



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 20, 2012

Ms. Jessica D. Richard  
Assistant City Attorney  
City of New Braunfels  
P.O. Box 311747  
New Braunfels, Texas 78131

OR2012-15008

Dear Ms. Richard:

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# 465544 (ORR# 2012-274).

The City of New Braunfels (the "city") received a request for all e-mails that mention a named individual, excluding social security numbers, driver's license numbers, home addresses, personal phone numbers, and e-mail addresses. You claim the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.108 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>2</sup>

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<sup>1</sup>Although you raise section 552.101 of the Government Code in conjunction with section 552.107 of the Government Code, we note section 552.101 does not encompass other exceptions found within the Act. Additionally, we note you have marked some of the submitted information under section 552.109 of the Government Code; however, based on the content of your argument, we understand you to raise only section 552.108 of the Government Code for this information.

<sup>2</sup>We 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 those submitted to this office.

Initially, you inform us the city has redacted communications within the submitted e-mail strings that do not mention the named individual and are not responsive to the request. Additionally, we have marked portions of the information that do not mention the named individual and are also not responsive to the request. Our ruling does not address the public availability of information that is not responsive to the request and the city is not required to release non-responsive information.<sup>3</sup>

Section 552.108 of the Government Code provides in part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

(1) release of the information would interfere with the detection, investigation or prosecution of crime [or]

(2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication[.]

Gov't Code § 552.108(a)(1), (2). Section 552.108(a)(1) is applicable to information pertaining to a pending criminal investigation or prosecution. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests that are present in active cases), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Section 552.108(a)(2) protects law enforcement records pertaining to a criminal investigation or prosecution that concluded in a final result other than a conviction or a deferred adjudication. A governmental body claiming section 552.108 must reasonably explain its applicability. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must provide comments explaining why claimed exceptions to disclosure apply); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977).

You state the responsive information submitted as Exhibit C consists of e-mail communications between employees of the city's police department relating to pending criminal investigations and prosecutions, and release of the information you have marked would interfere with the investigation and prosecution of crime. Based on these representations and our review, we find the city may withhold the responsive information submitted as Exhibit C under section 552.108(a)(1) of the Government Code. You further explain the information submitted as Exhibit D pertains to concluded investigations that did not result in conviction or deferred adjudication. Based on this representation and our

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<sup>3</sup>As this ruling is dispositive, we do not address your arguments under section 552.101 of the Government Code in conjunction with the common-law informer's privilege.

review, we find the city may withhold the information submitted as Exhibit D under section 552.108(a)(2) of the Government Code.<sup>4</sup>

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 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). 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.*, 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.). 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 explain the e-mail communications submitted as Exhibit F were sent between city employees and city attorneys in order to facilitate the rendition of legal services to the city. You state the e-mails were intended to be, and have remained, confidential. Based on these representations, and our review, we agree section 552.107 is applicable to the information at issue, and the city may generally withhold this information under section 552.107(1) of

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<sup>4</sup>As our ruling is dispositive, we do not address your arguments under section 552.108(b) of the Government Code.

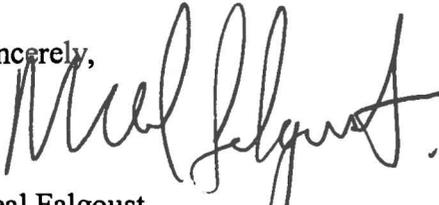
the Government Code. We note, however, these privileged e-mail strings include e-mails from a non-privileged party that are separately responsive to the instant request. Consequently, if these e-mails, which we have marked, exist separate and apart from the privileged e-mail strings in which they were included, the city may not withhold them under section 552.107(1) of the Government Code. If these e-mails do not exist separate and apart from the privileged e-mail strings in which they were included, the city may withhold them as privileged attorney-client communications under section 552.107(1) of the Government Code.

In summary, the city may withhold the responsive information submitted as Exhibit C under section 552.108(a)(1) of the Government Code and the information submitted as Exhibit D under section 552.108(a)(2) of the Government Code. The city may withhold the information submitted as Exhibit F under section 552.107(1) of the Government Code, but it may not withhold the e-mails we have marked on that basis if they exist separate and apart from the otherwise privileged communications.

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,



Neal Falgoust  
Assistant Attorney General  
Open Records Division

NF/ag

Ref: ID# 465554

Enc. Submitted documents

c: Requestor  
(w/o enclosures)