



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 15, 2012

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

OR2012-02401

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# 445558.

The City of Kemah (the "city"), which you represent, received a request for all correspondence between named public officials and any other persons made during a specified time period and in regards to fifty-three individuals or subjects. You state the city does not possess some of the requested information.¹ You indicate you have previously released or made available some of the requested information. *See* Gov't Code § 552.232 (prescribing procedures for response to repetitious or redundant request for information). We understand you to assert that some of the requested information belongs to private individuals and, therefore, is not subject to the Act. You claim that the submitted information is excepted from disclosure under section 552.107 of the Government Code.² We have considered your arguments and reviewed the submitted representative sample of information.³ We have also received and considered comments submitted by the requestor.

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). Additionally, we note the Act does not require a governmental body to answer factual questions or conduct legal research. *See* Open Records Decision Nos. 563 at 8 (1990), 555 at 1-2.

²We understand you to raise section 552.107 of the Government Code for your attorney-client privilege claim as this is the proper exception to raise for your assertion of this privilege.

³We 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.

See id. § 552.304 (providing that interested party may submit written comments regarding why information should or should not be released).

Initially, we must address your assertion that portions of the instant request are unclear. We note a governmental body must make a good-faith effort to relate a request to information that is within its possession or control. *See Open Records Decision No. 561 at 8-9 (1990)*. Additionally, a governmental body may not refuse to comply with a request on the ground of administrative inconvenience. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 687 (Tex. 1976). In this case, you have submitted information and made arguments against disclosure of the information; thus we will consider your arguments.

Next, we address your contention that the city has no right of access to the requested text messages and, thus, they are not 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)*. 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)*. Moreover, section 552.001 of the Act provides that it is the policy of this state that each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees. *See Gov’t Code § 552.001(a)*.

You state the city has no right of access to the cellular telephones related to the requested text messages and does not collect, assemble, or maintain these messages. However, the characterization of information as “public information” under the Act is not dependent on whether the requested records are in the possession of an official or employee of a governmental body or whether a governmental body has a particular policy or procedure that establishes a governmental body’s access to the information. *See Open Records Decision No. 635 at 3-4 (1995)* (finding that information does not fall outside definition of “public information” in Act merely because individual official or employee of governmental body possesses information rather than governmental body as whole); *see also Open Records Decision No. 425 (1985)* (concluding, among other things, that information sent to individual school trustees’ homes was public information because it related to official business of governmental body) (overruled on other grounds by *Open Records Decision No. 439 (1986)*). Thus, if the information at issue relates to city business, the mere fact that the city does not possess the information at issue does not take the information outside the scope of the Act. *See ORD 635 at 6-8* (stating information maintained on a privately-owned medium and actually used in connection with the transaction of official business would be subject to the Act). Accordingly, we conclude to the extent the requested text messages maintained by the

individuals concerned relate to the official business of the city, they are subject to the Act and must be released unless they are excepted from disclosure. To the extent the cellular telephone text messages do not relate to the official business of the city, they are not subject to the Act and need not be released.

Pursuant to section 552.301(e) of the Government Code, a governmental body is required to submit to this office within fifteen business days of receiving the request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See Gov't Code* § 552.301(e). You inform us that the city received this request on November 21, 2011. However, as of the date of this letter, you have not submitted to this office a copy or representative sample of the text messages requested. Consequently, we find the city has failed to comply with the procedural requirements of section 552.301 with respect to the text messages.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption the requested information is public and must be released unless a compelling reason exists to withhold the information from disclosure. *See 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); *see also* Open Records Decision No. 630 (1994). Generally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). As you raise no exceptions for the text messages, to the extent the requested text messages relate to the official business of the city, you must release the text messages pursuant to section 552.302 of the Government Code.⁴

We note that portions of the submitted information, which we have marked, are not responsive to the instant request because they were created after the date the instant request for information was received. *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). 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.

⁴We note that section 552.117 of the Government Code 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. Section 552.024 of the Government Code authorizes a governmental body to withhold information subject to section 552.117 without requesting a decision from this office if the employee or official, or former employee or official chooses not to allow public access to the information. Gov't Code §§ 552.117, .024(c).

Section 552.107(1) 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). 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)(A), (B), (C), (D), (E). 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, 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 responsive e-mails constitute confidential attorney-client communications between the city and its legal counsel that were made for the purpose of providing professional legal services to the city. You also state the communications were intended to be and remain confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to portions of the information at issue. Accordingly, the city may generally withhold these e-mails under section 552.107(1) of the Government Code. We note, however, some of the otherwise privileged e-mail strings include communications with non-privileged parties. To the extent the communications with these non-privileged parties, which we have marked as non-privileged, exist separate and apart from the e-mail strings in which they appear, the city may not withhold the communications with the non-privileged parties under section 552.107(1). Furthermore, we note a portion of the information at issue consists of negotiations where the parties’ interests were adverse. Accordingly, we find the city and the third party at issue did not share a common interest that would allow the attorney-client privilege to apply. *See Tex.*

R. Evid. 503(b)(1)(c); *In re Monsanto*, 998 S.W.2d 917, 922 (Tex. App.—Waco 1999, no pet.) (discussing the “joint-defense” privilege incorporated by rule 503(b)(1)(C)). Therefore, this information, which we have marked for release, is not privileged and may not be withheld under section 552.107(1). In addition, we find the city has failed to demonstrate how the remaining e-mails, which we have also marked for release, consist of communications between privileged parties. Thus, you have failed to demonstrate the applicability of the attorney-client privilege to these e-mails and the city may not withhold them under section 552.107(1) of the Government Code.

We note section 552.137 of the Government Code is applicable to some of the remaining information including the communications with the non-privileged parties that exist separate and apart from the e-mail strings in which they appear.⁵ 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). Gov’t Code § 552.137(a)-(c). Section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. The e-mail addresses we have marked do not appear to be of a type specifically excluded by section 552.137(c). Accordingly, the city must withhold the marked e-mail addresses under section 552.137, unless the owner of an address affirmatively consents to its release. *See id.* § 552.137(b).

In summary, the city may withhold the submitted information under section 552.107 of the Government Code except for (1) the e-mails we have marked for release and (2) any non-privileged portions of e-mails we have marked that exist separate and apart from the e-mail strings in which they appear. The city must withhold the e-mail addresses we have marked under section 552.137, unless the owner of the address affirmatively consents to its release. The city must release the remaining information.⁶

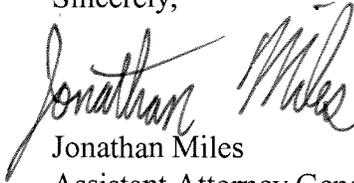
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

⁵The Office of the Attorney General will raise a mandatory exception like section 552.137 on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

⁶We note the remaining information contains the requestor’s e-mail address. The requestor has a special right of access to his e-mail address, which would otherwise be confidential with regard to the general public. *See* Gov’t Code § 552.137(b). We further 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. Accordingly, if the city receives another request for this information from an individual other than one with a right of access under section 552.137(b), the city is authorized to withhold the requestor’s e-mail address under section 552.137 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 black ink that reads "Jonathan Miles". The signature is written in a cursive style with a large initial "J" and "M".

Jonathan Miles
Assistant Attorney General
Open Records Division

JM/em

Ref: ID# 445558

Enc. Submitted documents

c: Requestor
(w/o enclosures)