



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 29, 2009

Mr. David M. Swope  
Assistant County Attorney  
Harris County  
1019 Congress, 15th Floor  
Houston, Texas 77002

OR2009-07322

Dear Mr. Swope:

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# 344443 (C. A. File No. 09GEN0417).

The Harris County Public Infrastructure Department (the "county") received a request for e-mails sent to or from eight named county employees over a specified time period.<sup>1</sup> You state the county has released some of the requested information. You claim that portions of the submitted information are not subject to the Act, and the remaining submitted information is excepted from disclosure under sections 552.107 and 552.137 of the Government Code. We have considered your arguments and reviewed the submitted information.<sup>2</sup>

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<sup>1</sup>We note that the county asked for and received clarification regarding this request. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

<sup>2</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.

Initially, we address your contention that the e-mails submitted as Exhibit B are not public information subject to the Act. The Act is only applicable to "public information." *See* Gov't Code § 552.021. Section 552.002(a) defines public information as "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). Information that is collected, assembled, or maintained by a third party may be subject to disclosure under the Act if it is maintained for a governmental body, the governmental body owns or has a right of access to the information, and the information pertains to the transaction of official business. *See* Open Records Decision No. 462 (1987).

After reviewing Exhibit B, we agree that, with the exception of the e-mails we have marked, the e-mails in Exhibit B are purely personal, and 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 county. *See* Gov't Code § 552.021; *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, we conclude that these e-mails are not subject to the Act, and need not be released in response to this request.<sup>3</sup> However, we find that the e-mails we have marked in Exhibit B were created in connection with the transaction of official county business. Therefore, these e-mails constitute "public information" as defined by section 552.002(a) and are subject to the Act.

You claim that the e-mails submitted as Exhibit C are excepted from disclosure under section 552.107(1) of the Government Code. Section 552.107(1) 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 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

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<sup>3</sup>As our ruling is dispositive, we need not address your remaining argument against the disclosure of this information.

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 lawyers representing another party in a pending action concerning a matter of common interest therein. 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 state that Exhibit C consists of communications between county attorneys and county employees, and that these communications were made in furtherance of the rendition of legal services and advice to the county. You further state that all of these communications were made in confidence, and that confidentiality has been maintained. The county attorneys and county employees have been identified. Based on our review of your representations and the information at issue, we find that you have demonstrated the applicability of the attorney-client privilege to Exhibit C. Accordingly, Exhibit C may generally be withheld under section 552.107. However, we note some of the individual e-mails in the submitted e-mail strings were communicated to a non-privileged third party, and, thus, are not privileged. Accordingly, to the extent these non-privileged e-mails, which we have marked, exist separate and apart from the submitted e-mail chains, they may not be withheld under section 552.107.

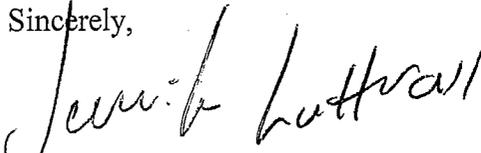
One of the e-mails subject to the Act in Exhibit B and the non-privileged e-mails in Exhibit C contain e-mail addresses subject to section 552.137 of the Government Code. Section 552.137 excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating 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). The e-mail addresses at issue are not a type specifically excluded by section 552.137(c) of the Government Code. In addition, you state that the county has not received consent for the release of the e-mail addresses at issue. Therefore, the county must withhold the e-mail addresses we have marked under section 552.137 of the Government Code.

In summary, except for the information we have marked, Exhibit B is not subject to the Act and need not be released in response to this request. The county may generally withhold Exhibit C under section 552.107 of the Government Code; however, to the extent the marked e-mails exist separate and apart from the submitted e-mail chains, the non-privileged e-mails must be released. The e-mail addresses we have marked in Exhibits B and C must be withheld under section 552.137 of the Government. 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](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 at (512) 475-2497.

Sincerely,



Jennifer Luttrall  
Assistant Attorney General  
Open Records Division

JL/eeg

Ref: ID# 344443

Enc. Submitted documents

c: Requestor  
(w/o enclosures)