



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 10, 2008

Ms. Claire Yancey
Assistant District Attorney
Denton County Criminal District Attorney
P.O. Box 2850
Denton, Texas 76202

OR2008-16853

Dear Ms. Yancey:

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# 328808.

Denton County (the "county") received a request for all e-mails sent or received and all websites visited by a named individual employed by the county's Adult Probation Department (the "department") during a specified time period. You indicate that the department does not possess information responsive to the request for websites.¹ You indicate that you have released some of the requested e-mails. You claim that some of the submitted e-mails are not subject to the Act, and that the remaining submitted information is excepted from disclosure under sections 552.101, 552.102, 552.107, 552.111, 552.117, 552.130, 552.137, 552.139 and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative samples of information.²

¹The Act does not require a governmental body to release information that did not exist when a request for information was received, create responsive information, or obtain information that is not held by or on behalf of the county. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dism'd); Open Records Decision No. 452 at 3 (1986).

²We assume that the representative samples of information submitted to this office are 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.

We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we address your contention that some of the submitted e-mails are not public information subject to the Act. The Act is only applicable to "public information." *See* Gov't Code § 552.021. Section 552.002(a) defines public information as "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it." *Id.* § 552.002(a). Information that is collected, assembled, or maintained by a third party may be subject to disclosure under the Act if it is maintained for a governmental body, the governmental body owns or has a right of access to the information, and the information pertains to the transaction of official business. *See* Open Records Decision No. 462 (1987).

After reviewing the information at issue, we agree that the e-mails we have marked are purely personal, and thus do not constitute "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business" by or for the county. *See* Gov't Code § 552.021; *see also* Open Records Decision No. 635 (1995) (statutory predecessor not applicable to personal information unrelated to official business and created or maintained by state employee involving de minimis use of state resources). Thus, we conclude that these e-mails are not subject to the Act, and need not be released in response to this request.³ However, we find that the remaining e-mails at issue were created in connection with the transaction of official county business. Therefore, these e-mails constitute "public information" as defined by section 552.002(a) and are subject to the Act. Accordingly, we will address your arguments for the remaining e-mails.

You argue that Exhibit C is not subject to the Act because it consists of information being held on behalf of the judiciary. The Act generally requires the disclosure of information maintained by a "governmental body." *See* Gov't Code § 552.021. While the Act's definition of a "governmental body" is broad, it specifically excludes "the judiciary." *See id.* § 552.003(1) (A), (B). In Open Records Decision No. 646 (1996), this office determined that a community supervision and corrections department is a governmental body for purposes of the Act, and that its administrative records, such as personnel records and other records reflecting day-to-day management decisions, are subject to the Act. *Id.* at 5. On the other hand, we also ruled that specific records regarding individuals on probation and subject to the direct supervision of a court that are held by a community supervision and corrections department are not subject to the Act because such records are held on behalf of the judiciary. *Id.*; *see* Gov't Code § 552.003.

³As our ruling is dispositive for this information, we need not address your remaining arguments.

You assert that the e-mails included in Exhibit C involve individuals who are currently or were formerly on probation and subject to the direct supervision of a court. You argue that because the e-mails in Exhibit C pertain to probationers and probation officers carrying out their official duties for the court, the e-mails at issue are not subject to the Act, as they are held on behalf of the judiciary. We agree that portions of Exhibit C constitute records relating to individuals on probation. Therefore, we find that the information we have marked in Exhibit C constitutes records held by the county on behalf of the judiciary and is not subject to disclosure under the Act. *See* ORD 646 at 2-3; *Benavides v. Lee*, 665 S.W.2d 151 (Tex. App.—San Antonio 1983, no writ) (in determining whether governmental entity falls within judiciary exception, this office looks to whether governmental entity maintains relevant records as agent of judiciary with regard to judicial, as opposed to administrative, functions). However, the remaining information in Exhibit C constitutes administrative records, rather than records regarding individuals on probation and subject to the direct supervision of a court, and thus, is subject to the Act. We will now address your arguments for the information subject to the Act.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This exception encompasses information that other statutes make confidential. Section 552.101 encompasses section 58.007 of the Family Code, which provides in part:

(c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

- (1) if maintained on paper or microfilm, kept separate from adult files and records;
- (2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and
- (3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapter B.

