

**City Attorney Survival Guide**  
**Ethics: Attorney-Client Privilege/Consultation with Attorney Exception**

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Governmental bodies have two powerful exceptions that allow them to withhold information to the public because of their association with their attorneys. Section 552.107 of the Public Information Act and Section 551.071 of the Open Meetings Act allow governmental bodies to keep certain communications and discussions with their attorneys confidential and privileged.

**A. Public Information Act § 552.107(1): Information Within the Attorney-Client Privilege**

Section 552.107(1) of the Public Information Act excepts from disclosure information that the Attorney General or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Evidence. Tex. Att’y Gen. ORD-676 (2002). Texas Rule of Evidence 503 states that “A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client.” Thus, information that is protected under Texas Rule of Evidence 503 is excepted from disclosure under § 552.107(1).

If a governmental body demonstrates that any portion of a communication is protected under the attorney-client privilege as defined in Texas Rule of Evidence 503, then the entire communication is excepted from disclosure under § 552.107(1).<sup>1</sup> Tex. Att’y Gen. ORD-676 at p. 5. The Attorney General does not have to conduct a word-by-word examination of information in documents, granting the exception only to the very specific information comprising a client confidence or attorney advice, opinion, or analysis. Tex. Att’y Gen. ORD-676 at p. 4. Rather, the applicability of the attorney-client privilege to particular information depends more on the facts surrounding the creation and maintenance of the information than on its content.<sup>2</sup> Tex. Att’y Gen. ORD-676 at p. 6.

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<sup>1</sup> See, e.g., *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Bloomfield Mfg. Co.*, 977 S.W.2d 389, 392 (Tex. App.--San Antonio 1998, orig. proceeding) (privilege extends to entire document); *In re Valero Energy Corp.*, 973 S.W.2d 453, 457 (Tex. App.--Houston [14th Dist.] 1998, no pet.) (privilege attaches to the complete communication, including factual information); *Osborne v. Johnson*, 954 S.W.2d 180, 190 (Tex. App.—Waco 1997, orig. proceeding) (if document contains information that is discoverable together with privileged information, entire document is protected by the privilege); *Marathon Oil Co. v. Moya*, 893 S.W.2d 585, 589 (Tex. App.--Dallas 1994, orig. proceeding) (privilege attaches to the complete communication); *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 425 (Tex. App.--Houston [14th Dist.] 1993, orig. proceeding) (privilege extends to entire document and not merely the specific portions relating to advice, opinion, or analysis).

<sup>2</sup> See, e.g., *Keene Corp. v. Caldwell*, 840 S.W.2d 715, 720 (Tex. App.--Houston [14th Dist.] 1992, orig. proceeding) (subject matter of information communicated between attorney and client is irrelevant to whether attorney-client privilege applies).

To assert the attorney-client privilege exception under the Public Information Act,

- (1) the governmental entity must establish that the information constitutes or documents a communication;
- (2) the communication must have been made for the purpose of facilitating the rendition of professional legal services to the client governmental body;
- (3) the entity must demonstrate that the communication was between or among clients, client representatives, lawyers, and lawyer representatives;
- (4) the entity must show that the communication was confidential; that is, the communication 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; and
- (5) the governmental body must demonstrate that the communication has remained confidential.

Tex. Att'y Gen. ORD-676.

1. Information Must Constitute or Document a Communication

It is fairly easy to establish the first element of the attorney-client privilege requirements because the governmental entity is often trying to withhold some type of letter, email, or memorandum involving its attorney(s). However, the entity must establish that the document was actually communicated to someone, *i.e.*, sent from one individual to another. If the attorney drafted a legal memorandum to a government official, but never sent it, then that document would not be “communication” and would not be protected by § 552.107(1).

2. Communications Must Have Been Made for the Purpose of Facilitating the Rendition of Professional Legal Services for the Governmental Body

The governmental body must also establish how each communication relates to the attorney’s role as the entity’s attorney. In other words, the entity must establish that the communication was directed to or from the entity’s attorney because of that person’s role as an attorney. The communication need not contain advice, *per se*, but the communication must have been made for the purpose of facilitating the rendition of professional legal services. See *Keene Corp.*, 840 S.W.2d at 720 (subject matter of information communicated between attorney and client is irrelevant to whether attorney-client privilege applies). Thus, if the communication was between an attorney and a client when the attorney was employed in a non-legal capacity, such as an accountant, escrow agent, or notary public, that communication was likely not made for the purpose of facilitating the rendition of professional legal services and would not be privileged under § 552.107(1). See *Harlandale Ind. Sch. Dist. v. Cornyn*, 25 S.W.3d 328 (Tex. App.—Austin 2000, *pet. denied*).

3. Communications Must Have Been Between Lawyers, Lawyer Representatives, and Client Representatives

Another one of the requirements of § 552.107(1) is that the governmental entity must demonstrate that the communication was between or among clients and their representatives and lawyers and their representatives. If the entity does not identify each party to the communication as one of the above types of individuals, they will not satisfy § 552.107(1), and the information will not be excepted from disclosure.

A “representative of the client” is “any person who, for the purpose of effectuating legal representation for the client, makes or receives a confidential communication while acting in the scope of employment for the client.” TEX. R. EVID. 503(a)(2)(A). The communication is protected when “the employee makes the communication at the direction of his superiors and where the subject matter upon which the attorney's advice is sought by the [entity] and dealt with in the communication is the performance by the employee of the duties of his employment.” *In re Monsanto Co.*, 998 S.W.2d 917, 922 (Tex. App.—Waco 1999, orig. proceeding). Thus, the purpose of the communication must be shown to be to, from, or between representatives of the client governmental body, made for the purpose of effectuating legal representation for it, and the subject matter must pertain to the performance by each client representative of the duties of his or her employment. Tex. Att’y Gen. ORD-676 at 9.

