



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 24, 2010

Mr. David M. Swope
Assistant County Attorney
Harris County
1019 Congress, 15th Floor
Houston, Texas 77002

OR2010-09333

Dear Mr. Swope:

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# 384086 (C.A. File 10GEN0735).

Harris County Judge Emmett (the "judge") received a request for the following information: (1) e-mails sent to or from the judge from January 1, 2009, through February 28, 2010; (2) information pertaining to Harris County (the "county") issued credit cards used by the judge during the same time period; and (3) the judge's telephone records from the same time period. You state you will provide some of the requested information to the requestor. You claim some of the submitted information is not subject to the Act and that portions of the submitted information are excepted from disclosure under sections 552.101, 552.102, 552.106, 552.107, 552.109, and 552.117 of the Government Code. We have considered your arguments and reviewed the submitted information.

Initially, we address your contention that the e-mails submitted as Exhibit B-1 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).

You state the information in Exhibit B-1 was not collected, assembled, or maintained in connection with the transaction of any official business of the judge. You assert the e-mails Exhibit B-1 pertain only to personal matters. After reviewing Exhibit B-1, we find that the e-mails at issue were created in connection with the transaction of official business. Therefore, these e-mails constitute "public information" as defined by section 552.002(a) and are subject to the Act. Thus, Exhibit B-1 is subject to the Act and must be released, unless it falls within the scope of an exception to disclosure. Gov't Code § 552.002(a)(1), .021.

We now address your exceptions to disclosure of 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." *Id.* § 552.101. This section encompasses information made confidential by statute. You assert the information in Exhibit B-2 is excepted from public disclosure under section 552.101 in conjunction with sections 418.176 through 418.182 of the Government Code. These sections were added to chapter 418 of the Government Code as part of the Texas Homeland Security Act (the "HSA"). The HSA makes specified categories of information confidential, including risk assessments, investigations of terrorism, vulnerabilities of critical infrastructure, and some types of information related to security systems. *Id.* §§ 418.176-.182. Section 418.177 provides that information is confidential if it:

- (1) is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, or investigating an act of terrorism or related criminal activity; and
- (2) relates to an assessment by or for a governmental entity, or an assessment that is maintained by a governmental entity, of the risk or vulnerability of persons or property, including critical infrastructure, to an act of terrorism or related criminal activity.

Id. § 418.177. Section 418.182 provides in part:

- (a) [I]nformation, including access codes and passwords, in the possession of a governmental entity that relates to the specifications, operating procedures, or location of a security system used to protect public or private property from an act of terrorism or related criminal activity is confidential.
- (b) Financial information in the possession of a governmental entity that relates to the expenditure of funds by a governmental entity for a security system is public information that is not excepted from required disclosure under Chapter 552.

Id. § 418.182. The fact that information may be related to a governmental body's emergency response preparedness or security concerns does not make such information *per se* confidential under the HSA. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). Furthermore, the mere recitation by a governmental body of a statute's key terms is not sufficient to demonstrate the applicability of a claimed provision. As with any exception to disclosure, a governmental body asserting one of the confidentiality provisions of the HSA must adequately explain how the responsive records fall within the scope of the claimed provision. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

Upon review, we find some of the information in Exhibit B-2 was collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, or investigating an act of terrorism and relate to an assessment of the risk or vulnerability of persons or property to an act of terrorism. Therefore, the judge must withhold this information, which we have marked, under section 552.101 in conjunction with section 418.177 of the Government Code. Additionally, we find some of the remaining information relates to the specifications, operating procedures, or location of a security system used to protect public or private property from an act of terrorism or related criminal activity. Thus, the judge must withhold this information, which we have marked, under section 552.101 in conjunction with section 418.182 of the Government Code. Although you generally assert the remaining information at issue is confidential under the HSA, you have not provided any arguments explaining this assertion. Accordingly, we find the judge has failed to demonstrate that any of the remaining information at issue is confidential under the HSA, and the judge may not withhold any of the remaining information in Exhibit B-2 under section 552.101 on that basis.

Next, you assert the e-mails submitted as Exhibit B-3 are excepted from disclosure under section 552.102 of the Government Code. Section 552.102(a) excepts from disclosure "[i]nformation in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]" *Id.* § 552.102. Section 552.102 is applicable only to information that is contained in the personnel file of an employee of a governmental body. *See Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref'd n.r.e.); *see also* Open Records Decision Nos. 473 at 3 (1987), 444 at 3-4 (1986), 423 at 2 (1984). The e-mails submitted as Exhibit B-3 are not contained in the personnel file of an employee of the judge. Thus, we conclude the judge may not withhold any portion of Exhibit B-3 under section 552.102.

