



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 3, 2013

Mr. George E. Hyde and Ms. Erin A. Higginbotham
Denton, Navarro, Rocha & Bernal, P.C.
2500 West William Cannon, Suite 609
Austin, Texas 78745

OR2013-07404

Dear Mr. Hyde and Ms. Higginbotham:

You ask whether certain information is subject to required public disclosure under the Public Information Act ("the Act"), chapter 552 of the Government Code. This request was originally received by the Open Records Division of this office and assigned ID# 486144. Preparation of the ruling has been assigned to the Opinion Committee of this office.

The City of El Paso (the "City"), which you represent, received a request for written communications in connection with the transaction of official business to or from a named individual during specified time periods. You assert that some of the requested information is not subject to the Act. You also assert that portions of the remaining information responsive to the request are excepted from required disclosure under the Act by section 552.107 (attorney-client privilege), and you have provided representative samples of this information.¹ We have considered the submitted arguments and reviewed the submitted representative sample.

You first state that some of the requested information consists of e-mails written using personal e-mail accounts. You assert that the City does not collect, assemble or maintain e-mails written or received in personal e-mail accounts. You claim that such information is

¹We assume the representative sample of records submitted to this office is truly representative of the requested records as a whole. See Tex. Att'y Gen. ORD-497 (1988) at 4. 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.

owned entirely by the individual public servant who owns and controls the private e-mail account and that the City has no right of access to the e-mail account. You therefore argue that because this information is not collected, assembled or maintained by the City, it is not public information as defined by the Act.

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." TEX. GOV'T CODE § 552.002(a). Thus, virtually all information that is in a governmental body's physical possession constitutes public information that is subject to the Act. *Id.* § 552.001(a)(1); *see also* Tex. Att'y Gen. ORD-549 (1990) at 4, ORD-514 (1988) at 1-2. 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. TEX. GOV'T CODE § 552.002(a)(2); *see* Tex. Att'y Gen. ORD-585 (1991). 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 the government and the official acts of public officials and employees. *See* TEX. GOV'T CODE § 552.001(a).

A governmental body may not circumvent the applicability of the Act by conducting official public business in a private medium. *See* Tex. Att'y Gen. ORD-585 (1991). Information does not fall outside the definition of "public information" merely because an individual member of the governmental body possesses the information rather than the governmental body as a whole. Tex. Att'y Gen. ORD-635(1995) at 3-4. 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* TEX. GOV'T CODE § 552.002(a). This office has found that information in a public official's personal e-mail account may be subject to the Act where the public official uses the personal e-mail account to conduct public business. *See* Tex. Att'y Gen. OR2005-06753, OR2003-0951. In this instance, any responsive information is maintained by an elected city representative. Thus, the requested e-mails that are located in the named individual's personal e-mail account and relate to the official business of the city constitute public information and are subject to the Act. As you raise no exceptions to disclosure of the information at issue, the City must release all such information at this time.

You also state that some of the information being requested that does meet the definition of "public information" is excepted from disclosure pursuant to Government Code section 552.107, and you supply representative samples of this information in Exhibit D.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, the 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. *See* Tex. Att’y Gen. ORD-676 (2002) at 6–7. 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 the 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 has been made. Tex. Att’y Gen. OR2012-19836, at 1. 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.

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, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of the 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. 1990).

You assert the information in Exhibit D was communicated between the city’s attorneys and city officials and staff in their capacities as clients. You state the information at issue was communicated for the purpose of the rendition of legal services to the city. You indicate the information was communicated in confidence, and you do not indicate the communication has been disclosed to third parties.

We first note that the submitted information in Exhibit D contains a copy of a city ordinance and a statute. In Open Records Letter Ruling OR2013-3624, this office considered whether statutes and city ordinances could be withheld from the public under the Act under

section 552.107, and concluded they could not. Tex. Att’y Gen. OR2013-3624, at 2. As laws and ordinances are binding on members of the public, they are matters of public record and may not be withheld from disclosure under the Act. See Tex. Att’y Gen. ORD 551 (1990) at 2–3 (laws or ordinances are open records), ORD-221 (1979) at 1 (official records of governmental body’s public proceedings are among most open of records). Therefore, the submitted ordinance and statute, which we have marked, must be released.

Second, we note that the attorney-client privilege applies only to communications between or among clients, client representatives, lawyers, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. See TEX. R. EVID. 503(b)(1). “A governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Absent such information, this office cannot necessarily assume that the communication was made only among the categories of individuals identified in rule 503.” Tex. Att’y Gen. ORD 676 (2002) at 8. Some of the e-mails that you have submitted include, as either senders or recipients, individuals that you have not identified as client representatives, attorneys for the City, or those attorneys’ representatives. Accordingly, the City may not withhold these e-mails, which we have marked for release, under section 552.107 of the Government Code.

Third, we note that some of the submitted e-mails include, as attachments, court-filed documents. Because these documents are “contained in a public court record,” standing alone they would be “public information and not excepted from required disclosure unless made confidential under this chapter or other law.” TEX. GOV’T CODE 552.022(a). However, because in this instance they constitute part of the attorney-client privileged communications, the City may withhold them pursuant to Rule 503 of the Texas Rules of Evidence. See Tex. Att’y Gen. OR2013-03347, at 2–3 (considering an attachment as part of an e-mail communication, and noting that the exception applies to the entire communication).

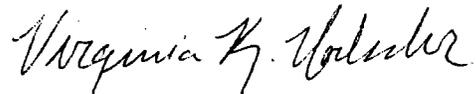
Finally, one of the documents you claim as privileged under 552.107(1) does not appear on its face to be a communication transmitted between privileged parties, nor have you identified the parties involved in the purported communication. Accordingly, the City may not withhold this document, which we have marked for release, under section 552.107 of the Government Code.

This letter ruling is limited to the particular information at issue in this request and 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,



Virginia K. Hoelscher
Assistant Attorney General
Opinion Committee

VKH/sdk

Ref: ID# 486144

Enc. Submitted documents

c: Requestor
(w/o enclosures)