



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 2, 2011

Ms. Donna L. Johnson
For the City of Waller
Olson & Olson, L.L.P.
Wortham Tower, Suite 600
2727 Allen Parkway
Houston, Texas 77019

OR2011-17813

Dear Ms. Johnson:

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# 437727.

The City of Waller (the "city"), which you represent, received a request for all e-mails between the city secretary and any city council member during a specified time period and the annual salary and benefits to the city secretary. You state the city has released or will release some information to the requestor. You indicate the city will redact e-mail addresses under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).¹ You claim portions of the submitted information are not subject to the Act. Additionally and alternatively, you claim portions of the submitted information are excepted from disclosure under sections 552.101, 552.104, 552.107, and 552.139 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

You state the information in Exhibit 5 is not public information under the Act. The Act applies to "public information," which is defined in section 552.002 of the Government Code as "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

¹Open Records Decision No. 684 is 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.

a governmental body and the governmental body owns the information or has a right of access to it.” Gov’t Code § 552.002. 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). The Act also encompasses information that a governmental body does not physically possess, if the information is collected, assembled, or maintained for the governmental body, and the governmental body owns the information or has a right of access to it. Gov’t Code § 552.002(a)(2); *see* Open Records Decision No. 462 at 4 (1987).

You state Exhibit 5 contains e-mails which “pertain only to personal matters” of city employees and officials and “contain no information related to city business.” Based on your representations and our review, we agree some of the information in Exhibit 5 does not constitute “information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business” by or for the city. *See* Gov’t Code § 552.021; *see also* Open Records Decision No. 635 (1995) (statutory predecessor not applicable to personal information unrelated to official business and created or maintained by state employee involving *de minimis* use of state resources). Therefore, this information, which we have marked, is not subject to the Act and need not be released in response to this request.² However, upon review, we find the remaining information in Exhibit 5 was collected or assembled or is maintained in connection with the transaction of official city business; thus, the remaining information constitutes “public information” as defined by section 552.002(a). Accordingly, this information is subject to the Act and must be released, unless the information falls within an exception to public disclosure under the Act. *See* Gov’t Code § 552.305(b).

Next, we note the information you have marked in Exhibit 2 and the information we have marked in Exhibit 3 was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2011-16624 (2011). In this ruling, we determined the city (1) must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 418.182 of the Government Code and (2) may withhold the information you indicated under section 552.107 of the Government Code. We have no indication the law, facts, and circumstances on which Open Records Letter No. 2011-16624 was based have changed. Accordingly, with regard to the information you have marked in Exhibit 2, we conclude the city must continue to rely on Open Records Letter No. 2011-16624 as a previous determination and withhold or release this previously ruled on upon information in accordance with that ruling. With regard to the information we have marked in Exhibit 3, we conclude the city may continue to rely on Open Records Letter No. 2011-16624 as a previous determination and withhold this previously ruled upon information in accordance with that ruling.³ *See* Open Records Decision No. 673 (2001) (so

²As we are able to make this determination, we need not address your arguments against disclosure of this information.

³As we are able to make these determinations, we need not address your arguments against disclosure of this information.

long as law, facts, circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). We will address your arguments against disclosure of the remaining information.

You claim the e-mail in Exhibit 4 is excepted from disclosure under section 552.104 of the Government Code. Section 552.104 excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104. The purpose of section 552.104 is to protect a governmental body’s interests in competitive bidding situations, including where the governmental body may wish to withhold information in order to obtain more favorable offers. *See* Open Records Decision No. 592 at 8 (1991) (statutory predecessor to section 552.104 designed to protect interests of governmental body). Section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. Open Records Decision No. 541 at 4 (1990). Section 552.104 does not except information relating to competitive bidding situations once a contract has been awarded. Open Records Decision Nos. 306 (1982), 184 (1978) (section 552.104 no longer applicable when bidding had been completed and contract is in effect). You state the e-mail at issue contains information on bid proposals submitted to the city. You argue this e-mail should be withheld at this time in order to protect the city’s interest during the bidding process. Upon review, we agree the city may withhold Exhibit 4 under section 552.104 until a contract is executed.

You raise section 552.107(1) of the Government Code for the remaining information in Exhibit 3. 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. *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. 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). 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, orig. proceeding). 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 state the remaining e-mails in Exhibit 3 constitute communications between legal counsel for the city, city officials, and city employees. Furthermore, you state these e-mails were made in furtherance of the rendition of legal services and were intended to be and have remained confidential. Based on your representations and our review, we find the city may withhold the information we have marked in Exhibit 3 under section 552.107(1). However, we find the remaining information in Exhibit 3 consists of communications between city employees and city officials and do not constitute attorney-client communications which were made in furtherance of the rendition of legal services. *See* ORD 676. Accordingly, the city may not withhold any of the remaining information in Exhibit 3 under section 552.107(1) of the Government Code.

We note some of the remaining information may be subject to section 552.117 of the Government Code.⁴ Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. 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)(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). Therefore, a governmental body must withhold information under section 552.117 on behalf of current or former officials or employees only if these individuals made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. If the individual at issue timely requested confidentiality under section 552.024, the city must withhold her information, which we have marked, under section 552.117(a)(1). Conversely, if this individual did not make a timely election under section 552.024, the city may not withhold this information under section 552.117(a)(1).

In summary, the information we have marked in Exhibit 5 is not public information subject to the Act and need not be released in response to this request. With regard to the

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).

information you have marked in Exhibit 2, we conclude the city must continue to rely on Open Records Letter No. 2011-16624 as a previous determination and withhold or release this previously ruled on upon information in accordance with that ruling. With regard to the information we have marked in Exhibit 3, we conclude the city may continue to rely on Open Records Letter No. 2011-16624 as a previous determination and withhold this previously ruled upon information in accordance with that ruling. The city may withhold Exhibit 4 under section 552.104 of the Government Code until a contract is executed. The city may withhold the information we have marked under section 552.107(1) of the Government Code. If the individual at issue timely requested confidentiality under section 552.024 of the Government Code, the city must withhold her information, which we have marked, under section 552.117(a)(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,



Sean Nottingham
Assistant Attorney General
Open Records Division

SN/agn

Ref: ID# 437727

Enc. Submitted documents

c: Requestor
(w/o enclosures)