

The ruling you have requested has been amended as a result of litigation and has been attached to this document.



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 23, 2004

Mr. Kevin D. Pagan
Deputy City Attorney
City of McAllen
P.O. Box 220
McAllen, Texas 78505-0220

OR2004-0526

Dear Mr. Pagan:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 194747.

The City of McAllen (the "city") received a request for 18 categories of information relating to communications involving city personnel, as well as other specific records pertaining to city personnel. You state that the city is only requesting a decision from this office regarding items 1 through 10 of the request. You further state that the city "has responded or is in the process of responding to all other requests." Therefore, we assume that you have released the remainder of the requested information to the requestor, to the extent it exists. If not, the city must release such information immediately. *See* Gov't Code §§ 552.006, .301, .302; Open Records Decision No. 664 (2000) (concluding that section 552.221(a) requires that information not excepted from disclosure must be released as soon as possible under the circumstances). Items 1 through 10 of the request consist of the following:

1. All City Manager Mike Perez emails from October 1, 2000 to October 16, 2003
2. All City Attorney James Darling emails from October 1, 2000 to October 16, 2003
3. All City Deputy Attorney Kevin Pagan emails from October 1, 2000 to October 16, 2003
4. All City Mayor Leo Montalvo emails and written correspondence from October 1, 2000 to October 16, 2003

5. All City Commissioner Jan Klinck emails and written emails and written correspondence from October 1, 2000 to October 16, 2003
6. All City Commissioner Carlos Garza emails and written emails and written correspondence from October 1, 2000 to October 16, 2003
7. All City Commissioner Hilda Salinas emails and written emails and written correspondence from October 1, 2000 to October 16, 2003
8. All City Commissioner Adida Ramirez emails and written emails and written correspondence from October 1, 2000 to October 16, 2003
9. All City Commissioner Ric Godinez emails and written emails and written correspondence from October 1, 2000 to October 16, 2003
10. All emails, written communications, notes, and any other form of communications between Amado Cano and Mike R. Perez, James Darling, and Kevin Kagan [sic] (inclusive) between October 1, 2000 to October 16, 2003

You claim that the information at issue is excepted from disclosure under sections 552.103, 552.107, 552.109, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹ We have also considered comments submitted by the requestor. See Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

We begin by noting your concern regarding the scope of information that is responsive to the present request. The Public Information Act (the "Act") requires a governmental body to make a good-faith effort to relate a request to any responsive information that is within the governmental body's possession or control. See Open Records Decision No. 561 at 8-9 (1990). In this case, as you have submitted a representative sample of information for our review and raised exceptions to disclosure of the information, we presume that the city has made a good-faith effort to identify and locate any information that would be responsive to the request. Accordingly, we will address your claimed exceptions with respect to the submitted sample of information. See *id.*; see also *Industrial Found. v. Texas Industrial Accident Bd.*, 540 S.W.2d 668, 687 (Tex. 1976); Attorney General Opinion JM-672 (1987)

¹ We assume that 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 that those records contain substantially different types of information than that submitted to this office.

(difficulty or cost of complying with public information request is not a relevant factor in determining whether the responsive information is excepted from required public disclosure).

As a preliminary matter, however, we must address the city's obligations under section 552.301 of the Government Code with respect to two of your claimed exceptions. Sections 552.301(a) and (b) provide:

(a) A governmental body that receives a written request for information that it wishes to withhold from public disclosure and that it considers to be within one of the [Act's] exceptions . . . must ask for a decision from the attorney general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions.

(b) The governmental body must ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the tenth business day after the date of receiving the written request.

You indicate that the city received the present request for information on October 16, 2003. As the city sought clarification of the request, we note that the ten-business-day deadline under section 552.301(b) was tolled during the time the city was communicating with the requestor regarding the scope of the request. *See* Open Records Decision No. 663 at 2-5 (1999) (addressing circumstances under which governmental body's communications with a requestor to clarify or narrow request will toll ten-business-day deadline to request decision under section 552.301(b)). Accordingly, we find that the city was required to submit a request for a decision from this office, stating the exceptions that apply, no later than November 12, 2003. You submitted your request for a decision on November 10. However, you did not raise section 552.103 of the Government Code as an exception to disclosure until your submission of November 14, 2003. Consequently, we determine that the city failed to raise section 552.103 as an exception within the deadline as mandated under section 552.301(b) of the Government Code.

