



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

March 2, 2009

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

OR2009-02690

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# 336205.

The City of Lubbock (the "city") received two requests for e-mails, memos, and other correspondence to and from named city employees, concerning the future of Emergency Management in Lubbock. You claim that the submitted information is excepted from disclosure under sections 552.107, 552.108, 552.117, and 552.137<sup>1</sup> of the Government Code.<sup>2</sup> We have considered the exceptions you claim and reviewed the submitted information. We have also considered the comments submitted to this office by one of the requestors. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note that Exhibit G contains an e-mail that was created after the date of the request. That e-mail, which we have marked, is therefore not responsive to the instant

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<sup>1</sup>Although you claim section 552.136 of the Government Code for certain e-mail addresses, based on the statutory language you cite it is clear that you meant to invoke section 552.137. We will therefore consider your claim under section 552.137 of the Government Code.

<sup>2</sup>Although you initially raised sections 552.101, 552.102, 552.103, and 552.111 of 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 Therefore, we presume that you have withdrawn these exceptions.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, .302.

request. The city need not release nonresponsive information and this ruling will not address that information.

Section 552.108(a)(1) excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime [if] release of the information would interfere with the detection, investigation, or prosecution of crime.” Gov’t Code § 552.108(a)(1). A governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). Section 552.108 may be invoked by the proper custodian of information relating to an investigation or prosecution of criminal conduct. *See* Open Records Decision Nos. 474 (1987), 372 (1983). The custodian of the records may withhold the information if it provides this office with a demonstration that the information relates to the pending case and a representation from the law enforcement entity that it wishes to withhold the information. You state that the Office of the Attorney General’s Criminal Justice Division objects to the release of the information in Exhibit E under section 552.108 because its release would interfere with an ongoing criminal investigation. Based on this representation, we conclude that the release of this information would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. App.—Houston [14th Dist.] 1975), writ ref’d n.r.e., 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases). Therefore, the city may withhold the information submitted as Exhibit E pursuant to section 552.108(a)(1) of the Government Code.<sup>3</sup>

Section 552.107 of the Government Code protects information that comes 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. *See* 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. *See* 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. *See 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 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

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<sup>3</sup>Because our determination on this issue is dispositive, we need not address your argument for the duplicate information in Exhibit D.

representatives, lawyers, and lawyer representatives. 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). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. See *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 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).

The city seeks to withhold the remaining information in Exhibit D under section 552.107 of the Government Code. You state that this information consists of attorney-client communications that were made for the purpose of facilitating the rendition of professional legal services to the city. You also state that the communications were intended to be and have remained confidential. Based on your representations and our review of the information at issue, we conclude that the city may withhold the remaining information in Exhibit D under section 552.107 of the Government Code.<sup>4</sup>

You argue that Exhibit G contains personal e-mail addresses. 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. Gov’t Code § 552.137(a). We note that section 552.137 does not apply to a general business e-mail address. It also 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. We have marked the e-mail addresses that are subject to section 552.137 of the Government Code. You state you have not received consent for the release of any e-mail address from a member of the public. Therefore, the city must withhold the marked addresses pursuant to section 552.137 of the Government Code.

In summary, the city may withhold the information in Exhibit E, and the duplicate information in Exhibit D, under section 552.108(a)(1) of the Government Code. The city

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<sup>4</sup>Because our determination on this issue is dispositive, we need not address your argument under section 552.117 of the Government Code.

may withhold the remaining information in Exhibit D under section 552.107 of the Government Code. The city must withhold the marked e-mail addresses of members of the public under section 552.137 of the Government Code. The remaining submitted information must be released.

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

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Karen E. Stack  
Assistant Attorney General  
Open Records Division

KES/sdk

Ref: ID# 336205

Enc. Submitted documents

c: 2 Requestors  
(w/o enclosures)