



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

April 17, 2015

Ms. Marivi Gambini  
Paralegal  
City Attorney's Office  
City of Irving  
P.O. Box 152288  
Irving, Texas 75015-2288

OR2015-07482

Dear Ms. Gambini:

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# 561388.

The City of Irving (the "city") received a request for (1) any records related to gas or oil wells drilled near a specified location during a specified time period, (2) any correspondence between the city or the city council and any representative of two named companies or any other companies with control over the wells mentioned above, and (3) any correspondence between the city or the city council, Dallas County, the city of Dallas, the Texas Governor's Office, or any state representative's office regarding earthquakes in Irving. You indicate you will release some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.107(1) and 552.111 of the Government Code.<sup>1</sup>

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<sup>1</sup>Although you claim the submitted information is privileged under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5, we note the proper exceptions to raise when asserting the attorney-client privilege and the attorney work product privilege for information not subject to section 552.022 of the Government Code are sections 552.107 and 552.111 of the Government Code, respectively. *See* Open Records Decision Nos. 677 (2002), 676 at 1-2 (2002). Further, although we understand you to raise the attorney work product privilege encompassed by section 552.111, you provide no arguments explaining how this privilege is applicable to the submitted information. Therefore, we assume you no longer assert this privilege under section 552.111 of the Government Code.

We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>2</sup>

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 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 that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “to facilitate the rendition of professional legal services” to the client governmental body. 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. *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 a 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, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (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: (A) to whom disclosure is made to further the rendition of professional legal services to the client; or (B) reasonably necessary to transmit 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. *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 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 submitted information is protected by section 552.107(1) of the Government Code. You state the information at issue consists of communications between attorneys for

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<sup>2</sup>We assume 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 those records contain substantially different types of information than that submitted to this office.

the city and city employees. You also state the communications were made for the purpose of facilitating the rendition of professional legal services to the city. You further state these communications have not been disclosed to third parties and have remained confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the city may generally withhold the submitted information under section 552.107(1) of the Government Code.<sup>3</sup> However, we note one of the privileged e-mail strings we have marked includes an e-mail received from a non-privileged party. If this e-mail is removed from the privileged e-mail string and stands alone, it is responsive to the request for information. Therefore, if the non-privileged e-mail 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 this non-privileged e-mail under section 552.107(1) of the Government Code.

We note the non-privileged e-mail we have marked contains an e-mail address. Section 552.137 of the Government Code provides, “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act],” unless the owner of the e-mail address has affirmatively consented to its release or the e-mail address is specifically excluded by subsection (c).<sup>4</sup> Gov’t Code § 552.137(a)–(c). The e-mail address we have marked is not of a type excluded by subsection (c). Thus, the city must withhold the e-mail address we have marked in the non-privileged e-mail under section 552.137 of the Government Code, unless its owner affirmatively consents to its public disclosure.

In summary, the city may withhold the submitted information under section 552.107(1) of the Government Code; however, the city must release the non-privileged e-mail we have marked if the city maintains it separate and apart from the otherwise privileged e-mail string in which it appears. The city must withhold the e-mail address we have marked in the non-privileged e-mail under section 552.137 of the Government Code, unless its owner affirmatively consents to its public disclosure.

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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<sup>3</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

<sup>4</sup>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).

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](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,



Alley Latham  
Assistant Attorney General  
Open Records Division

AKL/dls

Ref: ID# 561388

Enc. Submitted documents

c: Requestor  
(w/o enclosures)