KEN PAXTON
ATTORNEY GENERAL OF TEXAS

March 6, 2015

Ms. Tabitha Goodwin
Counsel for the Town of Addison
Cowles & Thompson
4965 Preston Park Boulevard, Suite 320
Plano, Texas 75093

OR2015-04306

Dear Ms. Goodwin:

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# 555578.

The Town of Addison (the "town"), which you represent, received two requests for all correspondence containing specified words between named individuals during specified time periods. You state most of the information will be released to the requestor. You claim the submitted information is excepted from disclosure under section 552.107 of the Government Code.[1] We have considered the exception you claim and reviewed the submitted information.

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

[1]Although you raise section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503 and Texas Disciplinary Rule of Professional Conduct 1.05, this office has concluded that section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 677 (2002), 676 at 1-2 (2002), 575 at 2 (1990). Furthermore, 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. ORDs 677, 676 at 1-2.

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. Finally, 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." *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. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

The town states the submitted information consists of communications involving town attorneys, town representatives, and other town employees and officials. The town states the communications were made for the purpose of facilitating the rendition of professional legal services to the town and these communications have remained confidential. Therefore, the town may generally withhold the submitted information in Exhibits B-1 through B-4 under section 552.107(1) of the Government Code. However, we note some of these e-mail strings include e-mails received from or sent to non-privileged parties. Furthermore, if these e-mails are removed from the e-mail strings and stand alone, they are responsive to the requests for information. Therefore, if the town maintains these non-privileged e-mails, which we have marked, separate and apart from the otherwise privileged e-mail strings in which they appear, then the town may not withhold these non-privileged e-mails under section 552.107(1) of the Government Code. Additionally, you state Exhibit B-5 includes communications between the town and third parties during contract negotiations when their interests were adverse. We further note Exhibit B-5 contains communications with individuals with whom you have not identified as privileged. Accordingly, we find the town has failed to demonstrate any of the information in Exhibit B-5 consists of privileged attorney-client communications, and none of the remaining information may be withheld on that basis.

To the extent the non-privileged e-mail communications we have marked are maintained by the town separate and apart from the otherwise privileged e-mail strings in which they appear, portions of the non-privileged e-mail communications as well as Exhibit B-5 are subject to section 552.137 of the Government Code.[2] 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). Gov't Code § 552.137(a)-(c). To the extent the e-mail addresses at issue are not of a type specifically excluded by section 552.137(c), the town must withhold the e-mail addresses in the non-privileged e-mail communications as well as Exhibit B-5 under section 552.137, unless the owners affirmatively consent to release of their e-mail addresses.

In summary, the town may generally withhold Exhibit B-1 through B-4 under section 552.107(1) of the Government Code. However, if the e-mails we have marked are maintained by the town separate and apart from the otherwise privileged e-mail strings in which they appear, then the town must release the marked non-privileged e-mails. The town must withhold the e-mail addresses in the non-privileged e-mail communications as well as Exhibit B-5 under section 552.137, unless the owners affirmatively consent to release of their e-mail addresses. The remaining information must be released.

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,

Paige Lay

Paige Lay
Assistant Attorney General
Open Records Division

PL/bhf

---

[2]The 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).

Ref: ID# 555578

Enc. Submitted documents

cc: Requestor
(w/o enclosures)