



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 15, 2014

Mr. Todd Kimbrough
General Counsel
Lubbock Power & Light
P.O. Box 2000
Lubbock, Texas 79457

OR2014-18562

Dear Mr. Kimbrough:

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# 539587.

The City of Lubbock (the "city") received a request for (1) all e-mails between a named individual and any city e-mail address during a specified time period; (2) all city e-mails containing specified words during a specified time period; (3) all e-mails between a named individual and any Lubbock Power & Light ("LP&L") e-mail address during a specified time period; (4) all LP&L e-mails consisting of a specified word during a specified time period; (5) all city e-mails to or from any Nextera Energy employee or representative during a specified time period; and (6) all information during a specified time period relating to Nextera Energy, Hale County Wind Farm, Red Raider Wind Farm, Florida Power and Light, or NIRE. You state some information was released to the requestor. You claim portions of the submitted information are excepted from disclosure under sections 552.102, 552.107, 552.110, 552.117, and 552.133 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.102(a) excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]" Gov't Code § 552.102(a). The Texas Supreme Court held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354

S.W.3d 336 (Tex. 2010). Upon review, we find none of the information is excepted under section 552.102(a) of the Government Code. Accordingly, none of the information may be withheld on that basis.

You raise section 552.107 of the Government Code for Exhibits B and E. 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 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.* 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, orig. proceeding). 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 Exhibits B and E consist of communications between attorneys of LP&L and the client governmental body. You state the communications were confidential and made in furtherance of providing professional legal services to LP&L. We understand the communications have remained confidential. Based on your representations and our review, we find you have demonstrated the attorney-client privilege to some of the information at issue, which we have marked. Accordingly, the city may generally withhold the information

we marked under section 552.107(1) of the Government Code.¹ However, we note some of the otherwise privileged e-mail strings contain e-mails shared with individuals you have not demonstrated are privileged parties. Furthermore, if the e-mails are removed from the e-mail strings and stand alone, they are responsive to the request for information. Therefore, if the non-privileged e-mails, which we have marked, are maintained by the city separate and apart from the otherwise privileged e-mail strings in which they appear, then the city may not withhold the non-privileged e-mails under section 552.107(1) of the Government Code. However, if the non-privileged e-mails are not maintained separate and apart from the otherwise privileged e-mail strings, the city may withhold the marked e-mails under section 552.107(1) of the Government Code. Further, you have not demonstrated the remaining information at issue consists of privileged attorney-client communications. Thus, the remaining information may not be withheld under section 552.107(1) of the Government Code.

Section 552.117 of the Government Code excepts from disclosure the home addresses and telephone numbers, emergency contact information, 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). Section 552.117 also encompasses a personal cellular telephone or pager number, unless the cellular or pager service is paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (statutory predecessor to section 552.117 not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the city may only withhold information under section 552.117 on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Accordingly, to the extent the employees whose information is at issue timely elected to keep such information confidential under section 552.024, the city must withhold the information we have marked under subsection 552.117(a)(1) of the Government Code; however, the marked cellular telephone numbers may be withheld only if a governmental body does not pay for the cellular telephone service. If the employees did not make timely elections under section 552.024, the city may not withhold this information under section 552.117(a)(1) of the Government Code.

You raise section 552.133 of the Government Code for Exhibit C. Section 552.133 excepts from disclosure a public power utility's information that is "reasonably related to a competitive matter." Gov't Code § 552.133(b). Section 552.133 provides, in relevant part, the following:

¹As our ruling is dispositive, we need not address your remaining arguments against disclosure for this information.

(a) In this section, “public power utility” means an entity providing electric or gas utility services that is subject to the provisions of this chapter.

(a-1) For purposes of this section, “competitive matter” means a utility-related matter that is related to the public power utility’s competitive activity, including commercial information, and would, if disclosed, give advantage to competitors or prospective competitors. The term:

(1) means a matter that is reasonably related to the following categories of information:

(A) generation unit specific and portfolio fixed and variable costs, including forecasts of those costs, capital improvement plans for generation units, and generation unit operating characteristics and outage scheduling;

(B) bidding and pricing information for purchased power, generation and fuel, and Electric Reliability Council of Texas bids, prices, offers, and related services and strategies; [and]

(C) effective fuel and purchased power agreements and fuel transportation agreements and contracts;

(D) risk management information, contracts, and strategies, including fuel hedging and storage;

(E) plans, studies, proposals, and analyses for system improvements, additions, or sales, other than transmission and distribution system improvements inside the service area for which the public power utility is the sole certificated retail provider[.]

Id. § 552.133(a), (a-1)(1)(A)-(E). Section 552.133(a-1)(2) provides fifteen categories of information that are not competitive matters. *Id.* § 552.133(a-1)(2). We understand Lubbock Power & Light (“LP&L”) is a municipally owned electric utility. Thus, LP&L is a public power utility for the purposes of section 552.133. You assert Exhibit C pertains to a competitive matter of LP&L. Further, the information at issue is not among the fifteen categories of information expressly excluded from the definition of “competitive matter” by section 552.133(a-1)(2). Based on your representations and our review, Exhibit C relates to competitive matters as defined by section 552.133(a-1). Thus, we conclude the city must withhold Exhibit C under section 552.133 of the Government Code.

We note you raise section 552.110 of the Government Code for portions of the remaining information. Section 552.110 protects trade secrets and commercial or financial information

obtained from a person. However, section 552.110 is designed to protect the interests of third parties, not the interests of a governmental body. Thus, we do not address your argument under section 552.110 of the Government Code.

We note the remaining information, including the non-privileged e-mails, to the extent they exist separate and apart, contains e-mail addresses that may be subject to section 552.137 of the Government Code.² 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 id.* § 552.137(a)-(c). We note section 552.137 does not apply to an e-mail address provided to a governmental body by a person or his agent who has a contractual relationship or who seeks a contractual relationship with the governmental body. *See id.* § 552.137(c). Additionally, section 552.137 does not apply to a government employee’s work e-mail address because such an address is not that of the employee as a “member of the public,” but is instead the address of the individual as a government employee. You do not inform us a member of the public has affirmatively consented to the release of any of the submitted e-mail addresses. Thus, we conclude the city must withhold the e-mail addresses we marked under section 552.137 of the Government Code, to the extent they do not fall under the exceptions listed in subsection 552.137(c). However, to the extent the e-mail addresses at issue are subject to subsection 552.137(c), the city may not withhold this information under section 552.137.

In summary, the city may withhold the information we marked under section 552.107(1) of the Government Code. However, if the non-privileged e-mails we marked are maintained separate and apart from the otherwise privileged e-mail strings, the city may not withhold the marked e-mails under section 552.107(1) of the Government Code. To the extent the employees whose information is at issue timely elected to keep such information confidential under section 552.024, the city must withhold the information we have marked under subsection 552.117(a)(1) of the Government Code; however, the marked cellular telephone numbers may be withheld only if a governmental body does not pay for the cellular telephone service. The city must withhold Exhibit C under section 552.133 of the Government Code. The city must withhold the e-mail addresses we marked under section 552.137 of the Government Code, to the extent they do not fall under the exceptions listed under subsection 552.137(c). 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.

²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Lauren Dahlstein
Assistant Attorney General
Open Records Division

LMD/som

Ref: ID# 539587

Enc. Submitted documents

c: Requestor
(w/o enclosures)