



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

September 1, 2016

Mr. Daniel W. Ray  
Greenville City Attorney  
Scott, Ray & Sullivan, PLLC  
Post Office Box 1353  
Greenville, Texas 75403

OR2016-19801

Dear Mr. Ray:

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# 624908. Because the request involves communications concerning litigation to which the Open Records Division may be a party, preparation of this ruling has been assigned instead to the Opinion Committee.

The City of Greenville ("City") received a request for six categories of information, generally described as: (1) all contracts for the City Manager, Massoud Ebrahim, since his initial hire, including information regarding retirement benefits, compensation, and allowance benefits and "any/all other financial or other benefits provided to and or added to the City Manager's compensation package"; (2) a list of "benchmark cities" used as a point of comparison for the City Manager's compensation and benefits; (3) a list of "benchmark cities" used as a point of comparison for Public Safety compensation and benefits; (4) the exit interviews of six named former city employees; (5) all emails since September 1, 2015, to or from any of four specified email addresses and containing any of eight specified terms or phrases; and (6) all complaints, investigations, findings, or disciplinary actions regarding the city manager's "job performance, conduct, or any complaints related to inappropriate conduct."

Of the responsive documents, you claim certain pages are excepted from required public disclosure. You claim that some of the submitted information is not subject to the Act. You assert the remaining information is excepted from disclosure under sections 552.101,

552.107, and 552.131 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>1</sup>

Initially, you argue that emails contained in Exhibit D are not public information subject to the Act. The Act is applicable only to “public information.” TEX. GOV’T CODE §§ 552.002, .021. Section 552.002(a) defines “public information” as information that is

(a) . . . written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

(1) by a governmental body;

(2) for a governmental body and the governmental body:

(A) owns the information;

(B) has a right of access to the information; or

(C) spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information; or

(3) by an individual officer or employee of a governmental body in the officer’s or employee’s official capacity and the information pertains to official business of the governmental body.

*Id.* § 552.002(a). Thus, almost all of the information in a governmental body’s physical possession constitutes public information and is subject to the Act. *See id.*; *see also* Tex. Att’y Gen. ORD-549 (1990) at 4, ORD-514 (1988) at 1–2. You assert that the emails in Exhibit D are personal emails created by individuals not acting in their official government capacities and do not pertain to the transaction of the City’s official business. Based upon these representations and our review of the emails at issue, we agree that Exhibit D does not constitute public information for purposes of section 552.002 of the Government Code. *See* Tex. Att’y Gen. ORD-635 (1995) at 4, 7 (recognizing that section 552.002 is not applicable to personal information unrelated to official business and created or maintained by a public employee involving a de minimis use of public resources). Therefore, we conclude Exhibit D is not subject to the Act and need not be released in response to the present request for information.

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<sup>1</sup>We 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-499 (1988) at 6, ORD-497 (1988) at 4. This open records letter ruling 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.

You raise section 552.101 in conjunction with the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) for emails submitted in Exhibit E. At the direction of Congress, the Secretary of Health and Human Services (“HHS”) promulgated regulations setting privacy standards for medical records, which HHS issued as the Federal Standards for Privacy of Individually Identifiable Health Information. *See* HIPAA, 42 U.S.C. § 1320d-2 (historical and statutory notes); Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. pts. 160, 164 (“Privacy Rule”); *see also* Tex. Att’y Gen. Op. No. JC-0508 (2002) at 2. These standards govern the releasability of protected health information by a covered entity. *See* 45 C.F.R. pts. 160, 164. Under these standards, generally a covered entity may not use or disclose protected health information, except as provided by parts 160 and 164 of the Code of Federal Regulations. 45 C.F.R. § 164.502(a). The Open Records Division has addressed the interplay of the Privacy Rule and the Act. *See* Tex. Att’y Gen. ORD-681 (2004). ORD-681 considered section 164.512 of title 45 of the Code of Federal Regulations, which provides that “[a] covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law.” *See* 45 C.F.R. § 164.512(a)(1). ORD-681 recognized that section 552.021 of the Act “is a mandate in Texas law that compels Texas governmental bodies to disclose information to the public.” Tex. Att’y Gen. ORD-681 (2004) at 8. Thus, ORD-681 held that disclosures under the Act come within section 164.512(a). *See id.* Consequently, the Privacy Rule does not make information confidential for purposes of section 552.101 of the Government Code. *Id.* at 9; *see also Abbott v. Tex. Dep’t of Mental Health & Retardation*, 212 S.W.3d 648, 652, 660 (Tex. App.—Austin 2006, no pet.); Tex. Att’y Gen. ORD-478 (1987) at 2 (as a general rule, statutory confidentiality requires express language making information confidential). Because the Privacy Rule does not make confidential information that is subject to disclosure under the Act, the City may not withhold any portion of Exhibit E on that basis.

