



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 27, 2012

Mr. Dick H. Gregg, Jr.
Counsel for City of Kemah
Gregg & Gregg, P.C.
16055 Space Center Boulevard, Suite 150
Houston, Texas 77062

OR2012-02892

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# 447035.

The City of Kemah (the "city"), which you represent, received a request for (1) all e-mails sent or received by any member of the city council on a personal computer for a specified time period and (2) any e-mails sent or received by any member of the city council from two named individuals.¹ You state the city will release some information to the requestor. You claim the submitted information is excepted from disclosure under section 552.107 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we note some of the submitted information, which we have marked, is not responsive because it was created after the date the city received the instant request. The city need not release this non-responsive information in response to this request, and this ruling will not address that information.

¹We note the city sought and received clarification from the requestor regarding the request. *See* Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

Next, we note some of the responsive information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2012-02401 (2012). We have no indication the law, facts, and circumstances on which the prior ruling was based have changed. Accordingly, to the extent the responsive information is identical to the information previously requested and ruled upon by this office in the prior ruling, the city must continue to rely on that ruling as a previous determination and withhold or release the responsive information in accordance with Open Records Letter No. 2012-02401. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and 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). To the extent the responsive information is not encompassed by Open Records Letter No. 2012-02401, we will address your arguments against its release.

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 Texas 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, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *See* TEX. R. EVID. 503(b)(1)(A)-(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, 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 assert the responsive information consists of written communications between city attorneys and city staff to facilitate the rendition of professional legal services to the city. You assert these communications were made in confidence and have maintained their confidentiality. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the responsive information. Accordingly, the city may generally withhold the responsive information under section 552.107 of the Government Code. However, we note some of the individual e-mails in the otherwise privileged e-mail chains consist of communications with non-privileged parties or individuals who are not identified. Accordingly, to the extent these non-privileged e-mails, which we have marked, exist separate and apart from the submitted e-mail chains, they may not be withheld under section 552.107.

We note the non-privileged e-mails contain information subject to section 552.101 of the Government Code.² 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 exception encompasses the doctrine of common-law 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. This office has found some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Upon review, we find the information we have marked is highly intimate or embarrassing and of no legitimate concern to the public. Therefore, to the extent the non-privileged e-mails exist separate and apart from their otherwise privileged e-mail strings, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.

We further note the non-privileged e-mails contain information subject to section 552.137 of the Government Code. 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 at issue are not excluded by subsection (c).

²The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Therefore, to the extent the non-privileged e-mails exist separate and apart from their otherwise privileged e-mail strings, the city must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure.³

In summary, to the extent the responsive information is identical to the information previously requested and ruled upon by this office in the prior ruling, the city must continue to rely on that ruling as a previous determination and withhold or release the responsive information in accordance with Open Records Letter No. 2012-02401. To the extent the responsive information is not encompassed by Open Records Letter No. 2012-02401, the city may generally withhold the responsive information under section 552.107 of the Government Code. However, to the extent the non-privileged e-mails we have marked exist separate and apart from their otherwise privileged e-mail strings, the city must withhold (1) the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy and (2) the e-mail addresses we have marked section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure. The city must release the remaining information in the non-privileged e-mails.

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/eb

³We 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 e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

Ref: ID# 447035

Enc. Submitted documents

c: Requestor
(w/o enclosures)