



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 7, 2015

Mr. Jerry E. Drake, Jr.
First Assistant City Attorney
City of Denton
215 East McKinney
Denton, Texas 76201

OR2015-16357

Dear Mr. Drake:

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# 574460.

The City of Denton (the "city") received a request for all e-mails regarding a specified address sent to the requestor or sent between two named city employees and employees from the city's Community Improvement Services or Building Inspections Department.¹ You state you have made some information available to the requestor. You claim some of the submitted information is excepted from disclosure under sections 552.101 and 552.107 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted information.

¹We note, and you acknowledge, the city sought and received clarification of the information requested. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

²Although you also raise Texas Rule of Evidence 503, 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. *See* Open Records Decision No. 676 at 6 (2002).

Section 552.107(1) of the Government Code protects information coming 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. 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 state the information in Exhibit B consists of communications made between a city attorney and employees of the city’s Community Improvement Services and Building Inspections departments. You state these communications were made in the furtherance of professional legal services to city. You further state these communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find the city may generally withhold Exhibit B under section 552.107(1) of the Government Code. However, one of the otherwise-privileged e-mail strings includes an attachment sent to a non-privileged third party. We find this attachment is separately responsive. Therefore, if this 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 attachment under section 552.107(1) of

the Government Code. In that instance, as you raise no further exceptions against disclosure for Exhibit B, the city must release the marked non-privileged attachment.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. You raise section 552.101 in conjunction with the common-law informer’s privilege, which Texas courts have long recognized. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969). The informer’s privilege protects the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided that the subject of the information does not already know the informer’s identity. *See Open Records Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978)*. The privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to “administrative officials having a duty of inspection or of law enforcement within their particular spheres.” *See Open Records Decision No. 279 at 2 (1981) (citing 8 John H. Wigmore, Evidence in Trials at Common Law, § 2374, at 767 (J. McNaughton rev. ed. 1961))*. The report must be of a violation of a criminal or civil statute. *See Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5*. The privilege excepts the informer’s statement only to the extent necessary to protect the informer’s identity. *See Open Records Decision No. 549 at 5 (1990)*.

You state the information you have marked in Exhibit C reveals the identity of a complainant who reported an alleged criminal violation of one of the city’s ordinances to the city’s Code Enforcement Department. You explain the alleged criminal violation is subject to prosecution by the city attorney’s office. There is no indication the subject of the complaint knows the identity of the complainant. Based on your representations and our review, we conclude the city may withhold the identifying information of the complainant, which we have marked, under section 552.101 of the Government Code in conjunction with the common-law informer’s privilege. The remaining information at issue, however, does not identify an individual who reported a violation of the law, and the city may not withhold it under section 552.101 in conjunction with the common-law informer’s privilege.

In summary, the city may withhold Exhibit B under section 552.107(1) of the Government Code. However, if the non-privileged attachment, which we have marked, exists separate and apart from the otherwise privileged e-mail string in which it appears, then the city must release the non-privileged attachment. The city may withhold the information we have marked under section 552.101 of the Government Code in conjunction with the common-law informer’s privilege. 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,

A handwritten signature in cursive script that reads "Abigail T. Adams". The signature is written in black ink and is positioned above the typed name and title.

Abigail T. Adams
Assistant Attorney General
Open Records Division

ATA/akg

Ref: ID# 574460

Enc. Submitted documents

c: Requestor
(w/o enclosures)