



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 25, 2010

Ms. Josette Flores
Assistant City Attorney
City of El Paso
2 Civic Center Plaza, 9th Floor
El Paso, Texas 79901

OR2010-16152

Dear Ms. Flores:

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# 397918.

The City of El Paso (the "city") received three requests from two requestors for certain information pertaining to certain violations of city building codes and complaints filed by or against the requestors. You state the city is releasing some of the requested information. You claim portions of the submitted information are excepted from disclosure under sections 552.101, 552.107, 552.137, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.107(1) of the Government Code protects information coming 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 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, 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 have marked the information you claim is excepted under section 552.107. This information consists of e-mail correspondence between individuals you identify as city officials and attorneys. You represent these e-mails were communicated for the purpose of providing legal advice to the city. You also represent these e-mails were intended as confidential communications, and that their confidentiality has been maintained. Therefore, based on your representations and our review, we agree the information you marked is privileged, and the city may withhold this information under section 552.107 of the Government Code.

You claim portions of the remaining information are excepted under section 552.101 of the Government Code. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. The common-law informer’s privilege, incorporated into the Act by section 552.101, has long been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). This privilege protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided that the subject of the information does not already know the informer’s identity. Open Records Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978). The informer’s privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to “administrative officials having a duty of inspection or of law enforcement within their particular spheres.” Open Records Decision No. 279 at 1-2 (1981). The report must be of a violation of a criminal or civil statute. *See* Open Records Decision Nos. 582 at 2 (1990), 515 at 4 (1988).

You explain, and provide documentation reflecting, that the reporters in the submitted information reported violations of the city's code of ordinances to city officials and police that are charged with enforcing such ordinances. Based on your representations and our review, we agree that information identifying the complainants would generally be protected under the informer's privilege. Additionally, there is no indication the identity of the individual who reported animal control violations is known by the subjects of that report. Consequently, we have marked the identifying information of the individual who reported these animal control violations, and the city may withhold this information under section 552.101 of the Government Code in conjunction with the informer's privilege. However, the requests and submitted information reveal that the individuals who are the subjects of the remaining complaints know the identities of the reporting parties. *See* ORD 208. Therefore, the remaining informers' identities may not be withheld under section 552.101 in conjunction with the informer's privilege.

You claim some of the remaining information is excepted from disclosure under section 552.137 of the Government Code, which generally requires a governmental body to withhold the e-mail address of a member of the general public. Gov't Code § 552.137(a). The e-mail addresses at issue do not appear to be specifically excluded by section 552.137(c). Accordingly, unless the city has received consent for their disclosure from the e-mail address owners, the city must withhold the e-mail addresses we have marked under section 552.137 of the Government Code.¹

Finally, you assert the remaining information contains social security numbers. Section 552.147 governs the release of social security numbers under the Act and provides "[t]he social security number of a living person is excepted from" required public disclosure under the Act. *Id.* § 552.147. Therefore, the city may withhold the social security numbers in the remaining information under section 552.147 of the Government Code.²

In summary, the city may withhold the information you marked under section 552.107 of the Government Code. The city may also withhold the information we marked under section 552.101 of the Government Code in conjunction with the common-law informer's privilege. The city must withhold the e-mail addresses we marked under section 552.137 of the Government Code, unless their owners have consented to their disclosure. The city may

¹We note this office has issued Open Records Decision No. 684 (2009), which is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

²We note that section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act. Gov't Code § 552.147(b).

withhold the social security numbers in the submitted information under section 552.147 of the Government Code. The remaining submitted information must be released.³

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,



Bob Davis
Assistant Attorney General
Open Records Division

RSD/tp

Ref: ID# 397918

Enc. Submitted documents

c: Requestor
(w/o enclosures)

³We note the requestors have a right of access to information in the submitted documents that otherwise would be confidential under section 552.130 of the Government Code. *See* Gov't Code § 552.023(a) ("a person or a person's authorized representative has a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect that person's privacy interests."); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning herself). Open Records Decision No. 684 authorizes governmental bodies to withhold Texas driver's license numbers without the necessity of requesting an attorney general decision. Accordingly, if the city receives another request for this information from an individual other than one with a right of access under section 552.023, the city is authorized to withhold the Texas driver's license number in the submitted information under section 552.130 without seeking a decision from this office.