



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

June 8, 2011

Ms. Elaine S. Hengen
Senior Assistant City Attorney
City of El Paso
#2 Civic Center Plaza
El Paso, Texas 79901

OR2011-08166

Dear Ms. Hengen:

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# 422027.

The City of El Paso (the "city") received a request for text messages relating to city business from the cellular telephones of the mayor and named city representatives from October 1, 2010 through April 1, 2011. You state the city will make available some of the requested information to the requestor, but claim the submitted information is either not public information under the Act or excepted from disclosure under sections 552.101 and 552.107 of the Government Code. We have considered your arguments and reviewed the submitted information.

You assert the text messages in Exhibit C do not consist of public information subject to the Act. The Act is applicable to "public information." *See* Gov't Code § 552.021. Section 552.002 of the Act 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 information that is in a governmental body's physical possession constitutes public information that is subject to the Act. *Id.* § 552.002(a)(1); *see also* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). You inform us the texts messages at issue were between a city council representative and her legislative aide. You assert the text messages at issue are not subject to the Act because they are "personal in nature." We note the request for information was specifically for "Text messages related to city business[.]" Upon review, we find the text messages at issue consist of

communications sent to or from the city council representative in her capacity as a city official and employer and concern city business. Therefore, we conclude the text messages in Exhibit C consist of information that was collected, assembled, or maintained by the city in connection with the transaction of the city's official business. Accordingly, Exhibit C is subject to the Act and must be released, unless the city demonstrates the information falls within an exception to public disclosure under the Act. *See* Gov't Code § 552.305(b).

You assert section 552.101 of the Government Code in conjunction with common-law right to privacy protects the messages in Exhibit C. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." 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). The types of information considered intimate and 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. This office has found the following types of information are excepted from required public disclosure under common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps); personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990); and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). Some of the submitted information in Exhibit C is highly intimate or embarrassing and is not of legitimate concern to the public; therefore, the city must withhold this information, which we have marked, under section 552.101 in conjunction with common-law privacy. Upon review, however, we find the remaining information is not highly intimate or embarrassing; therefore, the remaining information is not confidential under common-law privacy, and the city may not withhold it under section 552.101 on that ground.

You assert Exhibit B is excepted from disclosure under section 552.107 of the Government Code. Section 552.107(1) 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 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 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 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 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 explain Exhibit B constitutes confidential communications between a city attorney and a city council district representative that were made in furtherance of the rendition of professional legal services. You also assert the communications were intended to be confidential and their confidentiality has been maintained. After reviewing your arguments and the submitted information, we agree Exhibit B constitutes privileged attorney-client communications that the city may withhold under section 552.107.

We note section 552.117 of the Government Code may be applicable to some of the remaining information.¹ Section 552.117(a)(1) excepts from disclosure the current and former 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. We note section 552.117 also encompasses a personal cellular telephone number, provided the cellular phone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular mobile phone numbers paid for by governmental body and intended for official use). Whether information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open

¹The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body. *See* Open Records Decision Nos. 481 at 2 (1987), 480 at 5 (1987); *see, e.g.*, Open Records Decision No. 470 at 2 (1987) (because release of confidential information could impair rights of third parties and because improper release constitutes a misdemeanor, attorney general will raise predecessor statute of section 552.101 on behalf of governmental bodies).

Records Decision No. 530 at 5 (1989). Therefore, the city must withhold the information we have marked pursuant to section 552.117(a)(1) if the employee concerned timely elected to keep the marked information confidential under section 552.024; however, the city may only withhold the marked cellular telephone numbers if the employee concerned paid for the cellular telephone service with his own funds. If the employee whose information is at issue did not make a timely request for confidentiality or did not pay for the cellular telephone service, the information at issue may not be withheld under section 552.117.

To conclude, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The city must also withhold the information we have marked under section 552.117(a)(1) of the Government Code if the employee at issue timely elected to withhold that information under section 552.024 of the Government Code and, for the marked cellular telephone numbers, the employee concerned paid for the cellular telephone service with his own funds. The city may withhold Exhibit B under section 552.107(1) of the Government Code. The city must release the remaining information.

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,

James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/eb

Ref: ID# 422027

Enc. Submitted documents

c: Requestor
(w/o enclosures)