



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

May 18, 2010

Mr. Jeffrey L. Moore
Brown & Hofmeister, L.L.P.
740 East Campbell Road, Suite 800
Richardson, Texas 75081

OR2010-07120

Dear Mr. Moore:

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# 379693.

The City of Forney (the "city"), which you represent, received a request for (1) cellular telephone records for four named individuals during a specified time period; (2) text messages by and between the same four named individuals related to certain topics during a specified time period; (3) correspondence by and between specified parties regarding youth football during a specified time period; and (4) correspondence by and between specified parties regarding the upcoming football season during a specified time period. You state that the city is providing the requestor with some of the requested information. You inform us that you have redacted certain information from the documents being released, including certain account numbers under section 552.136 of the Government Code and public e-mail addresses under section 552.137 of the Government Code, pursuant to Open Records Decision No. 684 (2009).¹ You claim that some of the requested information is not subject to the Act. You further claim that the submitted information is excepted from disclosure

¹This office recently issued Open Records Decision No. 684, a previous determination to all governmental bodies, which authorizes withholding of ten categories of information, including a credit card number, debit card number, charge card number, insurance policy number, and bank account number under section 552.136 of the Government Code and an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

under section 552.107 of the Government Code. We have considered your arguments and reviewed the submitted information.

Initially, you claim that the personal cellular telephone records and text messages of two of the individuals named in the request 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). Moreover, section 552.001 of the Act provides that it is the policy of this state that each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees. *See id.* § 552.001(a).

We note that the characterization of information as "public information" under the Act is not dependent on whether the requested records are in the possession of an official or employee of a governmental body or whether a governmental body has a particular policy or procedure that establishes a governmental body's access to the information. *See* Open Records Decision No. 635 at 3-4 (1995) (finding that information does not fall outside definition of "public information" in Act merely because individual official or employee of governmental body possesses information rather than governmental body as whole); *see also* Open Records Decision No. 425 (1985) (concluding, among other things, that information sent to individual school trustees' homes was public information because it related to official business of governmental body) (overruled on other grounds by Open Records Decision No. 439 (1986)). Thus, the mere fact that the city does not possess the information at issue does not take the information outside the scope of the Act. *See id.* In Open Records Decision No. 635, this office found that information in a public official's personal appointment calendar may be subject to the Act in certain instances. *See* ORD 635 at 6-8 (stating information maintained on a privately-owned medium and actually used in connection with the transaction of official business would be subject to the Act). We note that the Act's definition of "public information" does not require that an employee or official create the information at the direction of the governmental body. *See* Gov't Code § 552.002. Accordingly, the mere fact that city officials may have generated business-related information using personal resources does not take the information outside the scope of the Act.

The request in this case was for, in part, personal cellular telephone records and text messages. You state that the city does not provide or pay for cellular telephones for two of the individuals named in the request. You also state that the city does not have a right of access to those individuals' personal cellular telephone records or text messages. However, you do not indicate whether the cellular telephones at issue were used to conduct city business. We reiterate that information is within the scope of the Act if it relates to the official business of a governmental body and is maintained by a public official or employee of the governmental body. *See id.* § 552.002(a). Thus, to the extent the cellular telephone

records and text messages maintained by the individuals at issue relate to the official business of the city, they are subject to the Act, and as you have claimed no exceptions to disclosure for these records, they must be released. To the extent the personal cellular telephone records and text messages do not relate to the official business of the city, they are not subject to the Act and need not be released.

We now address your argument against disclosure of the submitted information. 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. 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). 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, 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 pet.). 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 communications at issue were made in the furtherance of the rendition of professional legal services to the city. You inform us that the communications at issue were intended to be and have remained confidential. You have identified the parties to the communications as city staff, city officials, and attorneys representing the city. Based on your representations and our review, we agree that the submitted information constitutes privileged attorney-client communications. Accordingly, the city may withhold the submitted information under section 552.107(1) of the Government Code.

In summary, to the extent the requested personal cellular telephone records and text messages do not relate to the official business of the city, they are not subject to the Act and need not be released. However, to the extent the personal cellular telephone records and text messages relate to the official business of the city, they are subject to the Act, and as you have claimed no exceptions to disclosure for these records, they must be released. The city may withhold the submitted information under section 552.107(1) of the Government Code.

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,



Christopher D. Sterner
Assistant Attorney General
Open Records Division

CDSA/eeg

Ref: ID# 379693

Enc. Submitted documents

c: Requestor
(w/o enclosures)