We next address your argument under section 552.106 of the Government Code for Exhibit B-6. Section 552.106 excepts from disclosure "[a] draft or working paper involved in the preparation of proposed legislation" and "[a]n internal bill analysis or working paper prepared by the governor's office for the purpose of evaluating proposed legislation." Gov't Code § 552.106(a)-(b). We note section 552.106(b) applies to information created or used by employees of the governor's office for the purpose of evaluating proposed legislation.

The purpose of section 552.106 is to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the members of the legislative body. *See* Open Records Decision No. 615 at 2 (1993). Therefore, section 552.106 is applicable only to the policy judgments, recommendations, and proposals of persons who are involved in the preparation of proposed legislation and who have an official responsibility to provide such information to members of the legislative body. *See id.* at 1; *see also* Open Records Decision No. 429 at 5 (1985) (statutory predecessor to section 552.106 not applicable to information relating to governmental entity's efforts to persuade other governmental entities to enact particular ordinances).

In this instance, you generally assert Exhibit B-6 is excepted from disclosure under section 552.106. However, you have not provided any arguments to establish that the judge has an official responsibility to an involved legislative body to provide policy judgments, recommendations, and proposals to its members. Therefore, we conclude that the judge may not withhold any portion of Exhibit B-6 under section 552.106.

Next, you assert the e-mails submitted as Exhibit B-4 are excepted from disclosure under section 552.107 of the Government Code. Section 552.107(1) protects information that comes 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. *See* 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. *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 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)-(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. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no pet.). 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 the e-mails in Exhibit B-4 constitute attorney-client communications in the form of e-mails and attachments between the judge, the judge's staff, and county attorneys. You have identified most of the parties to the communications. You state the communications were intended to be confidential, and you indicate that the communications have maintained their confidentiality. Based upon your representations and our review, we conclude that the judge may withhold most of the e-mails in Exhibit B-4 under section 552.107(1). We note, however, that you have failed to demonstrate how the remaining information at issue consists of privileged attorney-client communications. Therefore, the judge may not withhold any of the remaining information in Exhibit B-4, which we have marked for release, under section 552.107.

We now turn to your argument under section 552.109 of the Government Code for Exhibit B-5. Section 552.109 excepts from public disclosure "[p]rivate correspondence or communications of an elected office holder relating to matters the disclosure of which would constitute an invasion of privacy[.]" Gov't Code § 552.109. This office has held the test to be applied to information under section 552.109 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 of the Government Code.

In *Industrial Foundation*, the Texas Supreme Court held that information is protected by common-law privacy 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. *Id.* at 685. The type of information considered intimate or 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, we find you have failed to demonstrate how any of the information in Exhibit B-5 is highly intimate or embarrassing. Therefore, none of the e-mails in Exhibit B-5 may be withheld under section 552.109 of the Government Code.

Next, you assert Exhibit B-7 contains information that is subject to section 552.117 of the Government Code. 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 this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). We note that section 552.117 also encompasses personal cellular telephone numbers, provided that the cellular telephone service is not paid for by a governmental body. See Open Records Decision No. 506 at 5-6 (1988). Whether a particular piece of information

is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). We have marked a representative sample of the types of personal information that are subject to section 552.117(a)(1). The judge may only withhold the information at issue under section 552.117(a)(1) if the individuals in question elected confidentiality under section 552.024 prior to the date on which the request for this information was made. If the individuals made timely elections under section 552.024, the judge must withhold the types information we have marked under section 552.117(a)(1). If the individuals did not make timely elections under section 552.024, the judge may not withhold the types of information we have marked under section 552.117(a)(1). Additionally, we understand you to assert the "Employee Call Detail Reports" and "Employee Personal Call Detail Reports" in Exhibit B-7 contain telephone numbers subject to section 552.117(a)(1). If these call detail reports contain the home or personal cellular telephone numbers of employees of the judge who timely elected confidentiality, then the judge also must withhold this information under section 552.117(a)(1).

