



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 30, 2011

Mr. John W. Peeler
Counsel for Harris County Emergency Services
District No. 46
Coveler & Katz, P.C.
Two Memorial City Plaza
820 Gessner, Suite 1710
Houston, Texas 77024-8261

Mr. David R. Brewer
Counsel for Atascocita Volunteer Fire Department
Four Kingwood Place
900 Rockmead, Suite 1 32
Kingwood, Texas 77339

OR2011-09328

Dear Mr. Peeler and Mr. Brewer:

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# 422888.

The Atascocita Volunteer Fire Department (the "department"), which you represent, and which is part of the Harris County Emergency Services District No. 46 (the "district"), received a request for specified categories of information, including e-mail messages sent from three named individuals for the past six months; specified meeting minutes, budgets, and financial records; specified personnel records related to named individuals; and specified

“response records.”¹ You state the department does not have some of the requested information.² You also state the department has supplied some of the information to the requestor, but claim some of the information is excepted from disclosure under sections 552.101, 552.107, 552.136, and 552.137 of the Government Code. You also inform us that the request may implicate the proprietary interests of the following third parties and that you have notified them of the department’s receipt of the request for information and of their right to submit arguments to this office as to why the requested information should not be released to the requestor: Bound Tree Medical; Harrison Hydraulic Generators; P.E. Consulting Services, Inc.; Styker EMS Equipment; and Turnkey Industries. *See Gov’t Code § 552.305(d)*; *see also* Open Records Decision No. 542 at 3 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have considered the exceptions you claim and reviewed the submitted representative sample of information.³

Initially, you indicate some of the submitted information is not responsive to the request for information because the requestor has agreed to its redaction. This ruling does not address the public availability of any information that is not responsive to the request, and the department is not required to release this information in response to this request.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Section 552.101 encompasses information protected by other statutes. This office has concluded section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2, 575 at 2 (1990). Therefore, we conclude the department may not withhold any portion of the submitted information under section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503.

¹We have received correspondence both from an attorney for the department and an attorney for the district. We understand the requestor was required to make a deposit for payment of anticipated costs under section 552.263 of the Government Code and you inform us the department received the cost deposit on May 23, 2011. *See* Gov’t Code § 552.263(e) (if governmental body requires deposit or bond for anticipated costs pursuant to section 552.263, request for information is considered to have been received on date that governmental body receives deposit or bond).

²The Act does not require a governmental body to disclose information that did not exist when the request for information was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. App.—San Antonio 1978, writ *dism’d*); Open Records Decision No. 452 at 3 (1986).

³We assume 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 those records contain substantially different types of information than that submitted to this office.

Section 552.101 encompasses section 773.091 of the Health and Safety Code, which is applicable to certain information related to the provision of emergency medical services. Section 773.091(b) provides as follows:

Records of the identity, evaluation, or treatment of a patient by emergency medical services personnel or by a physician providing medical supervision that are created by the emergency medical services personnel or physician or maintained by an emergency medical services provider are confidential and privileged and may not be disclosed except as provided by this chapter.

Health & Safety Code § 773.091(b). Upon review, we find you have not established the information you seek to withhold under section 773.091 consists of the records of the identity, evaluation, or treatment of a patient by emergency medical services personnel or by a physician providing medical supervision that are created by the emergency medical services personnel or physician or maintained by an emergency medical services provider. *See id.* Thus, we conclude you have not established any of the submitted information is confidential under section 773.091(b), and the department may not withhold any of the information under section 552.101 on that ground.

Section 552.101 also encompasses federal law. Section 6103(a) of title 26 of the United States Code provides that tax return information is confidential. *See* 26 U.S.C. § 6103(a)(2), (b)(2)(A), (p)(8); *see also* Attorney General Op. MW-372 (1981). After review of your arguments and the submitted information, we find you have not established the submitted information contains tax return information for purposes of section 6103; therefore, the department may not withhold any of the submitted information under section 552.101 of the Government Code on that ground. *See* 26 U.S.C. § 6103(b)(3) (defining taxpayer return information).

Section 552.101 also encompasses the doctrine of common-law privacy, which protects information that (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). The types 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. In addition, this office has found 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); and personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990). Some of the submitted information is highly intimate or embarrassing and is not of legitimate concern to the public; therefore, the department must

withhold this information, which we have marked, under section 552.101 in conjunction with common-law privacy. Upon review, however, we find the remaining information either is not highly intimate or embarrassing or is of legitimate public interest; therefore, the remaining information is not confidential under common-law privacy, and the department may not withhold it under section 552.101 on that ground.

