



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 3, 2011

Mr. Dick H. Gregg, Jr.  
Gregg & Gregg, P.C.  
For the City of Kemah  
16055 Space Center Boulevard, Suite 150  
Houston, Texas 77062

OR2011-06016

Dear Mr. Gregg:

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# 416161.

The City of Kemah (the "city"), which you represent, received a request for e-mails sent or received by four named individuals for a specified time period and documents detailing internet usage of any computer assigned to the mayor or the city administrator for the same time period.<sup>1</sup> You state the city has released some of the requested information. You claim a portion of the remaining information is not subject to the Act. Alternatively, you claim this portion of the remaining information is excepted from disclosure under section 552.101 and the entirety of the remaining information is excepted under section 552.107 of the Government Code. We have considered your arguments and reviewed the submitted representative sample of information.<sup>2</sup> We have also received and considered comments

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

<sup>2</sup>We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

You state that the city does not maintain information regarding internet usage because the city's computer system automatically erases all internet access information when a computer is turned off. The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

Next, we note the requestor objects to the city submitting a representative sample in this instance. However, the Act allows a governmental body to submit a representative sample of the information it seeks to withhold if a voluminous amount of information was requested. Gov't Code § 552.301(e)(1)(D); *see also* ORD 499 at 6 (if documents requested are numerous and repetitive, governmental body should submit a representative sample), ORD 497 at 4. Accordingly, we conclude the city has complied with the procedural requirements of the Act in submitting a representative sample of the information it seeks to withhold, and we will consider the city's arguments against the disclosure of the requested information.

You claim the e-mails in Exhibits 2-A, 2-B, 2-C, 2-D, 3, and 4 are not subject to the Act. The Act is applicable only to "public information." *See* Gov't Code §§ 552.002, .021. Section 552.002(a) provides that "public information" consists of

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(a). 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). You state the e-mails at issue are personal e-mails that were not collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official city business. Based on your representations and our review of the submitted information, we conclude that the e-mails at issue do not constitute public information for the purposes of section 552.002 of the Government Code. *See* Open Records Decision No. 635 at 4 (1995) (section 552.002 not applicable to personal information unrelated to official business and created or maintained by state employee involving *de minimis* use of state resources).

Therefore, the e-mails in Exhibits 2-A, 2-B, 2-C, 2-D, 3, and 4 are not subject to the Act, and the city need not release them in response to this request.<sup>3</sup>

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. 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, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *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. *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 assert the e-mails in Exhibit 1 consists of written communications between city attorneys and city staff to facilitate the rendition of professional legal services to the city. You assert these communications were made in confidence and have maintained their

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<sup>3</sup>As we are able to make this determination, we need not address your remaining arguments against disclosure of this information.

confidentiality. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the e-mails in Exhibit 1. Accordingly, the city may generally withhold these e-mails under section 552.107 of the Government Code. However, we note some of the individual e-mails in the otherwise privileged e-mail chains consist of communications with non-privileged parties. Accordingly, to the extent these non-privileged e-mails, which we have marked, exist separate and apart from the submitted e-mail chains, they may not be withheld under section 552.107.

In summary, the e-mails in Exhibits 2-A, 2-B, 2-C, 2-D, 3, and 4 are not subject to the Act, and the city need not release them in response to this request. The city may generally withhold the e-mails in Exhibit 1 under section 552.107 of the Government Code. However to the extent the marked non-privileged e-mails exist separate and apart from the submitted e-mail chains, the non-privileged e-mails 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\\_or1.php](http://www.oag.state.tx.us/open/index_or1.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,



Kate Hartfield  
Assistant Attorney General  
Open Records Division

KH/em

Ref: ID# 416161

Enc. Submitted documents

c: Requestor  
(w/o enclosures)