ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 17, 2008

Ms. Amy L. Sims
Assistant City Attorney
City of Lubbock
P. O. Box 2000
Lubbock, Texas 79457

OR2008-00863

Dear Ms. Sims:

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 #299762.

The City of Lubbock (the "city") received two requests from different requestors for e-mails sent or received from October 17 through October 19 by seven named city officials. You claim that the submitted e-mails are excepted from disclosure under sections 552.101, 552.102, 552.107, 552.117, 552.133, and 552.137 of the Government Code.[1] We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that one request was for e-mails sent or received by two named individuals on October 17 and October 18. You have not submitted any e-mails from October 17 for our review. Therefore, to the extent the requested e-mails existed on the date the city received this request, we assume you have released them to this requestor. If you have not released any such information, then you must release it at this time. *See* Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible). We next address your argument under section 552.107 of the Government Code, as it is potentially the most encompassing exception to disclosure you raise.

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[1]Although you initially raised sections 552.104, 552.109, and 552.111of the Government Code, you have not submitted arguments explaining how these exceptions apply to the submitted information. Therefore, we presume that you have withdrawn these exceptions. *See* Gov't Code §§ 552.301, 552.302.

You claim that the e-mails contained within Exhibit B are excepted from disclosure under section 552.107(1) 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 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, lawyer representatives, and lawyers representing another party in a pending action concerning a matter of common interest therein. 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. Lastly, 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 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, 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).

You state that Exhibit B contains e-mails that consist of communications between the City Attorney's Office and outside attorneys also working for the city. However, you do not explain how any of the communications at issue were made in confidence or establish that their confidentiality has been maintained. Furthermore, many of these "communications" are merely notifications that a "SPAM" e-mail was blocked by the city's e-mail software. Accordingly, we find that you have failed to demonstrate the applicability of section 552.107 to Exhibit B, and none of this exhibit may be withheld on this basis.

Section 552.133 excepts from disclosure information held by a public power utility that is related to a competitive matter. *See* Gov't Code § 552.133(b). Section 552.133(b) provides as follows:

> Information or records are excepted from [required public disclosure] if the information or records are reasonably related to a competitive matter, as defined in this section. Excepted information or records include the text of any resolution of the public power utility governing body determining which issues, activities, or matters constitute competitive matters. Information or records of a municipally owned utility that are reasonably related to a competitive matter are not subject to disclosure under this chapter, whether or not, under the Utilities Code, the municipally owned utility has adopted customer choice or serves in a multiply certificated service area. This section does not limit the right of a public power utility governing body to withhold from disclosure information deemed to be within the scope of any other exception provided for in this chapter, subject to the provisions of this chapter.

Id. § 552.133(b). "Competitive matter" is defined as a matter that the public power utility governing body in good faith determines by vote to be related to the utility's competitive activity. *Id.* § 552.133(a)(3). The governing body also must determine, in like manner, that the release of the information would give an advantage to competitors or prospective competitors. *Id.* Section 552.133(a)(3) lists thirteen categories of information that may not be deemed to be competitive matters. The attorney general may conclude that section 552.133 is inapplicable to the information at issue only if, based on the information provided, the attorney general determines that the public power utility governing body has not acted in good faith in determining that the issue, matter, or activity is a competitive matter or that the information requested is not reasonably related to a competitive matter. *Id.* § 552.133(c).

You argue that the bid made for the city's public electric utility, submitted as Exhibit E, is excepted under section 552.133 as information related to a competitive matter. You have submitted a city resolution defining "competitive matter" for purposes of this exception. Upon review, however, we note that you have not submitted any information pertaining to an actual bid to this office. Rather, Exhibit E consists of e-mails pertaining to a complaint regarding tree pruning and a city employee's family member. Therefore, we find that you have failed to establish that the information within Exhibit E is reasonably related to a competitive matter for purposes of section 552.133. Therefore, no portion of Exhibit E may be withheld on this basis.

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses information that is made confidential by statute. You claim that some of the responsive information within Exhibit C may not be

subject to release pursuant to the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). At the direction of Congress, the Secretary of Health and Human Services ("HHS") promulgated regulations setting privacy standards for medical records, which HHS issued as the Federal Standards for Privacy of Individually Identifiable Health Information. *See* HIPAA, 42 U.S.C. § 1320d-2 (Supp. IV 1998) (historical & statutory note); Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. Pts. 160, 164 ("Privacy Rule"); *see also* Attorney General Opinion JC-0508 at 2 (2002). These standards govern the releasability of protected health information by a covered entity. *See* 45 C.F.R. pts. 160, 164. Under these standards, a covered entity may not use or disclose protected health information, except as provided by parts 160 and 164 of the Code of Federal Regulations. 45 C.F.R. § 164.502(a).

