



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 8, 2011

Mr. David M. Hamilton  
Counsel to the City of Reno  
3830 Farm Road 195  
Paris, Texas 75462-1621

OR2011-18122

Dear Mr. Hamilton:

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# 438454.

The City of Reno (the "city"), which you represent, received a request for the minutes from three specified city council meetings, the requestor's personnel file including timesheets and evaluations, grievances filed by the requestor from October 30, 2001 to the date of the request, complaints filed on the requestor from September 1, 2008 to the date of the request, and the Chief of Police job description. You state the meeting minutes for two of the city council meetings do not exist.<sup>1</sup> You further state you have provided the meeting minutes from the remaining city council meeting and the Chief of Police job description. You also state the requestor's personnel file, including the requested timesheets and evaluations, will be made available to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.117 of the Government Code.<sup>2</sup> We have considered the exceptions you claim and reviewed the submitted information.

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<sup>1</sup>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 dismiss'd); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

<sup>2</sup>We understand you to raise section 552.107 of the Government Code, as this is the proper exception for your attorney-client privilege claim in this instance. *See* Open Records Decision No. 676 at 1-2 (2002).

Initially, we note some of the submitted information, which we have marked, is not responsive to the instant request because it consists of a complaint made before September 1, 2008. The city need not release this nonresponsive information in response to this request, and this ruling will not address that information.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses information protected by other statutes. Section 551.074 allows a governmental body to conduct certain deliberations about employees in an executive session. *See id.* § 551.074. Section 551.104 provides in part “[t]he certified agenda or tape of a closed meeting is available for public inspection and copying only under a court order issued under Subsection (b)(3).” *Id.* § 551.104(c). Thus, such information cannot be released to a member of the public in response to an open records request. *See* Attorney General Opinion JM-995 at 5-6 (1988) (public disclosure of certified agenda of closed meeting may be accomplished only under procedures provided in Open Meetings Act). Section 551.146 of the Open Meetings Act makes it a criminal offense to disclose a certified agenda or tape recording of a lawfully closed meeting to a member of the public. *See* Gov’t Code § 551.146(a)-(b); *see also* Open Records Decision No. 495 at 4 (1988) (attorney general lacks authority to review certified agendas or tapes of executive sessions to determine whether governmental body may withhold such information under statutory predecessor to section 552.101). However, other records related to a closed meeting, other than a certified agenda or tape recording, are not made confidential by chapter 551 of the Government Code. *See* Open Records Decision Nos. 605 at 2-3 (1992) (concluding that section 551.074 does not authorize a governmental body to withhold its records of the names of applicants for public employment who were discussed in an executive session), 485 at 9-10 (1987) (investigative report not excepted from disclosure under statutory predecessor to section 552.101 simply by virtue of its having been considered in executive session); *see also* Attorney General Opinion JM-1071 at 3 (1989) (statutory predecessor to section 551.146 did not prohibit members of governmental body or other individuals in attendance at executive session from making public statements about subject matter of executive session); *see also* Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality provision must be express, and confidentiality requirement will not be implied from statutory structure), 649 at 3 (1996) (language of confidentiality provision controls scope of its protection).

You state the requested grievances and complaints were handled privately in executive session as personnel issues consistent with section 551.074 of the Government Code. You contend “[t]his statutory scheme...raises the expectation of privacy of all the participating individuals[.]” However, as previously noted, records related to a closed meeting, other than a certified agenda or tape recording, are not made confidential by chapter 551 of the Government Code. Accordingly, none of the information at issue may be withheld on that basis.

You also argue the information at issue should be maintained as confidential because the requestor, the city, and participating city officials contractually agreed to handle personnel matters privately in executive session. However, information is not confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract.”). Consequently, unless the information falls within an exception to disclosure, it must be released, notwithstanding any expectations or agreements specifying otherwise.

Section 552.107 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 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.* 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).

The information at issue consists of communications between the requestor and the city, and an e-mail from a private citizen to the city secretary. Consequently, we find you have failed to establish the applicability of the attorney-client privilege to these communications with non-privileged parties. Therefore, the city may not withhold any of the information at issue under section 552.107 of the Government Code.

Finally, you raise section 552.117 of the Government Code. Section 552.117(a)(1) excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee of a governmental body who requests 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)). Section 552.117(a)(2) excepts from disclosure the same information of a peace officer, regardless of whether the peace officer complies with section 552.024 or section 552.1175 of the Government Code.<sup>3</sup> *Id.* Upon review, we find the responsive information does not contain information subject to section 552.117 of the Government Code. As such, the city may not withhold any portion of the responsive information under section 552.117.

We note the responsive information contains e-mail addresses that are subject to section 552.137 of the Government Code.<sup>4</sup> Section 552.137 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). *See* Gov't Code § 552.137(a)-(c). The e-mail addresses we have marked are not excluded by subsection (c). Therefore, the city must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners have affirmatively consented to their public disclosure.<sup>5</sup>

In summary, the city must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners have affirmatively consented to their public disclosure. The remaining responsive information must be released.

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<sup>3</sup>Section 552.117(a)(2) adopts the definition of peace officer found at article 2.12 of the Code of Criminal Procedure.

<sup>4</sup>The 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).

<sup>5</sup>We note Open Records Decision No. 684 (2009) is 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 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](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,



Damien Shores  
Assistant Attorney General  
Open Records Division

DS/sdk

Ref: ID# 438454

Enc. Submitted documents

c: Requestor  
(w/o enclosures)