Yet, Exhibit E contains information subject to section 552.117. 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.<sup>2</sup> *See* TEX. GOV’T CODE §§ 552.117(a)(1), .024. 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 information. *See* Tex. Att’y Gen. ORD-530 (1989) at 5. Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body’s receipt of the request for information. Therefore, to the extent the individual whose information is at issue timely requested confidentiality under

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<sup>2</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Tex. Att’y Gen. ORD-481 (1987) at 2, ORD-480 (1987) at 5, ORD-470 (1987) at 2.

section 552.024 of the Government Code, the City must withhold the information we marked in Exhibit E under section 552.117(a)(1) of the Government Code.

You next argue that the information in Exhibit F is protected by section 552.107 of the Government Code. Section 552.107(1) protects information that comes within the attorney-client privilege. TEX. 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. 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. *See id.* (quoting 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. *See In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) *mand. denied*, 12 S.W.3d 807 (Tex. 2000) (stating that the attorney-client "privilege does not apply if the attorney is acting in a capacity other than that of an 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. *See Tex. Att'y Gen. ORD-676 (2002) at 8; see also TEX. R. EVID. 503(b)(1)(A)–(E).* 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 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." Tex. Att'y Gen. ORD-676 (2002) at 10; *see TEX. R. EVID. 503(a)(5), (b)(1).*

Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding [mand. denied]) (stating that "the issue of confidentiality focuses on the intent of the parties at the time the communications are made"). 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.

You indicate that the information contained in Exhibit F is a representative sample of emails sent to and from the City Attorney's office. You argue the emails are communications that relate to numerous legal issues faced by the City, including pending or contemplated litigation. You state further that these emails were made for the purpose of facilitating the

rendition of professional legal services to the client governmental body. You tell us that each person included as a sender or recipient of the emails is an attorney or attorney representative or a representative of the client City. You state that all of the communications provided under Exhibit F were not intended to be disclosed and none have been disclosed to non-privileged parties. Based on your representations and our review, we conclude that most of the information you have provided under Exhibit F is subject to the attorney-client privilege and may be withheld under section 552.107(1) of the Government Code.

However, we note that Exhibit F includes completed reports and court-filed documents subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) . . . the following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108; [and]

...

(17) information that is also contained in a public court record[.]

TEX. GOV'T CODE § 552.022(a)(1), (17). This information must be released unless it is made confidential under the Act or other law. Despite your argument that the entirety of Exhibit F may be withheld under section 552.107(1), section 552.107(1) is a discretionary exception to disclosure and does not make information confidential under the Act. *See* Tex. Att'y Gen. ORD-676 (2002) at 6 (concluding that section 552.107(1) is not "other law" for purposes of section 552.022), ORD-665 (2000) at 2 n.5 (discussing discretionary exceptions generally). As a result, section 552.107 does not make information confidential for the purposes of section 552.022. Therefore, the City may not withhold the completed reports and court-filed documents subject to section 552.022(a)(1) and (a)(17) under section 552.107 of the Government Code. We note the Texas Supreme Court has held the Texas Rules of Evidence and Texas Rules of Civil Procedure are "other law" within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). We will, therefore, consider your assertions of the attorney-client privilege under rule 503 of the Texas Rules of Evidence.

