



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 28, 2011

Mr. Dick H. Gregg, Jr.
Gregg & Gregg, P.C.
16055 Space Center Boulevard, Suite 150
Houston, Texas 77062

OR2011-17402

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# 437197.

The City of Kemah (the “city”), which you represent, received a request for all e-mails sent to or from specified city officials during a specified time period; all telephone records for the specified city officials for a specified time period; a copy of the audio and video recordings for a specified city council meeting; information pertaining to a named city official; and the police file and any calls to the police pertaining to a specified incident, including any 9-1-1 calls. You state the city does not possess a 9-1-1 tape for the specified incident.¹ You state you will release some of the requested information. You claim that some of the requested information is not subject to the Act, or, alternatively, is excepted from disclosure under sections 552.101 and 552.107 of the Government Code. Further, you claim the remaining requested information is excepted from disclosure under sections 552.101 and 552.107 of the Government Code. We have considered your arguments and reviewed the submitted representative sample of information.²

¹The Act does not require a governmental body to release information that did not exist when it received a request or to create responsive information. *See Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

²This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling does not reach, and therefore does not authorize, the withholding of any other requested information to the extent that the other information is substantially different than that submitted to this office. *See Gov't Code* §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

Initially, we note some of the submitted information was created after the city received the present request for information. As such, this information, which we have marked, is not responsive. This ruling does not address the public availability of any information that is not responsive to the request, and the city need not release such information.

Next, we address your contention that some of the submitted information is not subject to the Act. You argue the information at issue in Exhibits 2-A through 6 is not subject to the Act because it consists of personal e-mails. The Act is applicable only to “public information.” *See* Gov’t Code §§ 552.002, .021. Section 552.002(a) defines “public information” as:

[I]nformation 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 of city officials, and state they 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 agree that the submitted e-mails in Exhibits 2-A through 5 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). As such, this information is not subject to the Act, and the city need not release it in response to this request.³ However, we find the e-mails in Exhibit 6 were collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official city business and are, therefore, public information subject to the Act. As such, we will consider your argument against disclosure of the information in Exhibit 6.

We next address the city’s obligations under section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(e) requires the governmental body to submit to the attorney general, not later than the fifteenth business day after the date of the receipt of the request: (1) written

³As we are able to make this determination, we need not address your remaining argument against disclosure of this information.

comments stating why the governmental body's claimed exceptions apply to the information that it seeks to withhold; (2) a copy of the written request for information; (3) a signed statement of the date on which the governmental body received the request or evidence sufficient to establish that date; and (4) the specific information that the governmental body seeks to withhold or representative samples if the information is voluminous. *See* Gov't Code § 552.301(e)(1)(A)-(D). You state the city received the request for information on September 2, 2011. We note this office does not count the date the request was received or holidays for the purpose of calculating a governmental body's deadlines under the Act. We note September 5, 2011 was a holiday. Thus, the city's fifteen-business-day deadline was September 26, 2011. You submitted representative samples of some of the requested information and arguments as to why the raised exceptions apply in a letter postmarked September 19, 2011. Although you timely submitted arguments against disclosure of the college transcript of the named official and the requested telephone records, as of the date of this letter, you have not submitted this information or a representative sample of this information to our office. Consequently, we find the city failed to comply with the requirements of section 552.301 as to this information.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *Id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 630 (1994). A compelling reason generally exists when information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3, 325 at 2 (1982). You raise section 552.101 of the Government Code as an exception to disclosure for the transcript and telephone records, which can provide a compelling reason to withhold information. However, because you have not submitted the transcript or telephone records for our review, we have no basis for finding any of this information excepted from disclosure or confidential by law. Thus, we have no choice but to order the requested transcript and telephone records released pursuant to section 552.302. If you believe this information is confidential and may not lawfully be released, you must challenge this ruling in court pursuant to section 552.324 of the Government Code.

You claim the information in Exhibit 6, which you timely submitted to our office, is excepted under section 552.101 of the Government Code in conjunction with common-law privacy. Section 552.101 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 the common-law right of privacy, which protects information if it (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

established. *Id.* at 681-82. The type 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 establish the information in Exhibit 6 is highly intimate or embarrassing and not of legitimate concern to the public; therefore, this information is not confidential under common-law privacy, and the city may not withhold it under section 552.101 on that ground.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. Gov't Code § 552.107(1). 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 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 to only 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 to only 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 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 generally state the information in Exhibits 1 and 7 constitutes e-mail communications amongst the attorney for the city and city staff and officials in their capacity as clients that were made for the purpose of providing legal services to the city. You state the

communications were intended to be confidential and have remained confidential. You identify some of the parties to the communications and we are able to discern the identities of some of the remaining parties. As such, we find the city may generally withhold the information in Exhibits 1 and 7 under section 552.107(1). However, we note some of the e-mails and portions of some of the e-mail strings in Exhibits 1 and 7 include communications with parties you have not identified and whose identities we are not able to discern as privileged parties. As such, the city may not withhold the e-mails we have marked under section 552.107(1). Additionally, if the portions of the e-mail strings we have marked exist separate and apart from the e-mail strings in which they appear, then the city may not withhold the portions of the e-mail strings we have marked under section 552.107(1).

We note one of the non-privileged e-mails in Exhibit 1, the information in Exhibit 6, and the remaining information in Exhibit 7 contain e-mail addresses of members of the public.⁴ 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). Gov’t Code § 552.137(a)-(c). Section 552.137 is not applicable to an institutional e-mail address, an Internet website address, the general e-mail address of a business, an e-mail address of a person who has a contractual relationship with a governmental body, or an e-mail address maintained by a governmental entity for one of its officials or employees. The e-mail addresses we have marked are not of the types specifically excluded by section 552.137(c). Accordingly, the city must withhold the e-mail addresses we have marked under section 552.137 unless the owners of the addresses have affirmatively consented to their release.⁵

In summary, the city need not release the information in Exhibits 2-A through 5 that is not subject to the Act. With the exception of the e-mails and portions of the e-mail strings we have marked for release, the city may withhold the information in Exhibits 1 and 7 under section 552.107(1) of the Government Code. The city must withhold the e-mail addresses we have marked in Exhibits 1, 6, and 7 under section 552.137 of the Government Code unless the owners have consented to their release. The remaining information must be released.

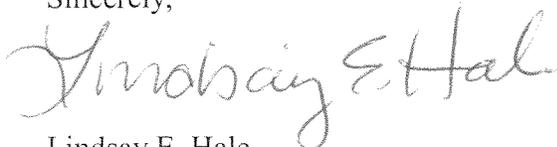
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

⁴The 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).

⁵We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

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,

A handwritten signature in cursive script that reads "Lindsay E. Hale".

Lindsay E. Hale
Assistant Attorney General
Open Records Division

LEH/em

Ref: ID# 437197

Enc. Submitted documents

c: Requestor
(w/o enclosures)