Fam. Code § 58.007(c). Section 58.007(c) is applicable to records of juvenile delinquent conduct or conduct indicating a need for supervision that occurred on or after September 1, 1997. *See* Open Records Decision No. 644 (1996). The juvenile must have been at least 10 years old and less than 17 years of age when the conduct occurred. *See id.* § 51.02(2) (defining “child” for purposes of title 3 of Family Code). Section 58.007 is not applicable to information that relates to a juvenile as a complainant, victim, witness, or other

involved party and not as a suspect or offender. You assert that the information contained Exhibit K is subject to section 58.007. However, none of the information contained in that exhibit identifies a juvenile suspect or offender. We therefore conclude that the county may not withhold any of the submitted information in Exhibit K under section 552.101 of the Government Code in conjunction with section 58.007 of the Family Code.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy. Section 552.102(a) of the Government Code excepts from public disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]" *Id.* § 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(a) 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. Accordingly, we will address your privacy claims under sections 552.101 and 552.102(a).

Common-law privacy protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). This office has found that some kinds of medical information or information indicating disabilities or specific illnesses are protected by 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). In addition, this office has found that personal financial information not relating to a financial transaction between an individual and a governmental body is confidential under common-law privacy. See Open Records Decision Nos. 545 (1990), 523 (1989) (individuals's mortgage payments, assets, bills, and credit history). The county must withhold the information we have marked under section 552.101 in conjunction with common-law privacy. See *id.*, *cf.* Fam. Code § 58.007. However, we find that the remaining information does not contain information that is highly intimate or embarrassing and of no legitimate concern to the public. Accordingly, you may not withhold any portion of the remaining information under common-law privacy.

You claim that Exhibit D is excepted from public 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. ORD 676 at 6-7. 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). 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.*, 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 contend that Exhibit D contains communications made between representatives of and attorneys for the county which were made in furtherance of the rendition of professional legal services to the county. You also assert that the communications were intended to be confidential and that their confidentiality has been maintained. You have also identified the parties to the communications. Based on your representations, and our review of the information at issue, we find that section 552.107 is applicable to Exhibit D. Therefore, the county may withhold Exhibit D under section 552.107 of the Government Code.

You also raise section 552.111 of the Government Code for portions of the remaining information, which excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” Gov’t Code § 552.111. This exception encompasses the deliberative process privilege. *See Open Records Decision No. 615 at 2* (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); *Open Records Decision No. 538 at 1-2* (1990). In *Open Records Decision No. 615*, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined that

section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, and opinions that reflect a governmental body's policymaking processes. *See* ORD 615 at 5. A governmental body's policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. The Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (Gov't Code § 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. *See* Open Records Decision No. 631 at 3 (1995). Moreover, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *See* ORD 615 at 5. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

You claim Exhibit I is protected by the deliberative process privilege. You contend that the Exhibit I implicates the county's policymaking processes. Based on your representations, we conclude that the county may withhold the information we have marked in Exhibit I under section 552.111. However, you have not explained how the remaining information contained in Exhibit I constitutes internal communications of the county reflecting the deliberative or policymaking processes of the county. Further, you have not identified the parties included in those e-mails nor have you explained how they share a privity of interest. Thus, you have failed to establish that the deliberative process privilege applies to the remaining information contained in Exhibit I and it may not be withheld on that basis.

Section 552.117(a)(6) excepts from disclosure the home address and telephone number, social security number, and family member information of an officer or employee of a community supervision and corrections department established under Chapter 76 of the Government Code who performs a duty described by section 76.004(b) of the Government Code, regardless of whether the officer or employee complies with sections 552.024 or 552.1175 of the Government Code. *See* Gov't Code § 552.117(a)(6). We note that section 552.117 also encompasses a personal cellular telephone number, provided that the service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-7 (1988) (statutory predecessor to section 552.117 not applicable to cellular phone numbers provided and paid for by governmental body and intended for official use).

We have marked personal information in the remaining submitted information that may be protected by section 552.117(a)(6). You do not inform us whether the individuals whose information is at issue perform duties described by section 76.004(b) of the Government Code. To the extent the information we have marked relates to individuals who perform a duty described by section 76.004(b) for the department, the county must withhold the marked information under section 552.117(a)(6), including the marked cellular telephone

numbers to the extent the cellular telephones are paid for by the individuals at issue. Otherwise, the information may not be withheld under this section. If the personal information we have marked is not subject to section 552.117(a)(6) of the Government Code, it may be excepted under section 552.117(a)(1) of the Government Code.

