



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 8, 2013

Ms. Cara Leahy White
Counsel For the City of Haslet
Taylor Olson Adkins Sralla Elam, L.L.P.
600 Western Place, Suite 200
Fort Worth, Texas 76107

OR2013-00457

Dear Ms. White:

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# 475513.

The City of Haslet (the "city"), which you represent, received a request for (1) all information concerning the identity of the creator or sender of a specified e-mail; (2) all correspondence regarding a city investigation into the creator or sender of the specified e-mail; and (3) information concerning a specified computer forensic investigation. You inform us you will redact information in accordance with Open Records Decision No. 684 (2009) and section 552.130(c) of the Government Code.¹ You claim some of the submitted information is excepted from disclosure under sections 552.107 and 552.137 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted information.

¹Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold specific categories of information without the necessity of requesting an attorney general decision. *See* ORD 684. The Texas legislature amended section 552.130 of the Government Code effective September 1, 2011, to allow a governmental body to redact the information described in subsections 552.130(a)(1) and (a)(3) without the necessity of seeking a decision from the attorney general. *See* Gov't Code § 552.130(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). *See id.* § 552.130(d), (e).

²Although you raise section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503, this office has concluded that section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 (2002), 677 (2002). The proper exception to raise when asserting the attorney client privilege for information not subject to section 552.022 of the Government Code is section 552.107 of the Government Code. *See* ORDs 676, 677. Further, although you do not raise section 552.137 of the Government Code in your arguments, we understand you to raise this section based on your markings in the submitted information.

Initially, we note the city has not submitted any information pertaining to a computer forensic investigation. To the extent the city maintains information responsive to this part of the request that existed on the date the request was received, we assume the city has released it. If the city has not released any such information, it must do so at this time. Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

Section 552.107(1) of the Government Code protects information that comes 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. *See* ORD 676 at 6-7. First, a governmental body must demonstrate 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. *See* 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. *See 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 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. *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. *See 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 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 inform us some of the submitted information consists of communications between attorneys representing the city and city employees and other client representatives of the city made for the purpose of rendering professional legal services to the city. You also inform us these communications were made in the furtherance of the rendition of professional legal services and were intended to be and remain confidential. Based on your representations and

our review, we find the information we have marked under section 552.107(1) of the Government Code constitutes privileged attorney-client communications the city may withhold under section 552.107. Accordingly, the city may withhold the marked information under this section.

We note some of the remaining information may be subject to section 552.117 of the Government Code.³ Section 552.117(a)(1) excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee of a governmental body who timely requests confidentiality for the information under section 552.024 of the Government Code. *See Gov't Code* §§ 552.117(a)(1), .024. Section 552.117(a)(1) encompasses an employee's personal cellular telephone number as long as the cellular service is not paid for by a governmental body. *See Open Records Decision No. 506 at 5-6 (1988)* (statutory predecessor to Gov't Code § 552.117 not applicable to numbers for cellular mobile phones installed in county officials' and employees' private vehicles and intended for official business). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See Open Records Decision No. 530 at 5 (1989)*. Information may only be withheld under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee who did not timely request confidentiality under section 552.024. Accordingly, if the city employees whose information is at issue timely elected to keep their information confidential pursuant to section 552.024 and the cellular telephone service is not paid for by a governmental body, the city must withhold the cellular telephone information we have marked under section 552.117(a)(1) of the Government Code. The city may not withhold this information under section 552.117 if the employees did not timely elect to keep their information confidential or if the cellular telephone service is paid for by a governmental body.

Section 552.137 of the Government Code 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). The city must withhold the e-mail addresses you have marked, and the additional e-mail address we have marked, under section 552.137, unless the owners of the addresses affirmatively consent to their release. *See id.* § 552.137(b).

In summary, the city may withhold the marked information under section 552.107(1) of the Government Code. The city must withhold the information we have marked under section 552.117(a)(1) of the Government Code if the employees whose information is at

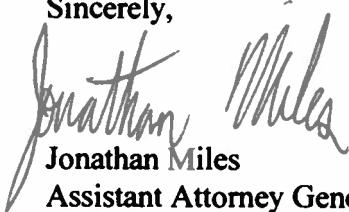
³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987)*.

issue timely elected to keep their information confidential pursuant to section 552.024 of the Government Code and the cellular telephone service is not paid for by a governmental body. The city must withhold the e-mail addresses you have marked, and the additional e-mail address we have marked, under section 552.137 of the Government Code, unless the owners of the addresses affirmatively consent to their release. 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,



Jonathan Miles
Assistant Attorney General
Open Records Division

JM/bhf

Ref: ID# 475513

Enc. Submitted documents

c: Requestor
(w/o enclosures)