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ATTORNEY GENERAL OF TEXAS

November 14, 2019

Mr. Ryan D. Pittman
Counsel for City of Frisco
Abernathy, Roeder, Boyd & Hullett
1700 Redbud Boulevard, Suite 300
McKinney, Texas 75069

OR2019-32168

Dear Mr. Pittman:

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# 797063 (City ID# G035900).

The City of Frisco (the "city"), which you represent, received a request for e-mails sent amongst specified individuals during a specified time period containing specified terms. You state you released some information. You claim the submitted information is excepted from disclosure under section 552.107 of the Government Code.¹ You also state release of the submitted information may implicate the proprietary interests of Gamma Real Estate ("Gamma"). Accordingly, you state, and provide documentation showing, you notified Gamma of the request for information and of its right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have reviewed the submitted information and considered the submitted arguments.

Initially, we note an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public

¹ Although the city also raises section 552.101 of the Government Code, the city has not provided any arguments to support this exception. Therefore, we assume the city has withdrawn its claim this section applies to the submitted information. *See* Gov't Code §§ 552.301, .302. Further, although the city also raises 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 Nos. 676 at 1-2 (2002).

disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from Gamma explaining why the submitted information should not be released. Therefore, we have no basis to conclude Gamma has a protected proprietary interest in the submitted information. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, the city may not withhold the submitted information on the basis of any proprietary interest Gamma may have in the 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. ORD 676 at 6-7. 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). 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.*, 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 submitted information consists of communications involving attorneys for the city and city employees and officials in their capacities as clients. You state these communications were made in furtherance of the rendition of professional legal services to the city. You state these communications were intended to be, and have remained, confidential. Based on your representations and our review, we find you have demonstrated

the applicability of the attorney-client privilege to some of the submitted information. Accordingly, with the exception of the information we marked for release, the city may withhold the submitted information under section 552.107(1) of the Government Code. However, upon review, we find the information we marked for release has been shared with an individual you have not demonstrated is a privileged party. Therefore, we conclude you have failed to establish the information we marked for release constitutes communications between or among city employees and attorneys for the purposes of section 552.107(1), and the city may not withhold this information under section 552.107(1). The city must release the information at issue.

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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,



Meagan Hunter
Assistant Attorney General
Open Records Division

MH/rm

Ref: ID# 797063

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Third Party
(w/o enclosures)