



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 5, 2008

Mr. John Danner
Assistant City Attorney
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283

OR2008-15208

Dear Mr. Danner:

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# 326862.

The City of San Antonio (the "city") received a request for all e-mails sent and received by a specified city e-mail address belonging to a named city employee for the last twelve months. You claim that a portion of the requested information is not subject to the Act. You claim that the submitted e-mails are excepted from disclosure under sections 552.101, 552.103, 552.106, 552.107, 552.111, 552.117, 552.130, and 552.137 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.²

Initially, you claim that a portion of the requested information is not subject to the Act. The Act is applicable to "public information." See Gov't Code § 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).

¹Although, you raised sections 552.102, 552.104, 552.105, 552.108, 552.109, 552.110, 552.113, 552.114, 552.115, 552.116, 552.1175, 552.119, 552.122, 552.128, 552.129, 552.131, 552.136, 552.139, and 552.140 of the Government Code as exceptions to disclosure of the requested information, you have provided no arguments regarding the applicability of these sections. Since you have not submitted arguments concerning these exceptions, we assume that you no longer urge them. See Gov't Code §§ 552.301(b), (e), .302

²We 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.

Thus, virtually all information that is 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 city contends that a portion of the submitted e-mails are not maintained under a law or ordinance or in connection with the transaction of official city business. After reviewing the information at issue, we agree that some of the e-mails at issue are not subject to the Act. *See* Open Records Decision No. 635 at 4 (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). We have marked the types of information that are not subject to the Act. Accordingly, the city need not release these types of e-mails to the requestor. However, we find that most of the submitted e-mails were created in connection with the transaction of official city business by the named employee. Therefore, these e-mails constitute "public information" as defined by section 552.002(a) and are subject to the Act. Accordingly, we will address the exceptions you claim with regard to the remaining e-mails.

We first address your argument under section 552.107 of the Government Code, as it is potentially the most encompassing exception you assert. 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). 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, 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 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 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 state that the remaining e-mails reveal communications between the city's attorneys and the city's employees. You represent that these communications were made for the purpose of facilitating the rendition of professional legal services. You also represent that the confidentiality of these communications has been maintained. Based on your representations and our review, we conclude that section 552.107 is applicable to most of the remaining e-mails. Thus, the city may withhold the e-mails we have marked under section 552.107 of the Government Code.³

However, you have only specifically identified two city attorneys, and we are only able to discern that several other individuals are city attorneys or city paralegals from their e-mail signature blocks. We are, therefore, unable to determine that the remaining e-mails, which we have marked, constitute attorney-client privileged communications. Therefore, the city has failed to demonstrate that these marked e-mails document privileged attorney-client communications, and they may not be withheld under section 552.107.

Next, you contend that the remaining e-mails are excepted from disclosure under section 552.103 of the Government Code. Section 552.103 provides in relevant part as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was

³As our ruling is dispositive as to the information we have marked under section 552.107 of the Government Code, we need not address your arguments under sections 552.106, 552.111, and 552.117 of the Government Code.

pending or reasonably anticipated on the date that the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You generally state that the remaining e-mails relate to litigation that was pending on the date the request for information was received. However, you do not explain how the remaining e-mails relate to litigation to which the city is a party. Therefore, the city has failed to demonstrate the applicability of section 552.103 to any of the remaining e-mails. Accordingly, you may not withhold any of the remaining e-mails under section 552.103 of the Government Code.

Next, you argue that a portion of the remaining information is excepted from disclosure under section 552.101 of the Government Code, which 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 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 informer’s 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 that 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 informer’s 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). 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 (1988). The privilege excepts the informer’s statement only to the extent necessary to protect that informer’s identity. Open Records Decision No. 549 at 5 (1990).

You state that a portion of the submitted information reveals the identity of an individual who reported violations of city code. However, you have not identified any alleged violation, nor have you explained whether the alleged violation carries civil or criminal penalties. Accordingly, the city has failed to demonstrate that the informer’s privilege is applicable to any of the remaining e-mails. Thus, we conclude that the city may not withhold any portion of the remaining e-mails under section 552.101 of the Government Code in conjunction with the informer’s privilege.

You also claim that the remaining e-mails contain Texas motor vehicle information excepted from disclosure under section 552.130 of the Government Code. Section 552.130 excepts from disclosure information relating to a Texas motor vehicle driver’s license or permit and

a Texas motor vehicle title or registration. Gov't Code § 552.130. Upon review, however, we find that the remaining e-mails do not contain any Texas motor vehicle information. Therefore, none of the remaining e-mails may be withheld under section 552.130.

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). *See id.* § 552.137(a)-(c). Section 552.137(c) excludes the e-mail addresses of a person who has a contractual relationship with a governmental body or its agent. *Id.* § 552.137(c)(1). Section 552.137 is also not applicable to an e-mail address that a governmental entity maintains for one of its officials or employees. We have marked personal e-mail addresses in the remaining e-mails that must be withheld under section 552.137, unless the owners of these e-mail addresses consent to their release.

In summary, we have marked the types of information that are not subject to the Act and need not be released. The city may withhold the e-mails we have marked under section 552.107 of the Government Code. The city must withhold the e-mail addresses we have marked under section 552.137 unless the owners of these e-mail addresses consent to their release. The remaining information must be released 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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3). If the governmental body does not file suit over 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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 challenge 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 Office of the Attorney General 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. 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,



Laura E. Ream
Assistant Attorney General
Open Records Division

LER/jb

Ref: ID# 326862

Enc. Submitted documents

c: Mr. Brian New
KENS 5 I- Team Reporter
c/o Mr. John Danner
P.O. Box 839966
San Antonio, Texas 78283
(w/o enclosures)