ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 9, 2012

Ms. Erin Higginbotham
Denton, Navarro, Rocha & Bernal
2500 West William Cannon, Suite 609
Austin, Texas 78745

OR2012-06843

Dear Ms. Higginbotham:

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# 452997.

The City of Garden Ridge (the "city"), which you represent, received a request for all e-mails the city's Quarry Commission relied upon in its proposed revision of ordinance 34 and all e-mails and text messages to or from nine specified individuals during the last eighteen months regarding ordinance 34. You claim some of the requested information is not subject to the Act. You state the city will release some of the requested information. You claim the remaining requested information is excepted from disclosure under sections 552.106, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.[1] We have also received and considered comments from a representative of the requestor. *See* Gov't Code § 552.304 (providing interested party may submit written comments stating why information should or should not be released).

We first address your contention that e-mails and text messages existing only in the personal accounts of quarry commission members are not subject to the Act because the city does not collect, maintain, or have a right of access to this information. The Act is applicable to

[1]We assume that 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 that those records contain substantially different types of information than that submitted to this office.

"public information." *See id.* § 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 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 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 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).

We further note the characterization of information as "public information" under the Act is not dependent on whether the requested records are in the possession of an individual 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 information does not fall outside definition of "public information" in Act merely because individual member of governmental body possesses information rather than governmental body as whole); *see also* Open Records Decision No. 425 (1985) (concluding, among other things, 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)). This office has found that information in a public official's personal records may be subject to the Act where the public official uses the records to conduct public business. *See* ORD 635 at 6-12 (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).

You state the quarry commission was created by the city to work on issues related to the quarry in the best interests of the citizens of the city and to study blasting and mining operations in order to report and make recommendations to the city council. You state quarry commissioners are appointed by the city council but are not considered to be city employees and are not provided with city e-mail addresses or cellular phones. You explain the city does not maintain, collect, or assemble the information stored in the commissioners' personal e-mail accounts nor does the city have a right of access to such information. Although you state the quarry commission has no legal or regulatory authority, you advise the mission of the quarry commission is to monitor the operations of the quarry for compliance with city ordinances and to recommend changes to city ordinances as needed and develop a grievance process to protect the natural environment of the city, the economic environment of the city, and the quality of life in the city. Furthermore, proposed ordinance number 34 on the city's website contains several provisions stating "the City, through its Quarry Commission" has carried out certain activities to draft the ordinance. Lastly, the

commission's public meetings are held in accordance with the requirements of the Texas Open Meetings Act. *See* Gov't Code § 551.001(3) (defining "governmental body" for purposes of chapter 551). Based on these representations and our review, we find the quarry commissioners act as public officials for the city and conduct public business. Information is within the scope of the Act if it relates to the official business of a governmental body and is maintained by a public official or employee of the governmental body. *See* Gov't Code § 552.002(a). A governmental body may not circumvent the applicability of the Act by conducting official public business in a private medium. *See* ORDs 635 at 12, 425 at 2. Here, the request is for commission members' e-mails and text messages regarding ordinance number 34. Thus, any responsive e-mails and text messages maintained by the quarry commissioners are in connection with the transaction of official business maintained for the city and therefore subject to the Act. Accordingly, the city must release any such information.

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). 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, 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). We note communications with third party consultants with which a governmental body shares a privity of interest are protected. *See* Open Records Decision Nos. 464 (1987), 429 (1985).

You state the information at issue consists of e-mails between the city, city officials, and the city attorney for the purpose of the rendition of professional legal services related to the specified ordinance. You state the communications were intended to be confidential and not disclosed to a third party. Based on your representations and our review, we find you have

demonstrated the attorney-client privilege is generally applicable to the submitted information. Accordingly, the city may generally withhold the submitted information under section 552.107(1) of the Government Code. However, one of the submitted communications includes the quarry operator and the operator's blasting contractor, both of whom are non-privileged parties. The city may not withhold the non-privileged communication, which we have marked, under section 552.107(1) of the Government Code.