Next, under section 552.301(e) of the Government Code, a governmental body receiving an open records request for information that it wishes to withhold pursuant to one of the exceptions to public disclosure is required to submit to this office within fifteen business days of receiving the request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. While you timely raised section 552.111 of the Government Code as an exception to disclosure, you have not submitted any comments explaining why section 552.111 should apply to the information at issue. Consequently, we determine that

the city has failed to comply with the procedural requirements of section 552.301(e) with respect to your section 552.111 claim.

Sections 552.103 and 552.111 of the Government Code are discretionary exceptions to disclosure that protect the governmental body's interests and may be waived by the governmental body. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 473 (1987) (governmental body may waive statutory predecessor to section 552.111); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As you have failed to comply with the procedural requirements of section 552.301 with respect to your claims under sections 552.103 and 552.111, we find that the city has waived these exceptions. However, we will address your remaining claimed exceptions to disclosure.

You contend that the information in Exhibit D is protected by the attorney-client privilege. 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 “for the purpose of facilitating 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 Texas 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). Because government attorneys often act in capacities other than that of professional legal counsel, including as administrators, investigators, or managers, 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. 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 to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5).

Whether a communication meets the definition of a confidential communication 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, no writ). 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).

In this case, while you claim that the information in Exhibit D is excepted from disclosure under section 552.107, we note that you have not identified the parties to the communications, nor have you explained how the communications were made pursuant to the rendition of legal services to the city. Furthermore, you have not established that the communications at issue were intended to be confidential or that the confidentiality of the information has been maintained. Based on the information provided, we are unable to conclude that any portion of the submitted information consists of privileged attorney-client communications. Consequently, the city may not withhold any of the information at issue pursuant to section 552.107 of the Government Code.

Next, you contend that Exhibit E consists of information that is excepted from disclosure under section 552.109 of the Government Code. Section 552.109 protects private correspondence and communications of elected office-holders when release of the information "would constitute an invasion of privacy." *See Gov't Code* § 552.109. In determining whether information is excepted from disclosure by section 552.109, this office relies on the same common-law privacy test applicable under section 552.101 of the Government Code.² *See Open Records Decision Nos. 506 (1988), 241 (1980), 212 (1978); see also Open Records Decision No. 40 (1974)* (providing that section 552.109 may protect content of information, but not fact of communication).

Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. In addition, this office has found that the following types of information are excepted from required public disclosure under common-law privacy: an individual's criminal history when compiled by a governmental body, *see Open Records Decision No. 565 (citing United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989)), personal financial information not relating to a financial transaction between an individual

² Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," and encompasses the doctrine of common-law privacy.

and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990), some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982).

Upon review, we find that the information in Exhibit E relates to the conduct and work performance of public employees. We determine that the information you seek to withhold under section 552.109 is not highly intimate and embarrassing and, moreover, is subject to a legitimate public interest. *See* Open Records Decision Nos. 444 at 5-6 (1986) (public has interest in public employee's qualifications, job performance, and circumstances of resignation or termination), 405 at 2-3 (1983) (public has interest in manner in which public employee performs job), 329 at 2 (1982) (information relating to complaints against public employees and discipline resulting therefrom not protected under statutory predecessor to section 552.101), 208 at 2 (1978) (information relating to complaint against public employee and disposition of complaint not protected under common-law privacy); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow). Accordingly, the city may not withhold the information in Exhibit E pursuant to section 552.109 of the Government Code.

Finally, you contend that e-mail addresses of members of the public are excepted from disclosure under section 552.137 of the Government Code. Section 552.137 provides:

(a) Except as otherwise provided by this section, 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 this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

(c) Subsection (a) does not apply to an e-mail address:

(1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;

(2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract; or

(4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.

(d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Act of June 2, 2003, 78th Leg., R.S., ch. 1089, § 1, 2003 Tex. Sess. Law Serv. 3124 (to be codified as amendment to Gov't Code § 552.137).

