



ATTORNEY GENERAL OF TEXAS
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November 15, 2007

Ms. Cara Leahy White
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OR2007-15089

Dear Ms. White:

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# 294757.

The City of Mansfield (the "city"), which you represent, received two requests for e-mail communications to and from the mayor and between members of the city council. You claim that portions of the requested information are not public information subject to release under the Act, and alternatively, that some of these records, as well as portions of the remaining submitted information, are excepted from disclosure under sections 552.107 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 mayor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

The city and the mayor both claim that some of the submitted information is not public information subject to the Act. Section 552.002 of the Act defines "public information" as consisting of

¹We 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.

information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

- (1) by a governmental body; or
- (2) for a governmental body and the governmental body owns the information or has a right of access to it.

Id. § 552.002(a). Thus, under this provision, information is generally “public information” within the scope of the Act when it relates to the official business of a governmental body or is maintained by a public official or employee in the performance of official duties, even though it may be in the possession of one person. In addition, section 552.001 of the Government Code states it is the policy of this state that each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees. *See* Gov’t Code § 552.001(a). We further note that the characterization of information as “public information” under the Act is not dependent on whether the requested records are in the possession of an individual or whether a governmental body has a particular policy or procedure that establishes a governmental body’s access to the information. *See* Open Records Decision No. 635 at 3-4 (1995) (finding that information does not fall outside definition of “public information” in Act merely because individual member of governmental body possesses information rather than governmental body as whole); *see also* Open Records Decision No. 425 (1985) (concluding, among other things, that information sent to individual school trustees’ homes was public information because it related to official business of governmental body) (overruled on other grounds by Open Records Decision No. 439 (1986)). Thus, the mere fact that the mayor generated the information at issue using his personal computer does not take the information outside the scope of the Act. *See id.*

You state that the city “does not provide [the mayor] a computer for his official use.” You assert that some of the records contained on the mayor’s computer are personal materials “wholly unrelated to [c]ity business.” The mayor asserts that some of the records at issue were created prior to his taking the oath as mayor. Thus, we understand you both to assert that these records were not created by or for a governmental body. Based upon these representations and our review of the submitted information, we find that the information we have marked was not collected, assembled, or maintained by or for a governmental body pursuant to law or in connection with the transaction of the official business of the city. Therefore, we conclude that the information we have marked is not public information for the purpose of the Act and is not required to be released to the requestors. *See* Gov’t Code § 552.002(a). However, having reviewed the remaining information, we find that it constitutes public information subject to the Act. Accordingly, we will address the claimed exceptions to disclosure.

The mayor argues that release of e-mails from city residents discussing city business would be a violation of the residents’ privacy. Section 552.101 of the Government Code excepts

from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision” and encompasses the doctrine of common-law privacy. See Gov’t Code § 552.101. The doctrine of common-law privacy protects information if it (1) contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). This office has frequently stated that a mere expectation of privacy on the part of the individual who provides information to a governmental body does not permit that information to be withheld under section 552.101. See Open Records Decision Nos. 479 at 1 (1987) (information is not confidential simply because the party that submitted the information anticipated or requested confidentiality), 180 at 2 (1977) (information is not excepted from disclosure solely because the individual furnished it with the expectation that access to it would be restricted), 169 at 6 (special circumstances required to protect information must be more than mere desire for privacy or generalized fear of harassment or retribution). This office has also stated on several occasions that certain information regarding individuals, including such information as their home addresses and telephone numbers, is generally not protected by common-law privacy under section 552.101. See Open Records Decision Nos. 554 at 3 (1990) (disclosure of a person’s home address and telephone number is not an invasion of privacy), 455 at 7 (1987) (home addresses and telephone numbers do not qualify as “intimate aspects of human affairs”). Accordingly, we conclude that none of the submitted information may be withheld under section 552.101 in conjunction with common-law privacy.

The city claims that portions of the submitted information are excepted from disclosure under section 552.107 of the Government Code. Section 552.107(1) 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).

Based on our review of your representations and the submitted information, we find that you have demonstrated the applicability of the attorney-client privilege to some of the information you seek to withhold under section 552.107(1). We have marked the information accordingly. However, we find that the city has failed to demonstrate that the remaining information at issue consists of confidential communications made in connection with the rendition of professional legal services to the city. We therefore conclude that the remaining information at issue is not protected by the attorney-client privilege and may not be withheld under section 552.107(1) of the Government Code.

Section 552.137 of the Government Code states in part that “[e]xcept 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 [the Act],” unless the owner of the e-mail address has affirmatively consented to its public disclosure. *Id.* § 552.137(a). The types of e-mail addresses listed in section 552.137(c) may not be withheld under this exception. *See id.* § 552.137(c). Likewise, section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. We have marked e-mail addresses that the city must withhold under section 552.137 unless the owner of the e-mail address has affirmatively consented to its disclosure.

Section 552.117 of the Government Code may also be applicable to some of the submitted information. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See Open Records Decision No. 530 at 5* (1989). Therefore, the city may only withhold information under section 552.117 on behalf of current or former officials or employees

who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. For those officials who timely elected to keep their personal information confidential, the city must withhold the information we have marked under section 552.117(a)(1). The city may not withhold this information under section 552.117 for those officials who did not make a timely election to keep the information confidential.

In summary, certain personal information contained in the submitted records, which we have marked, is not public information under the Act and may be withheld from the requestor. We have marked the information that the city (1) may withhold under section 552.107 of the Government Code; (2) must withhold under section 552.137 of the Government Code; and (3) must withhold under section 552.117 of the Government Code if a timely election was made. The remaining submitted information 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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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. 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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/mcf

Ref: ID# 294757

Enc. Submitted documents

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