



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 27, 2014

Ms. Leticia Brysch
City Clerk
City of Baytown
P.O. Box 424
Baytown, Texas 77522-0424

OR2014-19314

Dear Ms. Brysch:

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# 540767 (Baytown PIR #3101).

The City of Baytown (the "city") received a request for (1) information pertaining to a specified ordinance, including any proposed or potential revisions or amendments, materials made available to members of the city council, city officials and staff, and communications between city staff or officials; (2) information created or obtained during a specified time period related to specified topics; and (3) documents reflecting any communication between members of city staff or city officials with any person or entity not employed by the city pertaining to specified topics during a specified time period. You state the city will release some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.106 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

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

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.

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 the information at issue constitutes or documents a communication. *Id.* at 7. Second, the governmental body must demonstrate the communication was 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). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. 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, 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.” See *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 the communication has been maintained. Section 552.107(1) generally excepts an entire communication that a governmental body has demonstrated as being 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) (attorney-client privilege extends to entire communication, including facts contained therein).

You claim some of the submitted information consists of communications between city attorneys and city employees and officials that were made for the purpose of facilitating the rendition of professional legal services to the city. You state the communications have remained confidential and have not been disclosed to non-privileged parties. Based on your representations and our review, we agree the city may generally withhold the information you have marked under section 552.107(1) of the Government Code.² We note some of the privileged e-mail strings we have marked include e-mails and attachments received from non-privileged parties. If these e-mails and attachments are removed from the privileged e-mail strings and stand alone, they are responsive to the request for information. Therefore, if the non-privileged e-mails and attachments we have marked are maintained by the city separate and apart from the otherwise privileged e-mail strings in which they appear, then the city may not withhold these non-privileged e-mails and attachments under section 552.107(1) of the Government Code.

²As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

To the extent the non-privileged e-mails and attachments we have marked are maintained by the city separate and apart from the otherwise privileged e-mail strings in which they appear, we will address your arguments under section 552.106 of the Government Code for the non-privileged e-mails and attachments and the remaining information. Section 552.106 of the Government Code excepts from disclosure “[a] draft or working paper involved in the preparation of proposed legislation” and “[a]n internal bill analysis or working paper prepared by the governor’s office for the purpose of evaluating proposed legislation.” Gov’t Code § 552.106(a)-(b). 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).

The city raises section 552.106 for the non-privileged e-mails and attachments we have marked. However, we find you have failed to demonstrate the city shares a privity of interest with the non-privileged parties at issue. *Cf.* Open Records Decision No. 429 (1985) (predecessor to section 552.106 not applicable to materials prepared by person or agency who has no official responsibility to do so but only acts as interested party who wishes to influence legislative process); *see also* Open Records Decision No. 460 at 3 (1987) (predecessor to section 552.106 resembles predecessor to section 552.111 in that both exceptions protect advice, opinion, and recommendations on policy matters in order to encourage frank discussion during the policy-making process). Thus, we find you have failed to demonstrate the non-privileged e-mails and attachments we have marked are excepted under section 552.106, and they may not be withheld on that basis.

After review of the remaining information for which you raise section 552.106, we find the city has established the remaining information at issue constitutes advice, opinion, analysis, or recommendations for purposes of section 552.106. Consequently, the city may withhold the information we have marked under section 552.106(a) of the Government Code.

To the extent the non-privileged e-mails and attachments we have marked are maintained by the city separate and apart from the otherwise privileged e-mail strings in which they appear, portions of the non-privileged e-mails are subject to section 552.137 of the Government Code.³ Section 552.137 excepts from disclosure “an e-mail address of a member of the

³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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). Gov't Code § 552.137(a)-(c). Section 552.137 is not applicable to an institutional e-mail address, an Internet website address, the general e-mail address of a business, an e-mail address of a person who has a contractual relationship with a governmental body, or an e-mail address maintained by a governmental entity for one of its officials or employees. The e-mail addresses we have marked are not one of the types specifically excluded by section 552.137(c). Accordingly, the city must withhold the e-mail addresses we have marked under section 552.137 unless the owners of the addresses affirmatively consent to their release.

In summary, the city may withhold the information you have marked under section 552.107(1) of the Government Code; however, if the non-privileged e-mails and attachments we have marked are maintained by the city separate and apart from the otherwise privileged e-mail strings in which they appear, then the city may not withhold these non-privileged e-mails and attachments under section 552.107. The city may withhold the information we have marked under section 552.106(a) of the Government Code. In releasing the non-privileged e-mails, the city must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses at issue consent to their release.

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,



Cristian Rosas-Grillet
Assistant Attorney General
Open Records Division

CRG/dls

Ref: ID# 540767

Enc. Submitted documents

c: Requestor
(w/o enclosures)