If the individuals whose information we have marked do not perform duties described by section 76.004(b) of the Government Code for the department, section 552.117(a)(1) may apply to the information we have marked. 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. Gov't Code § 552.117(a)(1). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). The county may only withhold information under section 552.117(a)(1) if the individual at issue elected confidentiality under section 552.024 prior to the date on which the request for this information was made. You do not inform us, nor can we determine from the submitted information, whether the individuals at issue elected to keep their personal information confidential pursuant to section 552.024 of the Government Code prior to the county receiving the present request. Thus, if the individuals at issue made a timely election under section 552.024, the county must withhold the information we have marked pertaining to them under section 552.117(a)(1). If the individuals did not make a timely election under section 552.024, the marked information at issue may not be withheld under section 552.117(a)(1) of the Government Code.

You claim that the remaining information contains Texas motor vehicle record information. Section 552.130 of the Government Code excepts from disclosure information relating to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by a Texas agency. Gov't Code § 552.130(a)(1), (2). Although you assert that the remaining information contains information that is excepted under section 552.130, upon review, we find that the remaining information does not contain any information subject to section 552.130. Accordingly, none of the remaining information may be withheld on that basis.

Section 552.137 of the Government Code states 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. *Id.* § 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. The county must withhold the personal e-mail addresses that we have marked under section 552.137 unless the owner of an e-mail address has affirmatively consented to its public disclosure.

You assert Exhibit J is excepted from public disclosure under section 552.139 of the Government Code, which provides as follows:

(a) Information is excepted from the requirements of Section 552.021 if it is information that relates to computer network security or to the design, operation, or defense of a computer network.

(b) The following information is confidential:

(1) a computer network vulnerability report; and

(2) any other assessment of the extent to which data processing operations, a computer, or a computer program, network, system, or software of a governmental body or of a contractor of a governmental body is vulnerable to unauthorized access or harm, including an assessment of the extent to which the governmental body's or contractor's electronically stored information is vulnerable to alteration, damage, or erasure.

Id. § 552.139. You seek to withhold e-mails concerning access to payment systems, access to a law enforcement database, and obtaining access to an employee's computer. We determine that a portion of the information in Exhibit J, which we have marked, is excepted under section 552.139. However, you have failed to demonstrate how any of the remaining information in Exhibit J relates to computer network security or to the design, operation, or defense of a computer network as contemplated in section 552.139(a). Furthermore, you have not demonstrated that the remaining information consists of a computer network vulnerability assessment or report as contemplated in section 552.139(b). Consequently, none of the remaining information in Exhibit J may be withheld under section 552.139 of the Government Code.

We note that the submitted information contains partial credit card numbers and account numbers.⁴ Section 552.136 of the Government Code states that "[n]otwithstanding any other provision of [the Act], 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." *Id.* § 552.136(b). We have marked information that the county must withhold under section 552.136.

Finally, you claim that the remaining information contains social security numbers subject to section 552.147 of the Government Code. Section 552.147 provides that "[t]he social

⁴The 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).

security number of a living person is excepted from" required public disclosure under the Act. *Id.* § 552.147. Upon review, however, we find that the remaining information does not contain any information subject to section 552.147, and none may be withheld on that basis.

In summary, we have marked the e-mails that are not subject to the Act and need not be released. The county must withhold the information we have marked under section 552.101 in conjunction with common-law privacy. The county may withhold Exhibit D under section 552.107 of the Government Code. The county may withhold the information we have marked under section 552.111 of the Government Code. If the information we have marked relates to individuals who perform a duty described by section 76.004(b) for the department, the county must withhold the information we have marked under section 552.117(a)(6), including the marked cellular telephone numbers, if the cellular telephone service is paid for by the individuals at issue. Otherwise, to the extent that the individuals at issue timely elected confidentiality for their information under section 552.024, the county must withhold the information we have marked under section 552.117(a)(1), including the marked cellular telephone numbers, if the cellular telephone service is paid for by the individuals at issue. The county must withhold the personal e-mail addresses that we have marked under section 552.137 unless the owners of the e-mail addresses have affirmatively consented to their public disclosure. The county must withhold the partial credit card numbers and account numbers we have marked under section 552.136 of the Government Code and the information we have marked under section 552.139 of the Government Code. The remaining information that is subject to the Act 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

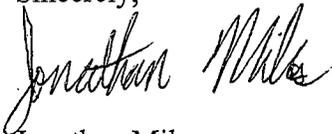
Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

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,



Jonathan Miles
Assistant Attorney General
Open Records Division

JM/ma

Ref: ID# 328808

Enc. Submitted documents

c: Requestor
(w/o enclosures)