



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 7, 2005

Mr. J.R. Schneider, Jr.
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OR2005-01930

Dear Mr. Schneider:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 219753.

The Caldwell County Appraisal District (the "district"), which you represent, received a request for a named individual's email from January 1, 2004 through December 17, 2004. You claim that the requested information is excepted from disclosure under sections 552.102, 552.103, 552.107, 552.111, 552.117, 552.136, and 552.137 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

¹ Although you assert the attorney-client privilege and the attorney work product exception under section 552.022 of the Government Code, section 552.022 provides a list of eighteen categories of information that are expressly public and may not be withheld unless confidential under other law. *See* Gov't Code § 552.022. Thus, section 552.022 is not an exception to disclosure. The proper exception to raise for the attorney-client privilege for information not subject to section 552.022 of the Government Code is section 552.107. *See* Open Records Decision No. 676 at 6 (2002). Further, the proper exception to raise for attorney work product not subject to section 552.022 is section 552.111. *See* Open Records Decision No. 677 (2002). Thus, we will consider your arguments under these exceptions.

² We assume that 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 that those records contain substantially different types of information than that submitted to this office.

Initially, we note that some of the submitted information, which we have marked, is not responsive to the instant request for information, as it was created outside of the requested time period. This ruling does not address the public availability of any information that is not responsive to the request, and the district need not release that information in response to this request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed).

Next, we note that the submitted information contains the agenda of a public meeting of a governmental body. The agendas of a governmental body's public meetings are specifically made public by statute. *See Gov't Code* §§ 551.022 (minutes and tape recordings), 551.043 (notice). Information made public by statute may not be withheld from the public under any of the Public Information Act's (the "Act") exceptions to public disclosure. *See, e.g., Open Records Decision Nos. 544 (1990), 378 (1983), 161 (1977), 146 (1976)*. Accordingly, the agenda of the public meeting must be released in accordance with the Open Meetings Act.

Third, we address your obligations under the Act. Under section 552.301(b), a governmental body that wishes to withhold information from public disclosure must request a ruling from this office and state the exceptions that apply not later than the tenth business day after the date of receiving the written request. *Gov't Code* § 552.301(b). You did not raise the attorney work product exception within the ten-business-day period mandated by section 552.301(b) of the Government Code. Therefore, you failed to comply with the requirements of section 552.301. Section 552.111 is a discretionary exception to disclosure that does not provide a compelling reason for non-disclosure under section 552.302 of the Government Code. *See Open Records Decision Nos. 630 at 3 (1994); 325 at 2 (1982)*. Therefore, the district may not withhold any of the submitted information under section 552.111.

Section 552.107 of the Government Code protects information coming within the attorney-client privilege. *Gov't Code* § 552.107. When asserting the attorney-client privilege, a governmental body maintains the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See Open Records Decision No. 676 at 6-7 (2002)*. First, a governmental body must demonstrate that the information at issue constitutes or documents a communication. *See 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 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) (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. See TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (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 only to a confidential communication, see *id.* 503(b)(1), meaning that 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. See *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). 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 from disclosure 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). Based on your representations and our review of the remaining submitted information, we have marked those portions of this information that reflect confidential communications exchanged between privileged parties in furtherance of the rendition of legal services to a client. Accordingly, we conclude that the district may withhold this particular marked information pursuant to section 552.107 of the Government Code.

The district claims that a portion of the remaining submitted information is subject to section 552.102 of the Government Code, which 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. In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref’d n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), for information claimed to be protected under the doctrine of common law privacy as incorporated by section 552.101.³ Consequently, we will consider these two exceptions together.

In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if it (1) contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person and (2) is not of legitimate concern to the public. 540 S.W.2d at 685. The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children,

³ Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision,” and it encompasses the doctrine of common law privacy. Gov’t Code § 552.101.

psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. In addition, this office has found that the following types of information are excepted from required public disclosure under common law privacy: personal financial information not relating to a financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990); some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps); and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982).

Upon review of the remaining submitted information, we conclude that none of it is protected by common law privacy. *See* Open Records Decision Nos. 659 at 5 (1999) (listing types of information that attorney general has held to be protected by right to privacy), 423 at 2 (1984) (explaining that because of greater legitimate public interest in disclosure of information regarding public employees, employee privacy under section 552.102 is confined to information that reveals "intimate details of a highly personal nature"). Thus, none of the remaining submitted information may be withheld under either section 552.101 or 552.102 on the basis of common law privacy.

The district further raises section 552.103 of the Government Code, which provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103. The district has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.]

1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The district must meet both prongs of this test for information to be excepted under section 552.103(a).

You state that the district has been named as a defendant in seven lawsuits during January 1, 2003 and December 15, 2004 which relate to the district's appraised value or taxable status of property. Thus, we agree that the district was involved in pending litigation on the date it received the present request. However, you do not explain, nor does the submitted information supply the explanation on its face, how any of the remaining information relates to the pending litigation. Therefore, we conclude that section 552.103 is not applicable to the remaining submitted information.

Section 552.117(a)(1) 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 timely request that this information be kept confidential pursuant to section 552.024 of the Government Code. Gov't Code § 552.117. Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time that the request for it is received by a governmental body. *See* Open Records Decision No. 530 at 5 (1989). We note, however, that the protections of section 552.117 apply only to information that a governmental body holds in its capacity as an employer. *See* Gov't Code § 552.117 (providing that employees of governmental entities may protect certain personal information in hands of their employer); *see also* Gov't Code § 552.024 (establishing election process for section 552.117). The information you seek to withhold pursuant to this exception pertains to an individual who is employed by another governmental agency rather than the district. Because the district does not hold this information as the employer of this individual, the district may not withhold it under section 552.117 of the Government Code.

The district also raises section 552.136 of the Government Code. Section 552.136 states that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136. An access device number is one that may be used to "(1) obtain money, goods, services, or another thing of value; or (2) initiate a transfer of funds other than a transfer originated solely by paper instrument." *Id.* The district has not explained how any of the submitted information can be used to obtain a thing of value or initiate a transfer of funds. Because the district has not shown the applicability of section 552.136, none of the submitted information may be withheld on this basis.

Finally, you claim that e-mail addresses that are contained within the remaining submitted information are excepted from disclosure pursuant to section 552.137 of the Government Code. Section 552.137 provides:

- (a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating

electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

(c) Subsection (a) does not apply to an e-mail address:

(1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;

(2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract; or

(4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.

(d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Gov't Code § 552.137. Section 552.137 requires a governmental body to withhold certain email addresses of members of the public that are provided for the purpose of communicating electronically with the governmental body, unless the members of the public with whom the e-mail addresses are associated have affirmatively consented to their release. Section 552.137 does not apply to a government employee's work e-mail address or a business's general e-mail address or web address. E-mail addresses that are encompassed by subsection 552.137(c) are also not excepted from disclosure under section 552.137. Based on our review of the remaining submitted information, we have marked the types of e-mail addresses that are excepted from disclosure under section 552.137(a). You indicate that the district has not received affirmative consent for the release of any e-mail address contained within the submitted information. Accordingly, we conclude that the district must withhold all such e-mail addresses contained within the submitted information pursuant to section 552.137(a) of the Government Code.

In summary, the agenda of the public meeting must be released in accordance with the Open Meetings Act. The district may withhold the information we have marked under section 552.107 of the Government Code. Finally, the district must withhold the types of e-mail addresses that we have marked under section 552.137. The remaining information must be released.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Lauren E. Kleine
Assistant Attorney General
Open Records Division

LEK/jev

Ref: ID# 219753

Enc. Submitted documents

c: Mr. John Storbakken
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(w/o enclosures)