



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 26, 2008

Mr. John Danner  
Assistant City Attorney  
City of San Antonio  
P.O. Box 839966  
San Antonio, Texas 78283

OR2008-13247

Dear Mr. Danner:

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# 322866.

The City of San Antonio (the "city") received a request for e-mail communications sent and received by a named former city councilman on the dates he was scheduled to have a city council meeting during his term. You claim some of the responsive information is not subject to the Act. You claim some of the remaining responsive information is excepted from disclosure under sections 552.107, 552.109, 552.117, and 552.137 of the Government Code.<sup>1</sup> We have considered your arguments and reviewed the submitted information.

Initially, you assert the e-mails you have marked are not subject to the Act. The Act is applicable to "public information." *See* Gov't Code § 552.021. Section 552.002 of the Act provides that "public information" consists of "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, virtually all information that is in a governmental body's physical possession constitutes public

---

<sup>1</sup> Although you also raise other sections of the Government Code, you have provided no arguments in explaining how these exceptions are applicable to the submitted information. Therefore, we presume you no longer assert these exceptions to disclosure. Gov't Code §§ 552.301, .302.

information that is subject to the Act. *Id.* § 552.002(a)(1); *see also* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). The city contends the e-mails you have marked are not maintained under a law or ordinance or in connection with the transaction of official city business. After reviewing the information at issue, we agree most of the e-mails at issue are not subject to the Act. *See* Open Records Decision No. 635 at 4 (1995) (statutory predecessor not applicable to personal information unrelated to official business and created or maintained by state employee involving *de minimis* use of state resources). Accordingly, the city need not release the e-mails we have marked to the requestor.<sup>2</sup> However, we find that the remaining e-mails you have marked were created in connection with the transaction of official business by the councilman. Therefore, these e-mails constitute “public information” as defined by section 552.002(a) and are subject to the Act. Therefore, we will address the exceptions you claim with regard to these e-mails, as well as the remaining information.

You assert a portion of the submitted information is excepted from disclosure under section 552.107(1) of the Government Code, which 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). 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 a lawyer representing another party in a pending action and concerning a matter of common interest therein. *See* TEX. R. EVID. 503(b)(1)(A)-(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).

---

<sup>2</sup>As our ruling is dispositive, we need not address your remaining arguments against the disclosure of this information.

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 the marked e-mail documents a communication between a city attorney and the former councilman. You explain that this communication was made in furtherance of the rendition of professional legal services to the city, was made in confidence, and has remained confidential. Based on your representations and our review, we find that the city may withhold the marked e-mail under section 552.107(1) of the Government Code.<sup>3</sup>

Next, we address your claim under section 552.109 of the Government Code. Section 552.109 excepts from public disclosure “[p]rivate correspondence or communications of an elected office holder relating to matters the disclosure of which would constitute an invasion of privacy[.]” Gov’t Code § 552.109. This office has held that the test to be applied to information under section 552.109 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the Government Code.

In *Industrial Foundation*, the Texas Supreme Court held that information is protected by common-law privacy 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. *Id.* at 685. 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. *Id.* at 683. Having reviewed your arguments and the information at issue, we find that you have failed to demonstrate that release of the remaining information would constitute an invasion of privacy. Therefore, none of the remaining information may be withheld under section 552.109 of the Government Code.

You also raise section 552.117 of the Government Code. Section 552.117(a)(1) excepts from disclosure the current and former home addresses, telephone numbers, social security numbers, personal cellular telephone numbers, and family member information of current or former officials or employees of a governmental body who request that this information

---

<sup>3</sup>As our ruling is dispositive under section 552.107 of the Government Code, we need not address your argument under section 552.109 of the Government Code for this information.

be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). Whether a particular piece of information is protected under 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, information may only be withheld 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 of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who did not timely request under section 552.024 that the information be kept confidential. Accordingly, to the extent the council members and employee to whom this information pertains timely elected confidentiality for their information under section 552.024, the city must withhold the information we have marked under section 552.117(a)(1).

Finally, you raise section 552.137 of the Government Code for the e-mail addresses contained within the remaining e-mails. This section 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 address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). 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. Upon review, we find that section 552.137 is applicable to some of the e-mail addresses at issue. Therefore, the city must withhold the personal e-mail addresses we have marked under section 552.137, unless the city receives consent for their release. The remaining e-mail addresses may not be withheld under section 552.137 of the Government Code.

In summary, the e-mails we have marked are not subject to the Act and need not be disclosed to the requestor. The city may withhold the marked e-mail under section 552.107(1) of the Government Code. The city must withhold the information we have marked under section 552.117 of the Government Code if the council members and employee at issue elected to keep such information confidential prior to the receipt of this request. The city must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the city receives consent for their release. 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). If the governmental body does not file suit over 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).

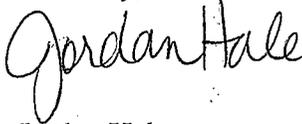
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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 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,



Jordan Hale  
Assistant Attorney General  
Open Records Division

JH/jb

Ref: ID# 322866

Enc. Submitted documents

c: Mr. Nicolas Norboge  
2520 Longview Street, Suite #410  
Austin, Texas 78705  
(w/o enclosures)