You assert some of the remaining information is excepted from disclosure under section 552.107 of the Government Code. Section 552.107(1) 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 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 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 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 pet.). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain 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 assert some of the submitted e-mail communications are excepted from disclosure under section 552.107 of the Government Code. However, you have not identified the parties to these communications. Thus, because you have not explained how these parties are

privileged with respect to the e-mails at issue, we find you have failed to demonstrate this information consists of communications between privileged parties. Therefore, the department may not withhold the information you have marked under section 552.107.

You assert some of the remaining information is excepted under section 552.136 of the Government Code. Section 552.136(b) provides “[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). Section 552.136(a) defines “access device” as “a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to . . . obtain money, goods, services, or another thing of value [or] initiate a transfer of funds other than a transfer originated solely by paper instrument.” *Id.* § 552.136(a). You assert the submitted information contains “access codes/PIN numbers to various [d]epartment accounts, fuel systems or electronic safes, the knowledge of which would allow a person to access things including but not limited to EMS related narcotics, training, and fuel.” Upon review, we find some of the submitted information consists of access device numbers; therefore, the department must withhold this information, which we have marked, under section 552.136 of the Government Code. However, you have not explained how the PIN number, Atascocita “landing page” and its password, and computer account password and login you have marked constitute access device numbers that may be used to obtain money, goods, services, or another thing of value for purposes of section 552.136. Thus, the department may not withhold this information under section 552.136.

Section 552.117 may also be applicable to some of the submitted information.⁴ Section 552.117 excepts from disclosure the home addresses and telephone numbers, emergency contact information, 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. Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 2 (to be codified as an amendment to Gov’t Code § 552.117(a)). 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). Therefore, the department may only withhold information under section 552.117 on behalf of current or former department members who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. For those current or former department members who timely elected to keep their personal information confidential, the school district must withhold the employees’ home addresses and telephone

⁴The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body. *See* Open Records Decision Nos. 481 at 2 (1987), 480 at 5 (1987); *see, e.g.*, Open Records Decision No. 470 at 2 (1987) (because release of confidential information could impair rights of third parties and because improper release constitutes a misdemeanor, attorney general will raise predecessor statute of section 552.101 on behalf of governmental bodies).

numbers, emergency contact information, social security numbers, and any information that reveals whether these employees have family members. The department may not withhold this information under section 552.117 for those department members who did not make a timely election to keep the information confidential.

You assert some of the remaining information is excepted from disclosure under section 552.137 of the Government Code. Section 552.137 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). Section 552.137 does not apply to a government employee's work e-mail address because such an address is not that of the employee as a "member of the public," but is instead the address of the individual as a government employee. The e-mail addresses at issue do not appear to be of a type specifically excluded by section 552.137(c). You do not inform us a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. Therefore, the department must withhold the e-mail addresses you have marked under section 552.137.

Finally, we note an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why requested information relating to it should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, no interested third party has submitted to this office any reasons explaining why the requested information should not be released. We thus have no basis for concluding any portion of the submitted information constitutes proprietary information of any interested third party, and the department may not withhold any portion of the submitted information on that basis. *See* Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3.

To conclude, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The department must withhold the information we have marked under section 552.117(a)(1) of the Government Code if the department members at issue made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. The department must also withhold the information we have marked under section 552.136 of the Government Code and the information you have marked under section 552.137 of the Government Code. The department must release the remaining information.

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,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/eb

Ref: ID# 422888

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Tom Clutts
Bound Tree Medical
5000 Tuttle Crossing Blvd.
Dublin, Ohio 43016
(w/o enclosures)

Mr. Gary Montana
Stryker EMS Equipment
2001 Wellington Drive
Mansfield, Texas 76063
(w/o enclosures)

Mr. Chad Marek
Harrison Hydraulic Generators
14233 West Road
Houston, Texas 77041
(w/o enclosures)

Mr. Rob Milner
Turnkey Industries
29710 FM 2978
Magnolia, Texas 77354
(w/o enclosures)

Mr. Mike Pietsch
P.E. Consulting Services, Inc.
3101 South Country Club Road
Garland, Texas 75043-1311
(w/o enclosures)