



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 15, 2010

Mr. Leonard V. Schneider
Ross, Banks, May, Cron & Cavin, P.C.
For City of Magnolia
2 Riverway, Suite 700
Houston, Texas 77056-1918

OR2010-03670

Dear Mr. Schneider:

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# 372639.

The City of Magnolia (the "city"), which you represent, received two requests from the same requestor for all e-mails sent and received by three named city officials during specified time frames. You state that you will release some information to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.106, 552.107, and 552.111 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 of the Government Code excepts from 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 made confidential by other statutes, including section 182.052 of the Utilities Code, which provides in relevant part:

¹Although you also raise section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503, this office has concluded that section 552.101 does not encompass discovery privileges. See Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Thus, we will address your attorney-client privilege claim under only section 552.107 of the Government Code.

(a) Except as provided by Section 182.054, a government-operated utility may not disclose personal information in a customer's account record, or any information relating to the volume or units of utility usage or the amounts billed to or collected from the individual for utility usage, if the customer requests that the government-operated utility keep the information confidential. However, a government-operated utility may disclose information related to the customer's volume or units of utility usage or amounts billed to or collected from the individual for utility usage if the primary source of water for such utility was a sole-source designated aquifer.

(b) A customer may request confidentiality by delivering to the government-operated utility an appropriately marked form provided under Subsection (c)(3) or any other written request for confidentiality.

Util. Code § 182.052(a)-(b). "Personal information" under section 182.052(a) includes an individual's address, telephone number, or social security number, but does not include the individual's name. *See id.* § 182.051(4); *see also* Open Records Decision No. 625 (1994) (construing statutory predecessor). We note that a post office box number is not an address for the purposes of section 182.052. Moreover, because section 182.052 is intended to protect the safety and privacy of individual customers, this statute is applicable only to information pertaining to natural persons, and does not protect information relating to business, governmental, and other artificial entities. *See* ORD 625 at 4-5 (in context of Util. Code § 182.051(4), "individual" means only natural persons and does not include artificial entities). Water service is included in the scope of utility services covered by section 182.052. Util. Code § 182.051(3). Section 182.054 of the Utilities Code provides six exceptions to the disclosure prohibition found in section 182.052. *See id.* § 182.054.

You state that the personal account numbers and amounts billed in Exhibit F are confidential under chapter 182 of the Utilities Code. In this instance, there is no indication that any of the exceptions listed in section 182.054 is applicable. We understand that the primary source of water for the city's utility services is not a sole-source designated aquifer. Therefore, the city must withhold the personal information and amounts billed information we have marked of customers who are natural persons under section 552.101 of the Government Code in conjunction with section 182.052 of the Utilities Code to the extent that such customers made written requests for the confidentiality of their information prior to the city's receipt of this request for information. *See* ORD 625 at 7 (character of requested information as public or not public must be determined at time request for information is made). To the extent that such customers did not make written confidentiality requests prior to the city's receipt of this request, the city must release the information we have marked. Regardless of any confidentiality requests, the remaining information in Exhibit F, including the personal account numbers, does not constitute personal information or information relating to volume or units of utility usage or the amounts billed to or collected from the individuals for utility

usage; this information is not confidential under section 182.052, and the city may not withhold any portion of it under section 552.101 on that basis.

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. ORD 676 at 6-7. First, a governmental body must demonstrate 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 a capacity other than that of attorney). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1). 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.*, 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 pet.). 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 information you have marked in Exhibits A, B, C, D, and E constitutes communications made between attorneys for the city and city employees and officials made for the purpose of providing legal services to the city. You have identified the parties to the communications. You indicate these communications were made in confidence and their confidentiality has been maintained. Based on your representations and our review, we find the city may generally withhold the information you have marked under section 552.107 of the Government Code.² We note, however, that some of the information you seek to

²As our ruling is dispositive, we need not address your remaining argument against disclosure.

withhold under section 552.107 was sent to non-privileged parties or parties whose relationship with the city you have failed to specify. Thus, we conclude you have failed to establish that section 552.107 is applicable to this information. Accordingly, we have marked the non-privileged information for release, and we conclude it may not be withheld under section 552.107(1).

We note portions of the remaining information are subject to sections 552.136 and 552.137 of the Government Code.³ Section 552.136 of the Government Code provides that “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136. Accordingly, the city must withhold the account numbers we have marked under section 552.136 of the Government Code.

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 address is of a type specifically excluded by subsection (c). *See id.* § 552.137(a)-(c). The e-mail addresses in the remaining information are not specifically excluded by section 552.137(c). As such, these e-mail addresses, which we have marked, must be withheld under section 552.137, unless the owners of the addresses have affirmatively consented to their release. *See id.* § 552.137(b).⁴

In summary, to the extent that the customers at issue made written requests for the confidentiality of their information prior to the city’s receipt of this request for information, the city must withhold the information we have marked in Exhibit F under section 552.101 of the Government Code in conjunction with section 182.052 of the Utilities Code. The city may withhold the information you have marked in Exhibits A, B, C, D and E, with the exception of the information we have marked for release, under section 552.107 of the Government Code. The city must withhold the account numbers we have marked in Exhibit F under section 552.136 of the Government Code. The city must withhold the e-mail address we have marked under section 552.137 of the Government Code. The remaining information must be released.

³The Office of the Attorney General will raise mandatory exceptions like section 552.136 and 552.137 on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

⁴We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

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, 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, toll free, at (888) 672-6787.

Sincerely,



Nneka Kanu
Assistant Attorney General
Open Records Division

NK/dls

Ref: ID# 372639

Enc. Submitted documents

c: Requestor
(w/o enclosures)