



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 15, 2008

Mr. Mark D. Kennedy
Hays County Criminal District Attorney's Office
111 East San Antonio Street, Suite 204
San Marcos, Texas 78666

OR2008-14135

Dear Mr. Kennedy:

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# 324946.

The Hays County Criminal District Attorney's Office (the "district attorney") received a request for lists of subdivisions and their locations under construction and the locations of all Hays County projects. The requestor also seeks the e-mails of two named individuals from the last six months. The district attorney states it has released some of the requested information. You claim portions of the submitted information are excepted from disclosure under sections 552.107 and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, you assert the request for information was withdrawn because the district attorney sent the requestor a written statement under section 552.231(b) of the Government Code on August 8, 2008, and as of September 11, 2008, the district attorney has not received a response from the requestor. A section 552.231 statement is required when the governmental body determines that responding to a request for information will require the programming and manipulation of data and the information could be made available in the

¹We 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.

requested form only at a cost that covers the programming and manipulation. *See* Gov't Code § 552.231(a). Section 552.231(b) states:

(b) The written statement must include:

- (1) a statement that the information is not available in the requested form;
- (2) a description of the form in which the information is available;
- (3) a description of any contract or services that would be required to provide the information in the requested form;
- (4) a statement of the estimated cost of providing the information in the requested form as determined in accordance with the rules established by the attorney general under Section 552.262; and
- (5) a statement of the anticipated time required to provide the information in the requested form.

Id. § 552.231(b). Section 552.262 of the Government Code provides in pertinent part:

(b) The rules of the attorney general shall prescribe the methods for computing the charges for providing copies of public information in paper, electronic, and other kinds of media and the charge, deposit, or bond required for making public information that exists in a paper record available for inspection. The rules shall establish costs for various components of charges for providing copies of public information that shall be used by each governmental body in providing copies of public information or making public information that exists in paper record available for inspection.

Id. § 552.262(b). If the requestor does not timely respond to the district attorney's statement, the requestor is considered to have withdrawn the request for information. *Id.* § 552.231(d-1). You have provided our office with the written statement you provided to the requestor. In the written statement you state, "it will take approximately 20 to 30 days for [the district attorney] to review the requested e-mails for information [the district attorney] is requesting to withhold." The written statement then provides an approximate cost for this action. Section 70.3(d)(3) of title 1 of the Texas Administrative Code states a governmental body shall not recover a labor charge for reviewing the information to determine whether it will raise an exception to disclosure of the requested information under the Act. *See* 1 T.A.C. § 70.3(d)(3)(A). Thus, because the approximate cost in the written statement included a charge for the district attorney to determine whether it would raise an exception to disclosure for the requested information, we find the written statement does not

comply with section 552.231(b). Therefore, the present request for information is not withdrawn. Accordingly, we will consider your claimed exceptions.

You assert portions of the submitted information are excepted from disclosure under section 552.107(1) of the Government Code, which 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, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *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, *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 Exhibit B consists of attorney-client communications. You indicate the e-mail communications at issue were made for the purpose of rendering professional legal advice to the district attorney. Based on our review of the information at issue, we agree the information we have marked consists of privileged attorney-client communications the district attorney may withhold under section 552.107. However, you do not explain the

district attorney's relationship with, or the capacities of, some of the parties involved in the remaining communications in Exhibit B. Thus, you have failed to demonstrate the remaining communications in Exhibit B document privileged attorney-client communications. Accordingly, the district attorney may not withhold the remaining communications in Exhibit B under section 552.107 of the Government Code.

We note a portion of Exhibit B is subject to section 552.101 of the Government Code.² Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses the common-law right of privacy, which protects information that is 1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and 2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). This office has found that some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Upon review, we find a portion of Exhibit B is highly intimate and embarrassing and is not of legitimate public interest. Thus, the district attorney must withhold the information we have marked in Exhibit B under section 552.101 in conjunction with common-law privacy.

Section 552.137 provides that "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 [the Act]," unless the owner of the e-mail address has affirmatively consented to its public disclosure. Gov't Code § 552.137(a)-(b). The types of e-mail addresses listed in section 552.137(c) may not be withheld under this exception. *See id.* § 552.137(c). Likewise, section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. Upon review, the district attorney must withhold the e-mail addresses it has marked, in addition to the e-mail addresses we have marked in the remaining information under section 552.137 of the Government Code, unless the owners of the e-mail addresses have affirmatively consented to their public disclosure or section 552.137(c) applies.

In summary, the district attorney may withhold the information we have marked in Exhibit B under section 552.107. The district attorney must withhold the information we have marked in Exhibit B under section 552.101 in conjunction with common-law privacy. The district attorney also must withhold the e-mail addresses it has marked, in addition to the e-mail addresses we have marked, in the remaining information under section 552.137 of the

²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Government Code, unless the owners of the e-mail addresses have affirmatively consented to their public disclosure or section 552.137(c) applies. 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 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). If the governmental body does not file suit over 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).

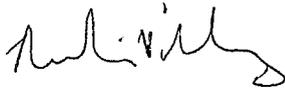
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can challenge that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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,



Melanie J. Villars
Assistant Attorney General
Open Records Division

MJV/jh

Ref: ID# 324946

Enc. Submitted documents

c: Mr. Randy Myers
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(w/o enclosures)