



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 29, 2012

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

OR2012-03170

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#s 446229 and 451614.

The City of Kemah (the "city"), which you represent, received two requests for e-mails to or from certain city officials during a specified time period, the telephone records of those city officials during a specified time period, audio and video recordings of a specified city council meeting, employment records of a named individual, and police records related to a specified accident, including audio recordings of 9-1-1 calls. You state the city has no responsive information related to the named employee's college transcript or audio recordings related to the specified accident.¹ You state the city will make available the requested recording of the city council meeting, police records related to the specified accident, and certain e-mails upon payment of charges. You claim some of the submitted information is not subject to the Act. In addition, you claim the submitted information is excepted from disclosure pursuant to sections 552.101 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative

¹We note the Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex.Civ.App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

sample of information.² We have also received and considered comments submitted by an interested third party. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

We first address your assertion the current requests for information are redundant of a previous request made to the city by the first requestor. Generally, section 552.232 of the Government Code outlines the procedures a governmental body must follow in responding to a repetitious or redundant request from the same requestor. *Id.* § 552.232. You explain the information at issue in the current requests was made available to the first requestor in response to a previous request for information. However, instead of treating the first requestor's current request as a redundant request in accordance with section 552.232, the city responded to the first requestor's current request with a cost estimate pursuant to section 552.2615 of the Government Code. *See id.* § 552.2615 (required estimate of charges for request for information that will result in imposition of charges exceeding forty dollars). Pursuant to section 552.2615(b), the cost estimate offered the first requestor the opportunity to accept the estimated charges, modify her request, or file a complaint with this office alleging she is being overcharged. In response to the cost estimate, the first requestor filed a complaint with this office alleging overcharges. Because the city provided the first requestor with a cost estimate for the current request, it did not treat the current request as a redundant request under section 552.232. Therefore, the city cannot now treat the current request as redundant under section 552.232. Further, we note the second requestor is not the same individual that previously requested the information at issue. *See id.* § 552.003(6) (defining "requestor" as person who submits request to governmental body for inspection or copies of public information). Accordingly, you have failed to establish the second requestor's current request is redundant of the first requestor's previous or current request for purposes of the Act. Thus, we will address your arguments against disclosure of the submitted information.

Next, we note you have not submitted information responsive to the requested employment records. Although you state the city submitted a representative sample of information, no portion of the submitted representative sample pertains to the requested employment records. Thus, we find the submitted information is not representative of the information responsive to the employment records. Please be advised this open records letter applies to only the types of information you have submitted for our review. Therefore, this ruling 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.* § 552.302 (where request for attorney general decision does not comply with requirements of section 552.301 of the Government Code, information at issue is presumed to be public).

²We assume the "representative sample" of information 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 that those records contain substantially different types of information than that submitted to this office.

Thus, to the extent the requested employment records existed and were maintained by the city on the date the city received the request for information, we presume the city has released such information. If not, the city must do so at this time. *See id.* §§ 552.301, .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to the requested information, it must release the information as soon as possible).

We next address your contention the e-mails in Exhibits 2-A through 6 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 e-mails in Exhibits 2-A through 6 consist of personal e-mails that do not relate to the transaction of official city business. *See* 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). Upon review of the submitted information, we agree the e-mails in Exhibits 2-A through 5 do 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. Thus, we conclude the e-mails in Exhibits 2-A through 5 are not subject to the Act, and need not be released in response to this request.³ However, the e-mails in Exhibit 6 consist of correspondence between the city attorney and a city council member and relate to the agenda of the Board of Kemah Community Development Corporation. We find these e-mails were created in connection with the transaction of official city business. Therefore, the e-mails in Exhibit 6 constitute “public information” as defined by section 552.002(a) and are subject to the Act. Accordingly, we will address your argument for these e-mails.

³As our determination is dispositive, we need not address your remaining arguments against disclosure of this information.

Next, we address your contention that the city has no right of access to the requested telephone records and, thus, they are not subject to the Act. You state the city has no right of access to the requested telephone records and does not collect, assemble, or maintain these records. 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* ORD 635 at 3-4 (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)). Furthermore, we note information in a public official’s personal cellular telephone records may be subject to the Act where the public official uses the personal cellular telephone to conduct public business. *See* ORD 635 at 6-7 (appointment calendar owned by a public official or employee is subject to the Act when it is maintained by another public employee and used for public business). 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 id.* 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 telephone records maintained by the individuals concerned do not relate to the official business of the city, they are not subject to the Act and need not be released. To the extent the telephone records relate to the official business of the city, they are subject to the Act and must be released unless they are excepted from disclosure. As you raise no exceptions to disclosure of the telephone records, to the extent the requested telephone records relate to the official business of the city, the city must release the requested telephone records. *See* Gov’t Code §§ 552.301, .302.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *Id.* § 552.101. Section 552.101 encompasses the common-law right of privacy, which protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. The types 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. *See id.* at 683. You assert the information in Exhibit 6 is subject to common-law privacy. Upon review, we find none of the information at issue is highly intimate or embarrassing and not of legitimate public concern. Therefore, the city may not withhold any of the information

in Exhibit 6 under section 552.101 of the Government Code in conjunction with common-law privacy.

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 state the information in Exhibits 1 and 7 constitute communications between the city attorney and city officials that were made for the purpose of facilitating the rendition of professional legal services to the city and reveals attorney-client communications. You also state the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find the city may withhold the information in Exhibits 1 and 7 under section 552.107(1) of the Government Code.

We note portions of the information in Exhibit 6 are subject to section 552.137 of the Government Code, which 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).⁴ See 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. See *id.* § 552.137(c). Therefore, the city must withhold the personal e-mail addresses in Exhibit 6 under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure.

In summary, the e-mails in Exhibits 2-A through 5 are not subject to the Act, and need not be released in response to this request. The city may withhold the information in Exhibits 1 and 7 under section 552.107 of the Government Code. The city must withhold the personal e-mail addresses in Exhibit 6 under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure. 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,



Jennifer Burnett
Assistant Attorney General
Open Records Division

JB/sdk

⁴The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Ref: ID#s 446229 and 451614

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)

Third Party
(w/o enclosures)