Texas Rule of Evidence 503(b)(1) provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to facilitate the rendition of professional legal services to the client:

(A) between the client or the client's representative and the client's lawyer or the lawyer's representative;

(B) between the client's lawyer and the lawyer's representative;

(C) by the client, the client's representative, the client's lawyer, or the lawyer's representative to a lawyer representing another party in a pending action or that lawyer's representative, if the communications concern a matter of common interest in the pending action;

(D) between the client's representative or between the client and the client's representative; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made to further the rendition of professional legal services to the client or reasonably necessary to transmit the communication.

Accordingly, to withhold attorney-client privileged information from disclosure under Rule 503, a governmental body must (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in the furtherance of the rendition of professional legal services to the client. *See* Tex. Att'y Gen. ORD-676 (2002) at 7-11. Upon a demonstration of all three factors, the entire communication is confidential under Rule 503 provided that the client has not waived the privilege or the communication does not fall within the purview of the exceptions to the privilege enumerated in Rule 503(d). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (orig. proceeding) (recognizing that the privilege extends to the "entire communication, including facts contained therein"); *In re Valero Energy Corp.*, 973 S.W.2d 453, 457 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding) (acknowledging that the privilege attaches to complete communication, including factual information).

You assert the emails and email attachments, which include the completed reports and court-filed documents, in Exhibit F subject to 552.022(a)(1) and (a)(17) consist of privileged attorney-client communications. You explain the information at issue was communicated

between city attorneys, attorney representatives, and city employees in their capacities as the client for the purposes of facilitating the rendition of professional legal services to the City. You also state the information at issue was intended to be confidential and was not disclosed to non-privileged parties. Based on these representations and our review, we find the information subject to section 552.022(a)(1), (17) consists of communications protected by the attorney-client privilege. Accordingly, the City may withhold the information subject to section 552.022(a)(1) and (a)(17) under Rule 503 of the Texas Rules of Evidence.

Lastly, regarding the documents in Exhibit G, you raise section 552.131(a)(2) as an exception to disclosure. Section 552.131(a)(2) provides:

(a) Information is excepted from [required disclosure] if the information relates to economic development negotiations involving a governmental body and a business prospect that the governmental body seeks to have locate, stay, or expand in or near the territory of the governmental body and the information relates to:

...

(2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained.

TEX. GOV'T CODE § 552.131(a)(2). Section 552.131(a) protects the proprietary interests of third parties that have provided information to governmental bodies, not the interests of the governmental bodies themselves. There has been no demonstration by a third party that any of the information at issue constitutes a trade secret or that release of any of the information at issue would cause a third party substantial competitive harm. *See* Tex. Att'y Gen. ORD-661 (1999) at 5–6 (concluding that similar section 552.110 requires specific, factual evidence that the release would cause substantial competitive harm), ORD-552 (1990) at 5 (stating that attorney general will accept a private person's claim under section 552.110(a) of the Government Code if person establishes *prima facie* case for trade secret exception, and no one submits argument that rebuts claim as a matter of law). Thus, the City may not withhold any portion of Exhibit G under section 552.131(a) of the Government Code.

In summary, the information in Exhibit D is not subject to the Act and need not be released in response to the present request for information. The City must release the information in Exhibit E except the information we have marked pursuant to section 552.117(a)(1) if the individual whose information is at issue timely requested confidentiality under section 552.024 of the Government Code. The City may withhold the information in Exhibit F pursuant to section 552.107(1) of the Government Code and Rule 503 of the Texas Rules of

Evidence. Absent application of section 552.131 of the Government Code, the City must release the information in Exhibit G.

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](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,



Charlotte M. Harper  
Assistant Attorney General  
Opinion Committee

CMH/sdk

Ref: ID# 624908

Enc. Submitted documents

c: Requestor  
(w/o enclosures)