



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 14, 2011

Ms. Jill Hoffman  
Bojorquez Law Firm, PLLC  
12325 Hymeadow Drive, Suite 2-100  
Austin, Texas 78750

OR2011-05220

Dear Ms. Hoffman:

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# 414730.

The City of Nolanville (the "city"), which you represent, received a request for communications of city officials during a specified time period that reference a named former city police chief and his position.<sup>1</sup> You claim the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.132 of the Government Code.<sup>2</sup> We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>3</sup>

---

<sup>1</sup>You state, and provide documentation reflecting, that the city sought and received clarification from the requestor regarding the scope of the request. *See* Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 384 (Tex. 2010) (where governmental body seeks clarification or narrowing of request for information, ten-day period to request attorney general opinion is measured from the date request is clarified or narrowed).

<sup>2</sup>Although you raise section 552.101 in conjunction with section 552.305 of the Government Code, section 552.305 is not an exception under the Act. *See* Gov't Code § 552.305. Rather, section 552.305 addresses the procedural requirements for notifying third parties their interests may be affected by a request for information. *See id.* We presume from your arguments that you intended to assert Exhibit D is confidential under the common-law informer's privilege and must, therefore, be withheld under section 552.101 of the Government Code.

<sup>3</sup>We assume 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 note portions of Exhibits D, E, and F were the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2011-04695 (2011). In that ruling, we held (1) if the named former police chief is a currently licensed peace officer as defined by article 2.12 of the Code of Criminal Procedure, the city must withhold the information we marked under section 552.117(a)(2) of the Government Code; (2) if the former police chief is not a currently licensed peace officer, the city must withhold the information we have marked under section 552.117(a)(1) of the Government Code, if he timely elected to keep this personal information confidential; and (3) the remaining information must be released. Section 552.007 of the Government Code provides if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential by law. *See* Gov't Code § 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Accordingly, pursuant to section 552.007, the city may not now withhold the information previously released in accordance with Open Records Letter No. 2011-04695 unless its release is expressly prohibited by law or the information is confidential by law. You now seek to withhold portions of the information released in Open Records Letter No. 2011-04695 under sections 552.107 and 552.132 of the Government Code. Section 552.107 does not prohibit the release of information or make information confidential. *See* Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) and Texas Rule of Evidence 503 may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). Accordingly, the information that was previously released in accordance with Open Records Letter No. 2011-04695 may not be withheld under section 552.107 of the Government Code. However, because section 552.132 makes information confidential under law, we will consider the city's argument under that section for the information in Exhibit E.

Section 552.132 of the Government Code provides in relevant part:

(d) An employee of a governmental body who is also a victim under Subchapter B, Chapter 56, Code of Criminal Procedure, regardless of whether the employee has filed an application for compensation under that subchapter, may elect whether to allow public access to information held by the attorney general's office or other governmental body that would identify or tend to identify the victim, including a photograph or other visual representation of the victim. An election under this subsection must be made in writing on a form developed by the governmental body, be signed by the employee, and be filed with the governmental body before the third anniversary of the latest to occur of one of the following:

- (1) the date the crime was committed;
- (2) the date employment begins; or

(3) the date the governmental body develops the form and provides it to employees.

(e) If the employee fails to make an election under Subsection (d), the identifying information is excepted from disclosure until the third anniversary of the date the crime was committed. In case of disability, impairment, or other incapacity of the employee, the election may be made by the guardian of the employee or former employee.

Gov't Code § 552.132(d), (e). Section 552.132(d) permits an employee of a governmental body who is also a victim, as defined by subchapter B of chapter 56 of the Code of Criminal Procedure, to elect whether to allow public access to information held by a governmental body that would identify or tend to identify the victim. *Id.* § 552.132(d). Under section 552.132(e) of the Government Code, if the employee fails to make such an election, the identifying information is excepted from disclosure until the third anniversary of the date the crime was committed. *Id.* § 552.132(e). In this instance, you provide no arguments explaining how the complainants identified in Exhibit E are city employees or how they are victims as defined by subchapter B of chapter 56 of the Code of Criminal Procedure. *See* Crim. Proc. Code art. 56.32(a)(11) (defining "victim"). Accordingly, we conclude you failed to demonstrate the applicability of section 552.132 to the information at issue and no portion of Exhibit E may be withheld on that basis.

We next turn to your raised exceptions to disclosure of the submitted information in Exhibits D and F that was not at issue in Open Records Letter No. 2011-04695. You raise section 552.101 of the Government Code for the remaining portions of Exhibit D. Section 552.101 excepts "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). 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. Open Records Decision No. 515 at 3 (1988). 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) (citing 8 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW, § 2374, at 767 (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 (1988).

You state the remaining portions of Exhibit D identify citizens who submitted complaints against the named former police chief. You state the complaints allege conflicts between the chief's work conduct and "municipal and/or departmental policy or established law." However, you do not identify any individual in the information at issue who actually reported a violation of law. Further, you fail to inform this office of any specific criminal or civil

statute the city believes to have been violated. We therefore conclude the city has failed to demonstrate the applicability of the common-law informer's privilege to the remaining information in Exhibit D. Thus, the city may not withhold any of the information at issue under section 552.101 of the Government Code in conjunction with the informer's privilege.

Finally, you claim the remaining information in Exhibit F is excepted under section 552.107(1) of the Government Code. Section 552.107(1) 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 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). 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 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 the e-mail communications in Exhibit F were sent between individuals you identify as city council members, city staff, and outside legal counsel for the city. You state these communications were made for the purpose of rendering professional legal services to the city. You also represent the communications have been disclosed only to city attorneys and representatives. Thus, based on your representations and our review, we agree the remaining

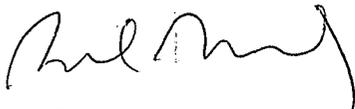
information in Exhibit F constitutes privileged attorney-client communications. Accordingly, the city may withhold the remaining information in Exhibit F under section 552.107(1) of the Government Code.

In summary, the city must withhold or release the information at issue in Open Records Letter No. 2011-04695 in accordance with that ruling. The city may withhold the remaining information in Exhibit F under section 552.107(1) of the Government Code. The remaining information in Exhibits D and E 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, toll free, at (888) 672-6787.

Sincerely,



Bob Davis  
Assistant Attorney General  
Open Records Division

RSD/tf

Ref: ID# 414730

Enc. Submitted documents

c: Requestor  
(w/o enclosures)