



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 7, 2014

Ms. Allison Bastian
Assistant City Attorney
City of Brownsville
1001 East Elizabeth Street, Suite 234
Brownsville, Texas 78520

OR2014-20297

Dear Ms. Bastian:

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# 542489.

The City of Brownsville (the "city") received a request for seven categories of information related to payday loans, payday lenders, and similar businesses. You state the city will release some of the requested information. You claim the submitted information is excepted from disclosure under sections 552.103, 552.106, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments submitted by the requestor. *See Gov't Code § 552.304* (providing that interested party may submit comments stating why information should or should not be released).

Initially, we note the city has marked a portion of the submitted information as not responsive to the request for information. The city need not release nonresponsive information in response to this request, and this ruling will not address that information.

Next, we must address the requestor's assertion the city failed to comply with section 552.301(e-1) of the Government Code in requesting this decision. Section 552.301(e-1) requires a governmental body that submits written comments requesting a ruling to the attorney general under subsection 552.301(e)(1)(A), to send a copy of those comments to the person who requested the information from the governmental body not later than the fifteenth business day after the date of receiving the written request. Gov't

Code § 552.301(e-1). Section 552.301(e-1) authorizes the governmental body to redact from those comments information that discloses or contains the substance of the information requested. *Id.* We note the city redacted virtually the entirety of its arguments in support of sections 552.103, 552.106, and 552.111 in the copy of the comments sent to the requestor. We further note portions of the comments the city redacted neither disclose nor contain the substance of the submitted information. We, therefore, conclude the city failed to comply with section 552.301(e-1) in requesting a decision with respect to its arguments under sections 552.103, 552.106, and 552.111 of the Government Code. However, we find the city complied with section 552.301(e-1) with regard to its redactions of its arguments in support of section 552.107.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to provide the requestor with information required in section 552.301 results in the legal presumption the requested information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Gov't Code § 552.302; Simmons v. Kuzmich*, 166 S.W.3d 342 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). Generally, a governmental body may demonstrate a compelling reason to withhold information by showing the information is made confidential by another source of law or affects third party interests. *See* Open Records Decision No. 630 (1994). Sections 552.103, 552.106, and 552.111 are discretionary exceptions that protect a governmental body's interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 470 at 7 (1987) (deliberative process privilege under statutory predecessor to section 552.111 subject to waiver). As such, sections 552.103, 552.106, and 552.111 do not constitute compelling reasons to withhold information for purposes of section 552.302, and the city may not withhold the responsive information under those exceptions. However, we will address the city's arguments under section 552.107(1).

Section 552.107(1) of the Government Code 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 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 to only 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 to only 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, 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 assert the information you have marked constitutes communications between city attorneys, city employees, and city officials made for the purpose of facilitating the rendition of professional legal services to the city. You have identified some of the parties to the communications. We are able to discern that some of the remaining individuals are privileged parties with the city. We understand the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find the city generally may withhold the information we have marked under section 552.107(1) of the Government Code.¹ However, the remaining information you seek to withhold consists of communications to individuals you have not demonstrated are privileged parties. Accordingly, we find you have failed to demonstrate the applicability of the attorney-client privilege to the remaining information you have marked, and the city may not withhold this information under section 552.107(1).

In addition, we note one of the marked e-mail strings includes e-mails received from or sent to parties whom you have not demonstrated are privileged. Furthermore, if the e-mails received from or sent to non-privileged parties are removed from the e-mail strings and stand alone, they are responsive to the request for information. Therefore, if these non-privileged e-mails, which we have marked, are maintained by the city separate and apart from the

¹As our ruling on this information is dispositive, we need not address your remaining argument against its disclosure.

otherwise privileged e-mail strings in which they appear, then the city may not withhold these non-privileged e-mails under section 552.107(1) of the Government Code.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee or official of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code.² *See* Gov't Code § 552.117(a)(1). We note section 552.117 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use).

Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former employee or official who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee or official who did not timely request under section 552.024 the information be kept confidential.

Accordingly, if the employee whose information is at issue timely requested confidentiality under section 552.024 and a governmental body does not pay for the cellular telephone service, the city must withhold the cellular telephone number we have marked under section 552.117(a)(1) of the Government Code. If the employee did not make a timely request under section 552.024, or a governmental body pays for the cellular telephone service, then the city may not withhold the marked cellular telephone number under section 552.117(a)(1).

We note the remaining information contains e-mail addresses subject to 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 are not excluded by subsection (c). Therefore, the city must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to public disclosure.

²The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body. *See* Open Records Decision Nos. 481, 480 (1987), 470 (1987).

In summary, the city may withhold the information we have marked under section 552.107(1) of the Government Code; however, the city must release the non-privileged e-mails we have marked if the city maintains the marked non-privileged e-mails separate and apart from the privileged e-mail strings. If the employee whose information is at issue made a timely election under section 552.024 and a governmental body does not pay for the cellular telephone service, the city must withhold the information we have marked under section 552.117(a)(1) of the Government Code. The city must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to public disclosure. 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.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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/dls

Ref: ID# 542489

Enc. Submitted documents

c: Requestor
(w/o enclosures)