In order to satisfy the strict requirement that all parties to the communication must be clients, lawyers, and their representatives, the governmental body must name each party to the communication, explain who they are, what their position is, and what role they have in the communication.

4. Communications Were Confidential

A governmental entity must also establish that its attorneys and employees intended for the communication to be confidential. The communication must not have been “intended to be disclosed to third persons other than those to whom disclosure [was] made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” TEX. R. EVID. 503(a)(5). The governmental entity must show that the documents were only disclosed to the entity’s attorneys and individuals within the entity with a need to know in order to respond to the legal issue at hand.

5. Communications Remained Confidential

Lastly, the information contained in the communications has to have remained confidential for the attorney-client privilege exception in § 552.107 to apply. If the governmental body voluntarily discloses the privileged communication to a third party, the attorney-client privilege is waived. The entity must therefore establish that the confidential communications have not subsequently been released to third parties.

## **B. Open Meetings Act § 551.071: Consultation With Attorney; Closed Meeting**

Section 551.071 of the Open Meetings Act authorizes a governmental body to conduct a private consultation with its attorney to seek advice about pending or contemplated litigation or a settlement offer. § 551.071(1). This provision implicates the attorney-client privilege and an attorney's duty to preserve the confidences of a client. See Tex. Att'y Gen. Op. Nos. JC-0506 (2002) at 4, JC-0233 (2000) at 3. A governmental body may not, however, meet in executive or closed session merely because the documents it will discuss are confidential under the Public Information Act. See Tex. Att'y Gen. Op. No. GA-0019 (2003) at 6.

A governmental body may not meet in executive session under § 551.071 unless the governmental body's attorney is present. An attorney who is not an employee of the governmental body may attend a closed (or open) meeting by telephone conference call, videoconference call, or the Internet. See TEX. GOV'T CODE § 551.129.

A governmental body may not invoke § 551.071 to convene a closed session and then discuss matters outside of that provision. Thus, a governmental body meeting in executive session to consult with its attorney may not discuss non-legal matters. See *Gardner v. Herring*, 21 S.W.3d 767 (Tex. App.—Amarillo 2000, no pet.); *Finlan v. City of Dallas*, 888 F. Supp. 779, 782 n.9 (N.D. Tex. 1995). General discussion of policy unrelated to legal matters is not permitted under the Open Meetings Act simply because an attorney is present during the closed session. See Tex. Att'y Gen. Op. Nos. JM-100 (1983) at 2, JC-0233 (2000) at 3. If a governmental body attempts to discuss non-legal matters in a closed session called under § 551.071, the attorney has a duty to stop the governmental body from discussing the non-legal matters.

A governmental body may not include in an executive session a person whose presence would undermine the legal basis for the executive session, and the attorney-client privilege can be waived by communicating privileged matters in the presence of persons who are not within the privilege. Thus, if a member of the public or the opposing party attends a closed session under § 551.071, the meeting is no longer confidential and the Open Meetings Act has been violated. See Tex. Att'y Gen. Op. Nos. JC-0506 (2002) at 6, JM-100 (1983) at 2, MW-417 (1981) at 2-3, JM-1004 (1989).

Lastly, no final action, decision, or vote may occur in an executive session, and a final action, decision, or vote on a matter deliberated in an executive session may take place only in a properly noticed open meeting. See § 551.102. Thus, a governmental body may deliberate with its attorney in closed session regarding whether it will file a lawsuit, but must vote on such action in open session.

## **C. What do These Exceptions Mean to City Attorneys?**

These exceptions, known as the attorney client privilege and the consultation with attorney exceptions to the Public Information Act and Open Meetings Act, allow governmental bodies to keep certain communications and discussions with their

attorneys confidential and privileged. However, often times, information presumed confidential or discussions presumed privileged are actually not, and withholding such may be violations of the Acts.

A City Attorney must remember his or her ethical duties when deciding whether the attorney-client privilege and the consultation with attorney exceptions apply to a particular communication or meeting. When looking at the requirements of the attorney-client privilege exception in § 552.107, it is important for governmental bodies and their attorneys to remember that just because an attorney's name is on an email or document, it does not mean that the communication is privileged. The privilege only attaches if the communication was sent to or from the attorney in his or her role as an attorney, regarding some type of legal issue. A governmental body cannot hide behind § 552.107(1) by including an attorney in a communication simply to try to keep the communication from being disclosed under the Public Information Act. Likewise, a governmental body should not add non-legal information to a legal communication in order to try to avoid disclosure of the non-legal information. Governmental entities should look at the facts surrounding the creation and maintenance of the information and ensure that all of the requirements of § 552.107(1) have been met before deciding that a communication is privileged.

Under the Open Meetings Act, a City Attorney must remember that a governmental body may not meet in executive session under § 551.071 unless the attorney is present, and only legal matters may be discussed at such a session. If a governmental body attempts to discuss non-legal matters in a closed session called under § 551.071, the attorney has a duty to stop the governmental body from discussing the non-legal matters. Lastly, the lawyer should also ensure that the governmental body does not discuss items in an executive session under § 551.071 that were not properly noticed. Even if it is a legal issue, attorneys should always make certain that the governmental body is adhering to the requirements of the Open Meetings Act.