



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 2, 2004

Mr. Robert J. Gervais  
City Attorney  
City of Texas City  
P.O. Drawer 2608  
Texas City, Texas 77592-2608

OR2004-10226

Dear Mr. Gervais:

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# 213987.

The City of Texas City (the "city") received a request for all e-mail messages sent and received, as well as the paper log sheet for text messages sent and received, since January 1, 2001, for an identified city employee. You state that a portion of the request was withdrawn. You indicate that some of the responsive information will be released, but claim that the submitted information is excepted from disclosure under sections 552.101, 552.107 and 552.137 of the Government Code. We have considered the submitted arguments and reviewed the submitted representative sample of information.<sup>1</sup>

Initially, we note that some of the submitted e-mail messages are not subject to disclosure under the Act. Section 552.021 provides for the public availability of "public information." See Gov't Code § 552.021. Section 552.002 defines "public information" as consisting of

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<sup>1</sup> 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.

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). In this instance, some of the submitted e-mails 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. *Id.*; *see also* 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). Thus, the submitted e-mails we have marked do not constitute public information, and therefore the Act does not require the city to release them to the requestor. However, we will address your claimed exceptions for the remaining submitted e-mails.

Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses information protected by other statutes. Section 418.176 of the Government Code provides:

(a) Information is confidential if the information is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, responding to, or investigating an act of terrorism or related criminal activity and:

- (1) relates to staffing requirements of an emergency response provider, including law enforcement agency, a fire-fighting agency, or an emergency services agency; [or]
- (2) relates to a tactical plan of the provider[.]

Gov’t Code § 418.176. The fact that information may relate to a governmental body’s security concerns does not make the information *per se* confidential under the Texas Homeland Security Act. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). Furthermore, the mere recitation by a governmental body of a statute’s key terms is not sufficient to demonstrate the applicability of a claimed provision. As with any exception to disclosure, a governmental body asserting one of the confidentiality provisions of the Texas Homeland Security Act must adequately explain how the responsive records fall within the scope of the claimed

provision. See Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

You claim that one of the submitted e-mails details a communication between the fire chief and police chief about the operation of the marine patrol. You further state that the city has major port and industrial safety and security concerns, and that access to the city's major port has been severely restricted. After reviewing the information, we agree that it is maintained for the purpose of responding to an act of terrorism, and that the information relates to an emergency response provider's staffing requirements and tactical plan. Accordingly, the city must withhold the marked e-mail under section 552.101 in conjunction with section 418.176.

Next, you claim that most of the remaining submitted e-mails are subject to section 552.107 of the Government Code, which 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). 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 Texas 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, 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 writ). 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 inform us that the e-mails you have marked reveal the substance of communications between attorneys for and representatives of the city. You state that these communications occurred in the course of the rendition of professional legal services and were intended to be confidential. Therefore, we conclude that you may withhold the types of e-mails you have marked as privileged under section 552.107.

We note that one of the remaining e-mails contains information that may be excepted from disclosure under section 552.117 of the Government Code. Section 552.117 excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024.<sup>2</sup> Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See Open Records Decision No. 530 at 5 (1989)*. The city may only withhold information under section 552.117 on behalf of current or former employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Therefore, to the extent that the employee in question made a timely election under section 552.024, the city must withhold the information we have marked under section 552.117.

Lastly, you claim that some of the submitted e-mail addresses are subject to section 552.137, 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). *See Gov't Code § 552.137(a)-(c)*. We note that section 552.137 does not apply 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 is instead the address of the individual as a government employee. Some of these e-mail addresses are the work e-mail addresses of government employees. Such addresses are not excepted from disclosure under section 552.137 and may not be withheld on that basis. Accordingly, the city must withhold as confidential under section 552.137 only those e-mail addresses we have marked unless the owners of these e-mail addresses have affirmatively consented to their public disclosure.

In summary, the city is not required to release the marked e-mails that do not constitute public information under the Act. The city must withhold the marked e-mail under section 552.101 in conjunction with section 418.176. The city may withhold the types of e-mails marked as privileged under section 552.107. The city must withhold the marked information under section 552.117 if the employee to whom the information pertains properly elected

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<sup>2</sup> The Office of the Attorney General will raise mandatory exceptions like section 552.117 on behalf of a governmental body, but ordinarily will not raise other exceptions. *Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987)*.

confidentiality under section 552.024. Unless the owners of the e-mail addresses we have marked have affirmatively consented to their public disclosure, the city must withhold these e-mail addresses under section 552.137. The city must release all remaining information to the requestor.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

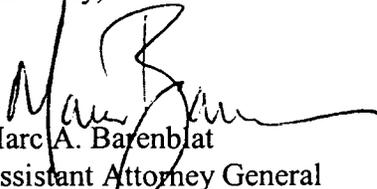
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Marc A. Barenblat  
Assistant Attorney General  
Open Records Division

MAB/jh

Ref: ID# 213987

Enc: Submitted documents

c: Mr. Mark Pandanell  
c/o Mr. Robert J. Gervais  
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(w/o enclosures)