



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 18, 2011

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

OR2011-00840

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# 406155.

The City of Denton (the "city") received a request for all e-mail correspondence sent or received by a named individual from September 20, 2010 to the date of the request. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.109, 552.111, 552.123, and 552.137 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 section 182.052 of the Utilities Code, which provides in relevant part the following:

¹Although you raise section 552.101 of the Government Code in conjunction with rule 503 of the Texas Rules of Evidence and 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). In this instance, your attorney-client and attorney work product privilege claims are properly addressed under sections 552.107 and 552.111 of the Government Code, respectively.

(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) means 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). Upon review, we find you have not demonstrated any portion of Exhibit B consists of personal information in a customer's account record or information relating to the volume or units of utility usage or the amounts billed to or collected from the individual for utility usage. Accordingly, the information at issue 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 552.101 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. This section encompasses the doctrine of common-law privacy, which protects information that (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. The types of information considered intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. Upon review, we find you have failed to demonstrate how any portion of Exhibit C constitutes information that is highly intimate or embarrassing and not of legitimate public interest. Accordingly, the city may not withhold any portion of Exhibit C under section 552.101 of the Government Code in conjunction with common-law privacy.

Next, we note Exhibits C and G contain personal information about city employees. Section 552.117(a)(1) of the Government Code 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 this information be kept confidential under section 552.024 of the Government Code.² 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 an employee's personal information under section 552.117(a)(1) if the individual in question elected confidentiality under section 552.024 prior to the date on which the request for this information was made. If the individuals whose information is at issue made timely elections under section 552.024, the city must withhold the information we have marked under section 552.117(a)(1) of the Government Code. If the individuals did not make timely elections under section 552.024, the marked information may not be withheld under section 552.117(a)(1) of the Government Code.

Next, you raise section 552.107(1) of the Government Code for Exhibit D. 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.

²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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).

You state, and the submitted documents reveal, Exhibit D consists of communications between city attorneys, city employees, and the mayor. You indicate these communications were made in connection with the rendition of professional legal services for the city. You also indicate the communications were made in confidence and the confidentiality has been maintained. Based on your representations and our review, we conclude the information in Exhibit D consists of privileged attorney-client communications and may be withheld under section 552.107(1) of the Government Code.³

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 submitted e-mail in Exhibit E is private. Although this information is correspondence of an elected office holder, you have failed to demonstrate how Exhibit E constitutes highly intimate or embarrassing information. Therefore, no part of Exhibit E may be withheld under section 552.109 of the Government Code.

You claim portions of Exhibit F are excepted from disclosure under section 552.123 of the Government Code, which excepts from required public disclosure:

The name of an applicant for the position of chief executive officer of an institution of higher education . . . except that the governing body of the institution must give public notice of the name or names of the finalists being considered for the position at least 21 days before the date of the meeting at which final action or vote is to be taken on the employment of the person.

Id. § 552.123. Section 552.123 permits the withholding of *any* identifying information about the candidates, not just their names. Open Records Decision No. 540 (1990) (construing statutory predecessor to section 552.123). Examples of information identifying individuals might include, but are not limited to, resumes, professional qualifications, membership in professional organizations, dates of birth, current positions, publications, letters of recommendation, or any other information that can be uniquely associated with a particular

³As our ruling is dispositive, we need not address your remaining argument against disclosure of Exhibit D.

applicant. *Id.* at 4. In addition, the exception protects the identities of all persons being considered for the position of university chief executive officer, whether they are nominated or apply on their own initiative. *Id.* at 5.

The University of North Texas is an “institution of higher education” as defined by section 61.003(8) of the Texas Education Code. Educ. Code § 61.003(8). We understand the president is the “chief executive officer.” You state Exhibit F contains a link, username, and password to a website that contains the identifying information of candidates for the position of president of the University of North Texas. However, we find you have failed to demonstrate how the information at issue identifies or tends to identify particular candidates. Thus, the city may not withhold the information at issue pursuant to section 552.123 of the Government Code.

You raise section 552.137 for personal e-mail addresses contained in Exhibit G. 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* Gov’t Code § 552.137(a)-(c). The e-mail addresses listed in Exhibit G 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.⁴ *See id.* § 552.137(b).

In summary, if the individuals whose information is at issue made timely elections under section 552.024 of the Government Code, the city must withhold the information we have marked in Exhibits C and G under section 552.117(a)(1) of the Government Code. The city may withhold the information in Exhibit D under section 552.107(1) of the Government Code. The city must withhold the personal e-mail addresses we have marked in Exhibit G under section 552.137 of the Government Code, unless the owners of the addresses have affirmatively consented to their release. The remaining information must be released.

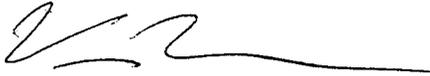
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

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, or call the Office of the Attorney General’s Open Government Hotline, toll free,

⁴Open Records Decision No. 684 (2009) serves as 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, without the necessity of requesting an attorney general decision.

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,

A handwritten signature in black ink, appearing to read 'VB', with a long horizontal flourish extending to the right.

Vanessa Burgess
Assistant Attorney General
Open Records Division

VB/dls

Ref: ID# 406155

Enc. Submitted documents

c: Requestor
(w/o enclosures)