



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 22, 2005

Ms. Charlotte A. Drew  
The Drew Law Firm, P.L.L.C.  
Lakeside Professional Building  
14884 Highway 105 West  
Montgomery, TX 77356

OR2005-10577

Dear Ms. Drew:

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# 236748.

The Magnolia Volunteer Fire Department (the "department"), which you represent, received a request for "email or written documentation between board members since June 1, 2005." You claim that the requested information is not subject to the Act. In the alternative, you claim that the requested information is excepted from disclosure under sections 552.101, 552.102, 552.107, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing for submission of public comments).

Initially, we address your contention that the information is not public information subject to the Act because only information related to the receipt or expenditure of public funds is public information subject to disclosure under the Act. Under the Act, all information, with certain exceptions, that is collected, assembled, or maintained by a "governmental body" is subject to required public disclosure. *See* Gov't Code § 552.002(a)(1). Section 552.003(1)(A)(xii) includes within the definition of governmental body "the part, section, or portion of an organization, corporation, commission, committee, institution, or agency that spends or that is supported in whole or in part by public funds." We also note that the receipt of public funds for the general support of the activities of a private organization brings that organization within the definition of a "governmental body." Open Records Decision No. 228 (1979).

“Whether or not a particular nonprofit volunteer fire department [is a governmental body subject to the Act] depends on the circumstances in each case, including the terms of the contract between the department and the public entity.” Attorney General Opinion JM-821 at 5 (1987) (citation omitted). In Attorney General Opinion JM-821, this office held that the Cy-Fair Volunteer Fire Department (“Cy-Fair”) was a governmental body for purposes of the Act’s predecessor to the extent that it was supported by public funds received pursuant to its contract with the Harris County Rural Fire Prevention District No. 9 (“RFPD”). *See id.* In issuing that opinion, this office analyzed the contract between Cy-Fair and RFPD, noting that Cy-Fair received public funds to provide all of RFPD’s needed services. *See id.* This office also noted that the contract provided that Cy-Fair must submit one-year operating budgets and a three-year capital expenditure budget to RFPD for approval. Consequently, this office found that the contract provided for the general support of Cy-Fair for purposes of the Act’s predecessor. *Id.*

In this instance, you state the department receives its funding from private fundraising and donations, private billing for certain department services, and a contract for services with the Montgomery County Emergency Services District No. 10 (the “ESD”). You have submitted that contract for our review. Under that contract, the department provides “emergency fire control, suppression and extinguishment [sic] services, first responder services and emergency rescue services to and for the benefit of the residents, other individuals and property within [ESD’s] territory.” The contract also provides that ESD will reimburse the department for specified costs incurred while providing these services. Fire Protection and Rescue Services Agreement, Art. IX, § 13. You inform us that all department expenditures and purchases, including those for capital improvements, equipment, and uniforms, are made by the department from any of the department’s three general sources of revenue. We also note that under the contract, the department must submit a five-year capital expenditure budget and a one-year operating budget to ESD for approval. *Id.*, Art. IX, § 14.

Based on your representations, our review of the contract at issue, and our holding in Attorney General Opinion JM-821, we find that ESD provides general support to the department, making the department a governmental body to the extent it received ESD’s financial support. *See id.*; *see also* Gov’t Code § 552.003(1)(A)(xii). Therefore, any responsive information that is related to expenditures made with public funds is “public information” subject to the Act. However, any responsive information that is related to expenditures made with private funds is not “public information” and it need not be released to the requestor. You have submitted e-mails from and to the fire chief as responsive to this request. The contract provides that the department pays the fire chief’s salary and benefits from ESD-contracted funds to carry out fire control and emergency services. Fire Protection and Rescue Services Agreement, Art. VII, § 10. Therefore, we find that the submitted information is “public information” subject to the Act. Accordingly, we will address your remaining argument against disclosure for the submitted information.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision,” including

information that is encompassed by the common law right to privacy. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). 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). 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* for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the Government Code. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976). Accordingly, we will consider your section 552.101 and section 552.102 claims together.

Information is protected from disclosure under the common law right to privacy if (1) it contains highly intimate or embarrassing facts, the release of which would be highly objectionable to a reasonable person, and (2) it is not of legitimate concern to the public. *See id.* 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, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. Upon review of the submitted documents, we find that the records at issue do not contain information that is considered highly intimate or embarrassing, and the information is of legitimate concern to the public. Accordingly, the department may not withhold any of the submitted information pursuant to common law privacy.

Section 552.107(1) of the Government Code 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 Texas 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)(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, *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, no writ). 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 that the e-mail dated August 18, 2005 is a confidential communication between the department’s chief, board members, and legal counsel “in preparation for a board meeting regarding volunteer personnel matters.” Based on your arguments and our review of the submitted information, we conclude that you have demonstrated that the information at issue reflects a confidential communication between privileged parties in furtherance of the rendition of legal services to the client. Accordingly, the department may withhold the e-mail we have marked under section 552.107(1).

Section 552.117(a)(1) of the Government Code 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 elect to keep this information confidential pursuant to section 552.024. Upon review of the submitted information, we find that it does not contain the type of information that can be withheld pursuant to section 552.117. Therefore, the department may not withhold any of the submitted information under section 552.117(a)(1).

We note that the submitted information contains e-mail addresses obtained from the public. Section 552.137 makes certain e-mail addresses confidential. 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. Under section 552.137, a governmental body must withhold the e-mail address of a member of the general public, unless the individual to whom the e-mail address belongs has affirmatively consented to its public disclosure. *See id.* § 552.137(b). We note, however, that section 552.137 does not apply to the work e-mail addresses of officers or employees of a governmental body, a website address, or the general e-mail address of a business. You do not inform us that a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. The department must, therefore, withhold the e-mail addresses we have marked under section 552.137. The submitted governmental e-mail addresses and the e-mail addresses of those with whom the department has a contractual relationship are not excepted under section 552.137.

In summary, the department may withhold the e-mail we have marked pursuant to section 552.107. The department must withhold the private e-mail addresses we have marked pursuant to section 552.137 of the Government Code. The remaining information must be released to the requestor.

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); *Texas 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 Office of the Attorney General 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. 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,



Jaime L. Flores  
Assistant Attorney General  
Open Records Division

JLF/jpa

Ref: ID# 236748

Enc. Submitted documents

c: Mr. Russell W. Copeland  
34615 Brown Lane  
Pinehurst, Texas 77362  
(w/o enclosures)