This office has also concluded the drafts of municipal ordinances and resolutions which reflect policy judgments, recommendations, and proposals are excepted by section 552.106. Open Records Decision No. 248 (1980).

After review of the remaining information for which you raise section 552.106, we find the city has established the information constitutes advice, opinion, analysis, or recommendations for purposes of section 552.106. Consequently, the city may withhold the remaining submitted information we marked based on section 552.106(a).

Finally, we have marked information that may be subject to section 552.117(a)(1) of the Government Code.³ Section 552.117(a)(1) excepts from disclosure, among other information, family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Gov't Code § 552.117(a)(1). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the city may only withhold information under section 552.117 on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. For an employee who timely elected to keep his or her personal information confidential, the city must withhold, among other information, information that reveals whether these employees have family members. The city may not withhold this information under section 552.117 for an employee who did not make a timely election to keep the information confidential. Therefore, to the extent the individual whose information we marked timely requested confidentiality under section 552.024 of the Government Code, and to the extent the information we marked concerns the individual's family member, the city must withhold the information under section 552.117(a)(1).

³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

In summary, the city may withhold the information we marked based on section 552.107(1). However, if the city maintains the communications with non-privileged parties separate and apart from the otherwise privileged communications in which they appear, the city may not withhold these non-privileged communications under section 552.107(1). If the non-privileged e-mails are subject to release because they are maintained separate and apart from the privileged communications, the city must withhold the personal e-mail addresses we marked in those e-mails under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure. The city may withhold the information we marked based on sections 552.111 and 552.106(a) of the Government Code. The city must withhold the information we marked based on section 552.117(a)(1) if the information concerns the individual's family member and the individual timely made the requisite election for confidentiality of the information. The city 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.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,



Kay Hastings
Assistant Attorney General
Open Records Division

KH/sdk

Ref: ID# 527045

Enc. Submitted documents

c: Requestor
(w/o enclosures)