ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 8, 2011

Ms. Cherl K. Byles
Assistant City Attorney
City of Fort Worth
1000 Throckmorton Street, 3rd Floor
Fort Worth, Texas 76102

OR2011-09700

Dear Ms. Byles:

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# 423257 (PIR No. W008220).

The City of Fort Worth (the "city") received a request for all e-mails during a specified time period sent or received by a named city council member. You state the city will provide some of the requested information to the requestor with certain information withheld pursuant to section 552.024 of the Government Code, and with e-mail addresses of members of the public withheld under section 552.137 of the Government Code pursuant to the previous determination issued to all governmental bodies in Open Records Decision No. 684 (2009).[1] You claim the remaining requested e-mails are excepted from disclosure under

[1]Section 552.024 of the Government Code authorizes a governmental body to redact from public release a current or former official's or employee's home address, home telephone number, emergency contact information, social security number, and information that reveals whether the person has family members without the necessity of requesting a decision from this office under the Act, if the employee or official timely elected to withhold such information. Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 1 (to be codified as an amendment to Gov't Code § 552.024(a)). Open Records Decision No. 684 authorizes all governmental bodies 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. We note, however, e-mail addresses may not be withheld under section 552.137 if the e-mail addresses are subject to section 552.137(c) of the Government Code. *See* Gov't Code § 552.137(c)(1) (stating e-mail addresses provided to governmental body by person who has contractual relationship with governmental body may not be withheld under section 552.137).

sections 552.105, 552.107, 552.111, 552.117, and 552.151 of the Government Code.[2] We have considered the exceptions you claim and reviewed the submitted representative sample of information.[3]

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). 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. *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

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[2]Although you also raise section 552.1175 of the Government Code, we note, in this instance, section 552.117 is the proper exception for the substance of your claim. Furthermore, although you also claim sections 552.103 and 552.106 of the Government Code, you have not submitted arguments explaining how these exceptions apply to the requested information. Therefore, we presume you have withdrawn your claims under these exceptions. *See* Gov't Code §§ 552.301, .302.

[3]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 those records contain substantially different types of information than that submitted to this office.

governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You claim the submitted communications are protected by the attorney-client privilege encompassed by section 552.107(1). You represent these communications are between attorneys for the city and city officials, employees, and consultants made in furtherance of the rendition of professional legal services, or were reviewed by attorneys for the city in furtherance of the rendition of professional legal services. You also state the communications were made in confidence and the confidentiality has been maintained. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to most of the information at issue. Thus, the city may withhold the e-mails we have marked under section 552.107(1) of the Government Code.[4] The remaining e-mail consists of directions to a city employee's home. You have failed to demonstrate how this e-mail was communicated in furtherance of the rendition of professional legal services. Consequently, we find you have failed to establish the applicability of the attorney-client privilege to the remaining e-mail, and the city may not withhold this information under section 552.107(1) of the Government Code.

Section 552.117(a)(2) of the Government Code excepts from public disclosure the home addresses, home telephone numbers, emergency contact information, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with section 552.024 or section 552.1175 of the Government Code.[5] Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 2 (to be codified as an amendment to Gov't Code § 552.117(a)). Additionally, section 552.117(a)(2) encompasses a peace officer's personal cellular telephone number, provided the cellular telephone service is paid for by the officer with his or her own funds. *See* Open Records Decision No. 670 at 6 (2001) (extending section 552.117 exception to personal cellular telephone number and personal pager number of employee who elects to withhold home telephone number in accordance with section 552.024). We have marked a city police officer's home address and personal cellular telephone number in the remaining e-mail. The city must withhold this information under section 552.117(a)(2) of the Government Code.

Section 552.151 of the Government Code provides:

> Information in the custody of a governmental body that relates to an employee or officer of the governmental body is excepted from the requirements of Section 552.021 if, under the specific circumstances

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[4]As our ruling for this information is dispositive, we need not address your remaining arguments against disclosure for this information.

[5]"Peace officer" is defined by Article 2.12 of the Texas Code of Criminal Procedure.

> pertaining to the employee or officer, disclosure of the information would subject the employee or officer to a substantial threat of physical harm.

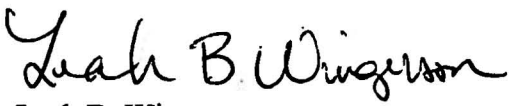
Gov't Code § 552.151. You have marked the information you seek to withhold under section 552.151 in the remaining information, which includes detailed directions to a city police officer's home. You explain the officer provides protection and security detail to city officials. You argue the release of this information would cause the officer to face a substantial threat of physical harm because "suspected criminals could harm the officer . . . in retaliation for the officer's protection" of city officials. Based on your representations and our review, we find the city has demonstrated release of the detailed directions to the officer's home, which we have marked, would subject the officer to a substantial threat of physical harm. Accordingly, we conclude the city must withhold the information we have marked under section 552.151 of the Government Code. The remaining information you have marked does not consist of directions to the officer's home and you have not demonstrated how release of this information would subject the officer to a substantial threat of physical harm. Consequently, the city may not withhold any of the remaining information at issue under section 552.151 of the Government Code.

In summary, the city may withhold the e-mails we have marked under section 552.107(1) of the Government Code. The city must withhold the address and cellular telephone number we have marked under section 552.117(a)(2) of the Government Code and the information we have marked under section 552.151 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,



Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/dls

Ref: ID# 423257

Enc. Submitted documents

c: Requestor
(w/o enclosures)