Section 552.111 of the Government Code excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." Gov't Code § 552.111. This exception encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines work product as:

> (1) [M]aterial prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or
>
> (2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5(a). A governmental body seeking to withhold information under this exception bears the burden of demonstrating the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. *Id.*; ORD 677 at 6-8.

You claim the remaining information is protected by the attorney work product privilege. However, as discussed above, the remaining information was communicated to non-privileged parties. Therefore, the city has failed to establish the applicability of the work product privilege to the remaining information. Accordingly, none of the remaining information may be withheld under section 552.111 of the Government Code on the basis of the work product privilege.

You also raise section 552.106 as an exception to disclosure of the remaining information. Section 552.106(a) of the Government Code excepts from required public disclosure "[a] draft or working paper involved in the preparation of proposed legislation[.]" Gov't Code § 552.106(a). Section 552.106 protects advice, opinion, and recommendation on policy matters in order to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the members of the legislative body. *See* Open Records Decision No. 460 at 3 (1987). Therefore, section 552.106 is applicable only to the policy judgments, recommendations, and proposals of persons who are involved in the preparation of proposed legislation and who have an official responsibility to provide such information

to members of the legislative body. *Id.* at 1. Section 552.106 does not protect purely factual information from public disclosure. *See id.* at 2; *see also* Open Records Decision No. 344 at 3-4 (1982) (for purposes of statutory predecessor, factual information prepared by State Property Tax Board did not reflect policy judgments, recommendations, or proposals concerning drafting of legislation). However, a comparison or analysis of factual information prepared to support proposed legislation is within the scope of section 552.106. ORD 460 at 2.

You state the remaining information constitutes working papers regarding drafts of ordinance 34 and includes policy judgments, recommendations, and proposals from the city attorney and other city officials. As noted above, the remaining communication includes the quarry operator and blasting contractor. You do not inform us these third parties have any official responsibility to provide legislative advice to the city. We therefore conclude the city may not withhold any of the remaining information under section 552.106 of the Government Code.

The remaining information contains the quarry commissioners' personal e-mail addresses as well as the e-mail addresses of the quarry operator, the quarry operator's contractor, city employees, and a city contractor. 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 owner of the e-mail address consents to its release or the e-mail address falls within the scope of section 552.137(c).[2] *See* Gov't Code § 552.137(a)-(c). Section 552.137 is not applicable to a government employee's work e-mail address because such an address is not that of the employee as a "member of the public" but rather the address of the individual as a government employee. Accordingly, the city may not withhold city employees' work e-mail addresses under section 552.137. Further, an e-mail address provided to a governmental body by a person who has a contractual relationship with the governmental body is not excepted from disclosure under section 552.137 of the Government Code. *Id.* § 552.137(c)(1). Accordingly, the city may not withhold the e-mail address of a city contractor under section 552.137. The remaining e-mail addresses, which we have marked, do not appear to be a type specifically excluded by section 552.137(c). Accordingly, the city must withhold the e-mail addresses we have marked under section 552.137 of the Government Code unless the owners of the e-mail addresses consent to their release.

In summary, the city must release any e-mails or text messages within the quarry commissioners' personal e-mail accounts and cellular phones that are subject to the Act. With the exception of the non-privileged e-mail we have marked, the city may withhold the submitted information under section 552.107(1) of the Government Code. The city must

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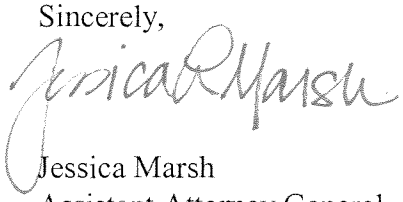
[2]The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

withhold the e-mail addresses we have marked under section 552.137 of the Government Code. The remaining information must be released.

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,



Jessica Marsh
Assistant Attorney General
Open Records Division

JM/em

Ref: ID# 452997

Enc. Submitted documents

c: Requestor
(w/o enclosures)