Section 552.117(a)(2) excepts from public disclosure the home address, home telephone number, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with sections 552.024 and 552.1175 of the Government Code.¹ Gov't Code § 552.117(a)(2). We note section 552.117 is not applicable to officers' names, ages, work telephone numbers, and birth dates. *Id.* § 552.117(a). The judge must withhold the personal information we have marked pertaining to peace officers employed by the county under section 552.117(a)(2). However, the judge may only withhold the cellular telephone numbers pertaining to county peace officers if the officers at issue paid for the service with his own funds.

Next, we note section 552.1175 of the Government Code applies to portions of the remaining information. Section 552.1175 provides in part:

(a) This section applies only to:

(1) peace officers as defined by Article 2.12, Code of Criminal Procedure[.]

(b) Information that relates to the home address, home telephone number, or social security number of an individual to whom this section applies, or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

¹"Peace officer" is defined by Article 2.12 of the Texas Code of Criminal Procedure.

- (1) chooses to restrict public access to the information; and
- (2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Id. § 552.1175(a)(1), (b). We have marked the personal information of peace officers who are not employed by the county. If these individuals are still licensed peace officers and elect to restrict access to their information in accordance with section 552.1175(b), the judge must withhold the marked information under section 552.1175. If these individuals are no longer licensed peace officers or if no elections are made, the judge may not withhold these individuals' personal information under section 552.1175.

Next, we note some of the remaining information is excepted from disclosure under section 552.101 of the Government Code in conjunction with common-law privacy, which, as previously noted, 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.*, 540 S.W.2d 668, 685. In addition to the type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation*, this office has also found that the following types of information are excepted from required public disclosure under common-law privacy: 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), 545 (1990); and personal financial information not relating to a financial transaction between an individual and a governmental body, *See* Open Records Decision Nos. 545, 523 (1989) (individuals' mortgage payments, assets, bills, and credit history). We have marked information that is confidential under common-law privacy and must be withheld under section 552.101 on this basis.

We note the remaining submitted information contains information that is subject to sections 552.130, 552.136, and 552.137 of the Government Code.² Section 552.130 of the Government Code excepts from public disclosure information that relates to a Texas motor vehicle operator's or driver's license or permit. Gov't Code § 552.130(a)(1). The judge must withhold the Texas driver's license number we have marked under section 552.130.

Section 552.136 of the Government Code 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." *Id.*

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

§ 552.136; *see id.* § 552.136(a) (defining “access device”). Accordingly, the judge must withhold the credit card, insurance policy, and account numbers we have marked under section 552.136.

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. We have marked a representative sample of the types of e-mail addresses that must be withheld under section 552.137, unless the owner of an e-mail address has consented to its disclosure.

We note some of the remaining information appears to be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See Open Records Decision No. 550 (1990).*

In summary, the judge must withhold the information we have marked in Exhibit B-2 under section 552.101 of the Government Code in conjunction with sections 418.177 and 418.182 of the Government Code. Except for the information we have marked for release, the judge may withhold Exhibit B-4 under section 552.107 of the Government Code. The judge must withhold the types of information we have marked pursuant to section 552.117(a)(1), to the extent the employees at issue made timely elections under section 552.024 of the Government Code. Additionally, to the extent call detail reports in Exhibit B-7 contain the home or personal cellular telephone numbers of employees of the judge who timely elected confidentiality, then the judge also must withhold this information under section 552.117(a)(1) of the Government Code. The judge must withhold the information we have marked pertaining to peace officers employed by the county under section 552.117(a)(2); however, the judge may only withhold these officers’ cellular telephone numbers if the officers paid for the service with their own funds. The judge also must withhold information we have marked under section 552.1175 of the Government Code, to the extent the individuals whose information is at issue are currently a licensed peace officers who elected to restrict public access to their personal information. The judge must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy and sections 552.130 and 552.136 of the Government Code. The judge must withhold the types of personal e-mail addresses that we have marked under

section 552.137, unless the owner of an e-mail address has consented to its disclosure.³ The remaining information must be released to the requestor, but any information that is protected by copyright may only be released in accordance with copyright law.⁴

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

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Amy L.S. Shipp
Assistant Attorney General
Open Records Division

ALS/sdk

Ref: ID# 384086

Enc. Submitted documents

c: Requestor
(w/o enclosures)

³We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including: a Texas driver's license number under section 552.130 of the Government Code; insurance police and credit card account numbers under section 552.136 of the Government Code; and an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

⁴Regardless of the applicability of section 552.117, section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act. Gov't Code § 552.147(b).