Section 552.137 requires a governmental body to withhold certain e-mail addresses of members of the public that are provided for the purpose of communicating electronically with the governmental body, unless the relevant members of the public have affirmatively consented to the release of the e-mail addresses. We note, however, that section 552.137 does not apply to the work e-mail addresses of officers or employees of a governmental body, a website address or Uniform Resource Locator, or the general e-mail address of a business. E-mail addresses within the scope of section 552.137(c) are also not excepted from disclosure under section 552.137. In this case, provided the e-mail addresses at issue are not within the scope of section 552.137(c), and provided the city has not received affirmative consent to their release, we agree that the city must withhold the e-mail addresses we have marked in the submitted documents pursuant to section 552.137 of the Government Code.

In summary, provided the e-mail addresses we have marked in the submitted documents are not within the scope of section 552.137(c), and provided the city has not received affirmative consent to release the e-mail addresses, the city must withhold these e-mail addresses under section 552.137 of the Government Code. The remainder of the information at issue must be released to the requestor.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full

benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 194747

Enc: Submitted documents

c: Dr. Anthony Rogers
8506 Chivalry
San Antonio, Texas 78254
(w/o enclosures)

NOV 28 2006

At 1:56p. M.
Amalia Rodriguez-Mendoza, Clerk

CAUSE NO. GV400196

CITY OF McALLEN, TEXAS, Plaintiff,	§	IN THE DISTRICT COURT OF
	§	
V.	§	TRAVIS COUNTY, TEXAS
	§	
ATTORNEY GENERAL OF THE STATE OF TEXAS, Defendant.	§	
	§	
	§	353 rd JUDICIAL DISTRICT

AGREED FINAL JUDGMENT

On this date, the Court heard the parties' motion for agreed final judgment. Plaintiff, City of McAllen, Texas, and Defendant, Greg Abbott, Attorney General of Texas, appeared by and through their respective attorneys and announced to the court that all matters of fact and things in controversy between them had been fully and finally compromised and settled. This cause is an action under the Public Information Act (PIA), Tex. Gov't Code Ann. ch. 552. The parties represent to the Court that, in compliance with Tex. Gov't Code Ann. § 552.325(c), the requestor, Anthony Rogers, was sent reasonable notice of this setting and of the parties' agreement that the City of McAllen may withhold some of the information at issue; that the requestor was also informed of his right to intervene in the suit to contest the withholding of this information; and that the requestor has not informed the parties of his intention to intervene. Neither has the requestor filed a motion to intervene or appeared today. After considering the agreement of the parties and the law, the Court is of the opinion that entry of an agreed final judgment is appropriate, disposing of all claims between these parties.

IT IS THEREFORE ADJUDGED, ORDERED AND DECLARED that:

1. The information at issue, specifically, the e-mail communications, listed on the confidentiality log attached to the parties' Settlement Agreement, is excepted from disclosure by

Tex. Gov't Code § 552.107(1).

2. McAllen may withhold the e-mail communications described in ¶ 1 of this Agreed Final Judgment, along with any other information that the Attorney General determined was exempted from disclosure in OR2004-0526.

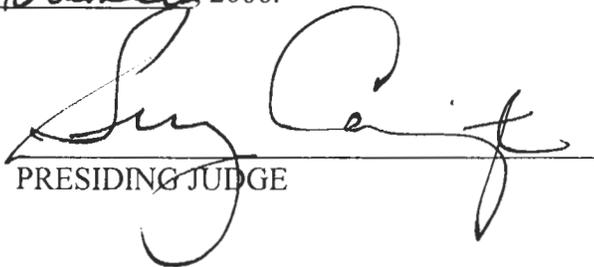
3. If it has not already done so, McAllen shall release the remaining e-mails to the requestor promptly upon receipt by McAllen of an agreed final judgment signed by the Court.

4. All costs of court are taxed against the parties incurring the same;

5. All relief not expressly granted is denied; and

6. This Agreed Final Judgment finally disposes of all claims between Plaintiff and Defendant and is a final judgment.

SIGNED this the 28 day of November 2006.


PRESIDING JUDGE

APPROVED:



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