



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 3, 2008

Ms. Caroline E. Cho
Assistant County Attorney
Williamson County
405 Martin Luther King Street, Box 7
Georgetown, Texas 78626

OR2008-07538

Dear Ms. Cho:

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# 311626.

The Williamson County Attorney's Office (the "county attorney") received a request for thirteen categories of information regarding a specified employee. You state that you have released the information responsive to categories 5 and 8(a)-(b) and some of the information responsive to categories 1 and 10. You state that the county attorney has no information responsive to categories 2-3, 6-7, 8(c)-(d), 9, and 12 of the request. You explain that the information responsive to categories 4 and 11 has been destroyed in accordance with the county attorney's record retention policy.¹ You claim that portions of the remaining requested information are excepted from disclosure under sections 552.107, 552.117, 552.136, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.²

¹The Act does not require a governmental body to release information that did not exist when the request was received or to create new information responsive to the request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

²We 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.

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)-(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-mails at issue are communications between assistant district attorneys and county employees. You further state that these communications were made for the purpose of facilitating the rendition of professional legal services. You also indicate that these communications were intended to be confidential and their confidentiality has been maintained. Upon review of your arguments and the information at issue, we find that you have demonstrated the applicability of the attorney-client privilege to some of the e-mails at issue. Accordingly, these e-mails, which we have marked, may be withheld under section 552.107. However, you have not demonstrated how the remaining e-mails at issue constitute confidential communications between privileged parties. Therefore, this information may not be withheld under section 552.107.

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 request that this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(1); *see also* Open Records Decision No. 670 (2001) (extending section 552.117(a)(1) exception to personal cellular telephone number and personal pager number of employee who elects to withhold home telephone number in accordance with section 552.024). However, information subject to section 552.117(a)(1) may not be withheld from disclosure if the current or former employee made the request for confidentiality under section 552.024 after the request for information at issue was received by the governmental body. Whether a particular piece of information is public must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Thus, if the individuals whose information is at issue timely elected to keep their personal information confidential, the county attorney must withhold the telephone numbers you have marked under section 552.117(a)(1) of the Government Code. The county attorney may not withhold this information under section 552.117(a)(1) if the individuals at issue did not make timely elections.

Section 552.117(a)(2) excepts from disclosure the current and former home addresses and telephone numbers, social security number, and family member information of a peace officer, regardless of whether the officer elected under section 552.024 or section 552.1175 of the Government Code to keep such information confidential.³ *See* Gov't Code § 552.117(a)(2). The county attorney must withhold the telephone numbers you have marked under section 552.117(a)(2).

Section 552.136 of the Government Code provides 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. Accordingly, the county attorney must withhold the cellular telephone account number we have marked pursuant to section 552.136. However, you have not explained how the remaining account number, whether used alone or in conjunction with another device, may be used to initiate a transfer of funds. Thus, you may not withhold this information under section 552.136.

Section 552.137 of the Government Code 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 do not appear to be of a type specifically excluded by section 552.137(c). You state that the relevant members of the public have not consented to the release of their e-mail addresses. Therefore, the county attorney must withhold the e-mail addresses you have marked under section 552.137.

³“Peace officer” is defined by Article 2.12 of the Texas Code of Criminal Procedure.

In summary: (1) the county attorney may withhold the e-mails we have marked under section 552.107 of the Government Code; (2) the county attorney must withhold the telephone numbers you have marked under section 552.117(a)(1) of the Government Code, if the individuals made timely elections; (3) the county attorney must withhold the telephone numbers you have marked under section 552.117(a)(2) of the Government Code, if the individuals are peace officers; (4) the county attorney must withhold the cellular telephone account number we have marked under section 552.136 of the Government Code; and (5) the county attorney must withhold the e-mail addresses you have marked under 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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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 challenge 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,



Bill Dobie
Assistant Attorney General
Open Records Division

WJD/jh

Ref: ID# 311626

Enc. Submitted documents

c: Ms. Peggy M. Venable
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(w/o enclosures)