



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 30, 2010

Ms. Julia Gannaway  
Attorney for City of La Marque  
Lynn, Pham & Ross, L.L.P.  
306 West Broadway Avenue  
Fort Worth, Texas 76104

Ms. Lydia Alcala-Garcia  
City Clerk  
City of La Marque  
1111 Bayou Road  
La Marque, Texas 77568-4299

OR2010-09685

Dear Ms. Gannaway and Ms. Alcala-Garcia:

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# 384813.

The City of La Marque (the "city") received two requests from the same requestor for "all documents in reference to the hiring of a private investigator to review allegations within the La Marque Fire Department" and for "the city manager's phone records[,] both office and mobile phone." You state you have released the city manager's office telephone records to the requestor. We understand you to assert a portion of the requested information is not subject to the Act. You claim the remaining requested information is excepted from disclosure under section 552.107 of the Government Code.<sup>1</sup> We have considered your

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<sup>1</sup>Although you also raise section 552.101 of the Government Code in conjunction with the attorney-client privilege found in rule 503 of the Texas Rules of Evidence and the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure, this office has concluded section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Accordingly, we will consider your assertion of the attorney-client under only section 552.107. We further note although rule 503 and rule 192.5 are "other law" for purposes of information subject to section 552.022 of the Government Code, the information at issue is not subject to section 552.022.

arguments and reviewed the submitted information. We have also received and considered comments from a representative of the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, the city asserts the city manager's personal cellular telephone records are not subject to the Act. The Act applies to "public information," which is defined in section 552.002 of the Government Code as:

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. Thus, virtually all of the information in a governmental body's physical possession constitutes public information and, thus, is subject to the Act. *Id.* § 552.002(a)(1); *see* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). The Act also encompasses information that a governmental body does not physically possess, if the information is collected, assembled, or maintained for the governmental body, and the governmental body owns the information or has a right of access to it. Gov't Code § 552.002(a)(2); *see* Open Records Decision No. 462 at 4 (1987).

The city states, and provides documentation showing, the city does not provide the city manager with a city-issued cellular telephone, the city does not pay the city manager an allowance for the use of his personal cellular telephone, and the city manager does not hold his personal cellular telephone out to the public as a means of contacting him for city business. Based on these representations, we agree the city manager's personal cellular telephone records do not constitute "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business" by or for the city. *See* Gov't Code § 552.021; *see also* Open Records Decision No. 635 (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). Therefore, this information is not subject to the Act and need not be released in response to this request.

Next, we address the requestor's representative's assertion the city possesses information responsive to the request for documents relating to the hiring of a private investigator that it did not submit to this office. The city states it possesses only one responsive document, which the city has submitted to this office. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ *dism'd*) (governmental body not required to disclose documents no longer in its possession); Open Records Decision No. 555 at 1-2 (1990) (governmental body not required to disclose information that did not exist at time request was received). Whether the city has additional

information that it has not provided is a question of fact. This office cannot resolve factual disputes in the opinion process. See Open Records Decision Nos. 592 at 2 (1991), 552 at 4 (1990), 435 at 4 (1986). Where fact issues are not resolvable as a matter of law, we must rely on the facts alleged to us by the governmental body requesting our decision, or upon those facts that are discernible from the documents submitted for our inspection. See ORD 552 at 4. Accordingly, we must accept the city's representation that it has no additional responsive information that it has not already provided to this office.

The city claims the responsive document is excepted under section 552.107 of the Government Code. Section 552.107(1) protects information that comes within the attorney-client privilege. Gov't Code § 552.107(1). 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 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). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. See 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, 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 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).

The city states the responsive document consists of a confidential communication between the city's outside counsel and additional outside counsel, the city attorney, city manager, and city's public safety director. The city states this communication was made in furtherance of the rendition of legal services to the city, and the city informs this office this communication

has remained confidential. Based on these representations and our review, we agree the responsive document constitutes a privileged attorney-client communication. Therefore, the city may withhold the responsive document under section 552.107 of the Government Code.

In summary, the city manager's personal cellular telephone records are not subject to the Act, and the city need not release this information. The city may withhold the responsive document under section 552.107 of the Government Code.

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

Sincerely,



Mack T. Harrison  
Assistant Attorney General  
Open Records Division

MTH/tp

Ref: ID# 384813

Enc. Submitted documents

c: Requestor  
(w/o enclosures)