



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 12, 2011

Ms. Anita Burgess
City Attorney
City of Denton
215 East McKinney
Denton, Texas 76201

OR2011-00618

Dear Ms. Burgess:

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# 405777.

The City of Denton (the "city") received a request for all e-mail correspondence to and from the mayor and 1) city council members, 2) the city manager, 3) assistant city managers, 4) department directors, 4) all employees in the city's legal department, and 5) Denton Chamber of Commerce employees.¹ You claim that the requested information is excepted from disclosure under sections 552.101, 552.107, 552.109, 552.111, and 552.137 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted information.

¹We note the city asked for and received clarification of the request. *See* Gov't Code § 552.222(b)(providing that if request for information is unclear, governmental body may ask requestor to clarify the request).

²Although you raise section 552.101 in conjunction with the attorney-client privilege under Texas Rule of Evidence 503 and with the attorney work product privilege under Texas Rule of Civil Procedure 192.5, 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). Furthermore, we note the proper exceptions to raise when asserting the attorney-client privilege and the attorney work product privilege for information not subject to section 552.022 of the Government Code are sections 552.107 and 552.111, respectively. *See* Open Records Decision Nos. 677 (2002), 676 at 1-2 (2002).

Section 552.101 of the Government Code exempts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code §552.101. This section encompasses information protected by other statutes. Section 182.052 of the Utilities Code provides in relevant part the following:

(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). Section 182.054 of the Utilities Code provides six exceptions to the disclosure prohibition found in section 182.052. *See id.* § 182.054. You have provided no information to allow us to conclude that any of these exceptions apply in this case. “Personal information” under section 182.052(a) of the Utilities Code means an individual’s address, telephone number, or social security number. *Id.* § 182.051(4); *see also* Open Records Decision No. 625 (1994) (construing statutory predecessor). We note that the names of customers are not included in the definition of personal information, and therefore are not confidential under section 182.052 of the Utilities Code. A customer’s request for confidentiality must precede the utility’s receipt of the request for information. ORD 625 at 6. Lastly, section 182.052 protects the personal information of natural persons only and not of artificial entities such as corporations, partnerships, or other business associations. *Id.* at 3-4.

You inform us that the information in Exhibit B pertains to a customer who has requested that such information be kept confidential. However, you do not inform us whether this customer did so prior to the city’s receipt of this request for information. Likewise, you do not indicate whether the city’s primary source of water is a sole-source designated aquifer. Nevertheless, if the city’s primary source of water is not a sole-source designated aquifer and if the customer at issue requested confidentiality under section 182.052(b) before the city received the request for information, the city must generally withhold the address and utility usage information we have marked pursuant to section 552.101 of the Government Code in conjunction with section 182.052 of the Utilities Code. If the city’s primary source of water is a sole-source designated aquifer, then the city has discretion to release the information at issue, notwithstanding the customers’ requests for confidentiality. We note, however, that

the information at issue may belong to a business and not a natural person. The city may not withhold the address or utility usage information of any business. Finally, the remaining information in Exhibit B does not consist of personal information in a customer's account record, nor information relating to the volume or units of utility usage or the amounts billed to or collected from the individual 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.

Next, you seek to withhold Exhibit C under section 552.101 of the Government Code in conjunction with common-law privacy. Section 552.101 also encompasses the doctrine of common-law privacy, which excepts from public disclosure private information about an individual if the information (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. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. This office has found that the following types of information are excepted from required public disclosure under common-law privacy: personal financial information not relating to a financial transaction between an individual and a governmental body, *see* Open Records Decision No. 600 (1992); and some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (information pertaining to illness from severe emotional and job-related stress protected by common-law privacy), 455 (1987) (information pertaining to prescription drugs, specific illnesses, operations and procedures, and physical disabilities protected from disclosure). Upon review, we find a portion of the remaining information is highly intimate or embarrassing and of no legitimate concern to the public. Therefore, the city must withhold the information we marked in Exhibits C and E under section 552.101 in conjunction with common-law privacy. However, we find no portion of the remaining information is highly intimate or embarrassing and of no legitimate concern to the public. Accordingly, no portion of the remaining information at issue may be withheld under section 552.101 in conjunction with common-law privacy.

Section 552.109 of the Government Code 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 the test to be applied to information under section 552.109 is the same as the common-law privacy test formulated by the Texas Supreme Court in *Industrial Foundation*, as outlined above. You contend the remaining information in Exhibit E is private. Although this information is correspondence of an elected office holder, you have failed to demonstrate how the remaining information in Exhibit E constitutes highly intimate or embarrassing information. Therefore, no portion of the remaining information in Exhibit E may be withheld under section 552.109 of the Government Code.

You claim the information in Exhibit D is protected by the attorney-client privilege. Section 552.107(1) 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 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 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 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. *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 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).

We understand you to assert the e-mails in Exhibit D consist of communications between attorneys for and employees and officials of the city. You indicate the communications were made in connection with the rendition of professional legal services for the city. You also indicate the communications were not intended to be, and have not been, disclosed to third parties. Based on your representations and our review, we conclude the information in Exhibit D consists of privileged attorney-client communications that the city may withhold under section 552.107(1) of the Government Code.³

³As our ruling is dispositive, we need not address your argument under the work product privilege of section 552.111 for this information.

We note portions of the information in Exhibits C and F may be subject to section 552.117 of the Government Code.⁴ Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that 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 by 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). The city may only withhold information under section 552.117(a)(1) if the individuals at issue elected confidentiality under section 552.024 prior to the date on which the request for this information was made. Therefore, if the individuals at issue timely elected to keep their personal information confidential, the city must withhold the information we have marked in Exhibits C and F. Otherwise, this information may not be withheld under section 552.117.

Finally, you claim Exhibit F contains personal e-mail addresses subject to section 552.137 of the Government Code. Section 552.137 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). Gov't Code § 552.137(a)-(c). The e-mail addresses we have marked are not of a type specifically excluded by section 552.137(c). Accordingly, the city must withhold the e-mail addresses we have marked in Exhibit F under section 552.137, unless the owners of the addresses affirmatively consent to their disclosure.

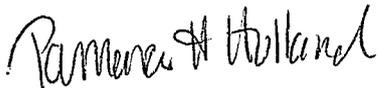
In summary, if the city's primary source of water is not a sole-source designated aquifer and if the customer at issue requested confidentiality under section 182.052(b) before the city received the request for information, the city must withhold the address and utility usage information we have marked in Exhibit B pursuant to section 552.101 of the Government Code in conjunction with section 182.052 of the Utilities Code. The city, however, may not withhold this marked information if it pertains to a business. The city must withhold the information we marked in Exhibits C and E under section 552.101 of the Government Code in conjunction with common-law privacy. The city may withhold Exhibit D under section 552.107 of the Government Code. If the individuals at issue timely elected to keep their personal information confidential, the city must withhold the information we have marked in Exhibits C and F under section 552.117 of the Government Code. The city must withhold the e-mail addresses we have marked in Exhibit F under section 552.137 of the Government Code, unless the owners of the addresses affirmatively consent to their disclosure. The remaining information must be released.

⁴The Office of the Attorney General will raise a mandatory exception like section 552.117 of the Government Code on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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,



Tamara H. Holland
Assistant Attorney General
Open Records Division

THH/tf

Ref: ID# 405777

Enc. Submitted documents

c: Requestor
(w/o enclosures)