



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 7, 2011

Ms. Elaine S. Hengen  
Senior Assistant City Attorney  
City of El Paso  
2 Civic Center Plaza, Ninth Floor  
El Paso, Texas 79901

OR2011-09647

Dear Ms. Hengen:

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# 423392.

The City of El Paso (the "city") received a request for e-mails from a specified city office containing specified words or phrases.<sup>1</sup> You state you will release some information to the requestor. You claim a portion of the requested information is not subject to the Act. In the alternative, you claim this information is excepted from disclosure under section 552.101 of the Government Code. You claim the requested information which is subject to the Act is excepted from disclosure under sections 552.101, 552.107, 552.117, 552.127, and 552.137

---

<sup>1</sup>You provide documentation showing the city sought and received clarification from the requestors regarding 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, 387 (Tex. 2010) (holding when a governmental entity, acting in good faith, requests clarification or narrowing of unclear or over-broad request for public information, ten-day period to request an attorney general ruling is measured from date request is clarified or narrowed).

of the Government Code. We have considered your arguments and reviewed the submitted representative sample of information.<sup>2</sup>

Initially, you assert the e-mails in Exhibits J and J-2 are not subject to the Act. The Act applies to “public information,” which is defined in section 552.002 of the Government Code 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.

Gov’t Code § 552.002. Thus, virtually all of the information in a governmental body’s physical possession constitutes public information and, thus, is subject to the Act. *Id.* § 552.002(a)(1); *see* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). The Act also encompasses information that a governmental body does not physically possess, if the information is collected, assembled, or maintained for the governmental body, and the governmental body owns the information or has a right of access to it. Gov’t Code § 552.002(a)(2); *see* Open Records Decision No. 462 at 4 (1987).

You inform us Exhibits J and J-2 consist of personal e-mails that do not relate to the transaction of official city business. You state these e-mails represent *de minimis* use of city e-mail accounts. Based on your representations and our review, we agree Exhibit J and most of Exhibit J-2 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. *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). Therefore, this information is not subject to the Act and need not be released in response to this request. However, upon review, we find the remaining e-mail in Exhibit J-2 was collected or assembled or is maintained in connection with the transaction of official city business; thus, this e-mail constitutes “public information” as defined by section 552.002(a). Accordingly, this e-mail, which we have marked, is subject to the Act, and we will therefore consider your arguments against disclosure of this information.

---

<sup>2</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 those records contain substantially different types of information than that submitted to this office.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. This office has found medical information or information indicating disabilities or specific illnesses is excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (information pertaining to illness from severe emotional and job-related stress), 455 (1987) (information pertaining to prescription drugs, specific illnesses, operations and procedures, and physical disabilities), 343 (1982) (references in emergency medical records to drug overdoses, acute alcohol intoxication, obstetrical or gynecological illnesses, convulsions or seizures, and emotional or mental distress). This office has also found an employee’s voluntary financial choices are highly intimate and embarrassing for purposes of common-law privacy. *See* Open Records Decision Nos. 600 (1992) (personal financial information protected by common-law privacy includes designation of beneficiary of employee’s retirement benefits and optional insurance coverage; choice of particular insurance carrier; direct deposit authorization; and forms allowing employee to allocate pretax compensation to group insurance, health care, or dependent care), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). However, there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See* ORD 600 at 9 (information revealing employee participates in group insurance plan funded partly or wholly by governmental body not excepted from disclosure); *see also* Open Records Decision Nos. 545 (financial information pertaining to receipt of funds from governmental body or debts owed to governmental body not protected by common-law privacy), 523 (1989). Whether financial information is subject to a legitimate public interest and therefore not protected by common-law privacy must be determined on a case-by-case basis. *See* Open Records Decision No. 373 (1983). Upon review, we agree portions of the remaining e-mail in Exhibit J-2 and portions of Exhibits G and L, which we have marked, are highly intimate or embarrassing and of no legitimate public interest. Therefore, the city must withhold this information under section 552.101 of the Government Code in conjunction with common-law privacy. However, none of the remaining information is highly intimate or embarrassing, and the city may not withhold it under section 552.101 on that basis.

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 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). 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.* 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 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-mails in Exhibits H and H-2 constitute communications between city attorneys, officials, administrators, and employees made for the purpose of providing legal services to the city. You state the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find the city may withhold most of the information in Exhibits H and H-2 under section 552.107(1) of the Government Code. However, we note some of the individual e-mails contained in the submitted e-mail strings consist of communications with parties you have not identified. Because you have not explained how these parties are privileged with respect to the e-mails at issue, these e-mails are not privileged. Further, we note some of the individual e-mails in some of the submitted e-mail strings were not communications made in furtherance of the rendition of legal services and advice, and, thus, are not privileged. Accordingly, to the extent these non-privileged e-mails in Exhibits H and H-2, which we have marked, exist separate and apart from the otherwise privileged e-mail strings, they may not be withheld under section 552.107(1).

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 this information be kept confidential under

section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, a governmental body must withhold information under section 552.117 on behalf of current or former officials or employees only if these individuals made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. You inform us the city employees whose information is at issue in Exhibit M chose to not allow public access to their personal information prior to the city's receipt of the request for information. Therefore, except for the information we have marked for release, the city must withhold the information you have marked in Exhibit M under section 552.117(a)(1) of the Government Code.

Section 552.127 of the Government Code excepts from disclosure information that "identifies a person as a participant in a neighborhood crime watch organization and relates to the name, home address, business address, home telephone number, or business telephone number of the person." Gov't Code § 552.127(a); *see also id.* § 552.127(b) (defining "neighborhood crime watch organization"). You state portions of the information in Exhibit N identify individuals who are members of a neighborhood crime watch organization. Based on your representation and our review, we find the city must withhold most of the information you have marked, as well as the information we have marked, in Exhibit N under section 552.127 of the Government Code. However, we find that the remaining information you seek to withhold under section 552.127 does not relate to names, home addresses, business addresses, home phone numbers, and business phone numbers of members of a neighborhood crime watch. Accordingly, none of this information, which we have marked for release, may be withheld under section 552.127.

Some of the remaining information is also excepted from disclosure under 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). *See* Gov't Code § 552.137(a)-(c). The e-mail addresses at issue do not appear to be of a type specifically excluded by section 552.137(c). Therefore, the city must withhold the e-mail addresses you have marked, as well as those we have marked, under section 552.137 of the Government Code, unless the owners consent to their release.<sup>3</sup>

In summary, the city need not release the information in Exhibits J and J-2 that is not subject to the Act. The city must withhold the information we have marked in the remaining e-mail

---

<sup>3</sup>As you acknowledge, Open Records Decision No. 684 (2009) serves as a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including 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.

in Exhibit J-2 and in Exhibits G and L under section 552.101 of the Government Code in conjunction with common-law privacy. The city may withhold Exhibits H and H-2 under section 552.107(1) of the Government Code, except to the extent the non-privileged e-mails we have marked exist separate and apart from the e-mail strings in which they appear. Except for the information we have marked for release, the city must withhold the information you have marked in Exhibit M under section 552.117(a)(1) of the Government Code. Except for the information we have marked for release, the city must withhold the information you have marked, and the additional information we have marked, under section 552.127 of the Government Code. The city must hold the marked e-mail addresses under section 552.137 of the Government Code unless the owners consent to their release. The city must release the remaining information.

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,



Mack T. Harrison  
Assistant Attorney General  
Open Records Division

MTH/em

Ref: ID# 423392

Enc. Submitted documents

c: Requestor  
(w/o enclosures)