This office has addressed the interplay of the Privacy Rule and the Act. Open Records Decision No. 681 (2004). In that decision, we noted that section 164.512 of title 45 of the Code of Federal Regulations provides that a covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law. *Id.*; *see* 45 C.F.R. § 164.512(a)(1). We further noted that the Act "is a mandate in Texas law that compels Texas governmental bodies to disclose information to the public." *See* Open Records Decision No. 681 at 8 (2004); *see also* Gov't Code §§ 552.002, .003, .021. We therefore held that the disclosures under the Act come within section 164.512(a). Consequently, the Privacy Rule does not make information confidential for the purpose of section 552.101 of the Government Code. *Abbott v. Tex. Dep't of Mental Health & Mental Retardation*, No. 03-04-00743-CV, 2006 WL 1649003 (Tex. App.—Austin, June 16, 2006, no. pet. h.) (disclosures under the Act fall within section 164.512(a)(1) of the Privacy Rule); Open Records Decision No. 681 at 9 (2004); *see also* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Because the Privacy Rule does not make confidential information that is subject to disclosure under the Act, the city may withhold protected health information from the public only if the information is confidential under other law or an exception in subchapter C of the Act applies.

You also raise section 552.101 of the Government Code in conjunction with section 181.001 of the Health and Safety Code. Section 181.101 provides that "[a] covered entity shall comply with the Health Insurance Portability and Accountability Act and Privacy Standards relating to... (3) uses and disclosures of protected health information, including requirements relating to consent[.]" Health & Safety Code § 181.101(3). However, section 181.101 was repealed effective September 1, 2003. *See* Acts 2001, 77th Leg., R.S., ch. 1511, § 1, 2001 Tex. Gen. Laws 5384, *repealed by* Act of April 10, 2003, 78th Leg., R.S., ch. 3, 2003 Tex. Sess. Law Serv. 5. We therefore conclude that the city may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with section 181.101 of the Health and Safety Code.

You assert some of the information in Exhibit C may be subject to section 552.117 of the Government Code. Section 552.117(a)(1) excepts from disclosure the current and former 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. Gov't Code § 552.117(a)(1). Whether information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Thus, the city may only withhold information under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date on which the request for information was made. Upon review, we find that multiple exhibits contain information that is potentially subject to section 552.117. The city may only withhold the information we have marked within Exhibits B, C and E under section 552.117(a)(1) if the employees at issue timely elected to keep their personal information confidential. If the employees at issue did not timely elect to keep their personal information confidential, then the information we have marked under this exception must generally be released.

Section 552.101 encompasses the doctrine of common-law privacy, which protects information that (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. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. This office has found that the following types of information are excepted from required public disclosure under common-law privacy: 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). Upon review, if the employee at issue did not elect to withhold her personal information under section 552.117, the city must withhold the information we have marked under section 552.101 in conjunction with common-law privacy. If the employee at issue did elect to withhold her personal information under section 552.117, then the city must release the information we have marked under section 552.101 in conjunction with common-law privacy.[2]

Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail

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[2]Because of our determinations under section 552.101 in conjunction with common-law privacy and section 552.117, we need not address your argument under section 552.102. *See Hubert v. Harte-Hanks Tex. Newspapers,* 625 S.W.2d 546 (Tex. App.—Austin 1983, *writ ref'd n.r.e.*) (holding that test under section 552.102 is the same as test under common-law privacy).

address is of a type specifically excluded by subsection (c).[3] *Id.* § 552.137(a)-(c). Section 552.137 does not apply to a government employee's work e-mail address because such an address is not that of the employee as a "member of the public," but is instead the address of the individual as a government employee. The e-mail addresses at issue do not appear to be of a type specifically excluded by section 552.137(c). You do not inform us that the relevant members of the public have consented to the release of these e-mail addresses. Therefore, the city must withhold the e-mail addresses we have marked under section 552.137.

In summary, if the employees at issue timely elected to keep their personal information confidential, the city must withhold the information we have marked within Exhibits B, C and E under section 552.117(a)(1) of the Government Code. If the employees at issue did not make such an election, the city must instead withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. Unless it received consent for their release, the city must withhold the e-mail addresses we have marked under section 552.137 of the Government Code. The remaining 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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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,

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[3]While you cite section 552.136 of the Government Code for your argument to withhold e-mail addresses, we understand you to raise section 552.137of the Government Code, as section 552.137 is the proper exception for the substance of your argument.

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 challenge 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,

Reg Hargrove
Assistant Attorney General
Open Records Division

RJH/mcf

Ref: ID# 299762

Enc. Submitted documents

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