



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 9, 2016

Mr. Zachariah T. Evans
For the City of Bee Cave
Akers & Akers, LLP
13809 Research Boulevard, Suite 250
Austin, Texas 78750

OR2016-13201

Dear Mr. Evans:

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# 615582.

The City of Bee Cave (the "city"), which you represent, received a request for six categories of information pertaining to the "Spillman subdivision." You state the city will release some information. You claim the submitted information is excepted from disclosure under section 552.107 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

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. *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, the communication must have been made "to facilitate 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, and lawyer representatives. *See* 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. Finally, 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. *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 submitted information consists of communications involving city representatives and attorneys for the city. You assert the communications were made for the purpose of facilitating the rendition of professional legal services to the city, and these communications have remained confidential. Upon review, we find the city has demonstrated the applicability of the attorney-client privilege to the submitted information. Therefore, the city may generally withhold the submitted information under section 552.107(1) of the Government Code. However, we note one of the e-mail strings at issue include e-mails sent to or received from a party you have not demonstrated is a privileged party. Furthermore, if these e-mails are removed from the otherwise privileged e-mail string and stand alone, they are responsive to the request for information. Therefore, if the city maintains these non-privileged e-mails, which we have marked, separate and apart from the otherwise privileged e-mail string in which they appear, then the city may not withhold these non-privileged e-mails under section 552.107(1) of the Government Code.

We note, to the extent the non-privileged e-mails we have marked are maintained separate and apart from the otherwise privileged e-mail string in which they appear, the e-mails also include an e-mail address subject to section 552.137 of the Government Code.¹ Section 552.137 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

¹The 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).

subsection (c). Gov't Code § 552.137(a)–(c). Accordingly, in the event the non-privileged e-mails we have marked are maintained separate and apart from the otherwise privileged e-mail string in which they appear, the city must withhold the e-mail address we have marked under section 552.137 of the Government Code, unless the owner of the e-mail address has affirmatively consented to its release.

In summary, the city may generally withhold the submitted information under section 552.107(1) of the Government Code; however, if the city maintains the non-privileged e-mails we have marked separate and apart from the otherwise privileged e-mail string in which they appear, then the city may not withhold these non-privileged e-mails under section 552.107(1) of the Government Code. In the event the non-privileged e-mails we have marked are maintained separate and apart from the otherwise privileged e-mail string in which they appear, the city must withhold the e-mail address we have marked under section 552.137 of the Government Code, unless the owner of the e-mail address has affirmatively consented to its release, and must release the remaining information in the non-privileged e-mails.

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,



Sean Nottingham
Assistant Attorney General
Open Records Division

SN/akg

Ref: ID# 615582

Enc. Submitted documents

c: Requestor
(w/o enclosures)