



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 5, 2014

Ms. Eileen M. Hayman  
For City of De Leon  
Messer, Rockefeller & Fort, PLLC  
4400 Buffalo Gap Road, Suite 2800  
Abilene, Texas 79606

OR2014-13606

Dear Ms. Hayman:

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# 531559.

The City of De Leon (the "city"), which you represent, received a request for specified types of complaints made during a specified time period and communications for a specified time period between certain individuals regarding specified topics. You indicate the city will release a majority of the requested information to the requestor upon her response to a cost estimate. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

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 information protected by the common-law informer's privilege, which has long been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). The privilege protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law enforcement authority, provided the subject of the information does not already know the informer's identity. Open Records Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978). The privilege protects the identities of individuals who report violations of

statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to “administrative officials having a duty of inspection or of law enforcement within their particular spheres.” Open Records Decision No. 279 at 2 (1981) (citing 8 John H. Wigmore, *Evidence in Trials at Common Law* § 2374, at 767 (J. McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. See Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5.

You contend the information you have marked in Exhibit C identifies individuals who made complaints of loose dogs and cats, dangerous dogs, or inadequate living conditions of dogs, which are violations of the city’s animal ordinances. The submitted information reflects some of the individuals at issue made complaints to the city’s animal control department and the city’s police department, which we understand are responsible for enforcing the ordinances at issue. We also understand violations of the ordinances at issue carry the possibility of criminal or civil penalties. You do not indicate, nor does it appear, the subjects of the complaints know the identities of the complainants at issue. Therefore, based on your representations and our review, we conclude the city may withhold the information we have marked that identifies individuals who reported a violation of the city’s animal ordinances to the city under section 552.101 of the Government Code in conjunction with the common-law informer’s privilege. See Open Records Decision No. 156 (1977) (name of person who makes complaint about another individual to city’s animal control division is excepted from disclosure by informer’s privilege so long as information furnished discloses potential violation of state law). However, we note some of the remaining information you have marked does not identify an individual. Additionally, you have not explained, and the submitted information does not otherwise indicate, whether the individuals in the remaining information at issue made complaints to the police or similar law-enforcement agencies that are responsible for enforcing the animal ordinances at issue. Consequently, we find the city has failed to demonstrate the applicability of the informer’s privilege to the remaining information at issue. As such, the city may not withhold the remaining information you have marked in Exhibit C under section 552.101 in conjunction with the informer’s privilege.

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, orig. proceeding). 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 Exhibit B constitutes communications between city personnel, the city attorney, and the city’s outside legal counsel that were made for the purpose of providing legal services to the city. Additionally, you state these communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find Exhibit B consists of privileged attorney-client communications the city may generally withhold under section 552.107(1) of the Government Code. We note, however, some of these privileged e-mail strings include an attachment and e-mails received from or sent to an individual you have not demonstrated is a privileged party. Furthermore, if the attachment and e-mails received from or sent to the non-privileged party are removed from the e-mail strings in which they appear and stand alone, they are responsive to the request for information. Therefore, if these non-privileged attachment and e-mails, which we have marked, are maintained by the city separate and apart from the otherwise privileged e-mail strings in which they appear, then the city may not withhold these non-privileged attachment and e-mails under section 552.107(1).

To the extent the non-privileged attachment and e-mails we have marked are maintained by the city separate and apart from the otherwise privileged e-mail strings in which they appear, portions of the non-privileged attachment and e-mails are subject to section 552.137 of the

Government Code.<sup>1</sup> 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). 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. The e-mail addresses we have marked are not of the types specifically excluded by section 552.137(c). Accordingly, the city must withhold the e-mail addresses we have marked in Exhibit B under section 552.137 unless the owners of the addresses affirmatively consent to their release.

We note some of the remaining information may be subject to copyright law. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; see Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, the city may withhold the information we have marked under section 552.101 of the Government Code in conjunction with the common-law informer’s privilege. The city may generally withhold Exhibit B under section 552.107(1) of the Government Code. However, to the extent the attachment and e-mails we have marked are maintained by the city separate and apart from the otherwise privileged e-mail strings in which they appear, then, the city must release the marked non-privileged attachment and e-mails. However, in releasing the non-privileged attachment and e-mails, the city must withhold the e-mail addresses we have marked under section 552.137 of the Government Code unless the owners of the addresses affirmatively consent to their release. The city must release the remaining information; however, any information protected by copyright may only be released in accordance with copyright law.

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.

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<sup>1</sup>The 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).

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.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml), 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink that reads "Lindsay E. Hale". The signature is written in a cursive, flowing style.

Lindsay E. Hale  
Assistant Attorney General  
Open Records Division

LEH/akg

Ref: ID# 531559

Enc. Submitted documents

c: Requestor  
(w/o enclosures)