



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 21, 2011

Ms. Nancy S. Kempf
Public Information Act Officer
Alamo Colleges
201 West Sheridan
San Antonio, Texas 78204-1429

OR2011-10478

Dear Ms. Kempf:

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# 424515.

The Alamo Community College (the "college") received a request for twenty-five categories of information including personnel files of named college employees; information and correspondence relating to evaluations, positions, transfers, complaints, and salaries of named college employees; and information and correspondence relating to a specified mediation. You state the college is providing the requestor with some of the requested information. You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.102, 552.107, and 552.111 of the Government Code.¹ You also state that release of the remaining requested information may implicate the privacy interests of third parties. Accordingly, you provide documentation demonstrating you notified the third parties of the request and of their right to submit arguments to this office as to why their information should not be released. *See* Gov't Code § 552.304 (providing that interested party may submit written comments regarding why information should or should not be released). We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments submitted by one of the third parties and by the requestor.

¹Although you also raise Texas Rule of Evidence 503, we note that the proper exception to raise when asserting the attorney-client privilege for information not subject to section 552.022 is section 552.107 of the Government Code. *See* Open Records Decision 676 at 102 (2002).

Initially, we note that the college has redacted portions of the submitted information. You do not assert, nor does our review of our records indicate, that the college has been authorized to withhold this information without seeking a ruling from this office. *See id.* § 552.301(a); Open Records Decision 673 (2000). Therefore, the college has failed to comply with section 552.301(e) with regard to the redacted information. *See Gov't Code* § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit copy of specific information requested). In this instance, we are not able to discern the nature of the information the college has redacted. Because we are not able to review this redacted information, we have no means of determining whether it is excepted from release pursuant to the Act. Therefore, pursuant to section 552.302 of the Government Code, the college must release the redacted information. If you believe the information is confidential and may not lawfully be released, you must challenge this ruling in court pursuant to section 552.324 of the Government Code. In the future, the college must not redact requested information that it submits to this office in seeking an open records ruling, unless the information is the subject of a previous determination under section 552.301. *See id.* §§ 552.301(e)(1)(D), .302; Open Records Decision No. 673 (2001).

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. Section 552.101 encompasses the common-law right to privacy. 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). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. The type of information considered intimate and 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. 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). Whether information is subject to a legitimate public interest and therefore not protected by common-law privacy must be determined on a case-by-case basis. *See* Open Records Decision No. 373 (1983). This office has noted the public has a legitimate interest in information that relates to public employees and their conduct in the workplace. *See, e.g.*, Open Records Decision Nos. 562 at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs but in fact touches on matters of legitimate public concern), 470 at 4 (job performance does not generally constitute public employee's private affairs), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of government employees), 405 at 2 (1983) (manner in which public employee's job was performed cannot be said to be of minimal public interest), 392 (1982) (reasons for employee's resignation ordinarily not private).

You contend the information in Tabs 2 and 3 is protected under common-law privacy. You assert release of this information would reveal health and other personal information. Having considered your arguments and reviewed the information you contend is private, we find you have not demonstrated any of the submitted information is highly intimate or embarrassing and not a matter of legitimate public interest. We therefore conclude the college may not withhold any of the information under section 552.101 of the Government Code in conjunction with common-law privacy.

You also claim the information in Tab 3 is excepted from disclosure under section 552.102 of the Government Code. Section 552.102(a) excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” Gov’t Code § 552.102(a). You assert the privacy analysis under section 552.102(a) is the same as the common-law privacy test under section 552.101, which is discussed above. *See Indus. Found.*, 540 S.W.2d at 685. In *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref’d n.r.e.), the court ruled the privacy test under section 552.102(a) is the same as the *Industrial Foundation* privacy test. However, the Texas Supreme Court recently expressly disagreed with *Hubert*’s interpretation of section 552.102(a) and held its privacy standard differs from the *Industrial Foundation* test under section 552.101. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, No. 08-0172, 2010 WL 4910163, at *5 (Tex. Dec. 3, 2010). The supreme court then considered the applicability of section 552.102, and has held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Id.* at *10. Having carefully reviewed the submitted information, we find that none of the information is excepted under section 552.102(a) and, therefore, none of it may be withheld on that basis.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. Gov’t Code § 552.107(1). 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 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 to only 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 to only 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, orig. proceeding). 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 information in Tab 4 and in Exhibits B and C in Tab 5 constitutes e-mail communications amongst college officials, in-house legal counsel, and outside legal counsel that were made for the purpose of providing legal services to the college. You state the communications were intended to be confidential and have remained confidential. The requestor argues the communications she requested are those that involve the college’s general counsel acting in a managerial capacity and, thus, are not protected by the attorney-client privilege. Upon our review of the information at issue and after careful consideration of the requestor’s comments, we find the information in Exhibits B and C in Tab 5 are communications made for the purpose of providing legal services to the college, and the college may withhold this information under section 552.107(1) of the Government Code.² However we find you have failed to demonstrate how the e-mail communication in Tab 4 is a privileged communication that has remained confidential. Therefore, we conclude you have failed to establish how the information in Tab 4 is a privileged communication for the purposes of section 552.107; thus, the college may not withhold the information in Tab 4 on this basis.

We note a portion of the remaining information may be subject to section 552.117 of the Government Code.³ Section 552.117 of the Government Code 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 of the Government Code. 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)). Section 552.117 is also applicable to personal pager and cellular telephone numbers, provided the cellular telephone

²As our ruling is dispositive, we need not address the college’s remaining argument for this information.

³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).*

service or pager service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (statutory predecessor to section 552.117 of the Government Code not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). 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). Therefore, a governmental body must withhold information under section 552.117 on behalf of current or former officials or employees only if these individuals made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Accordingly, if the employees whose information is at issue timely elected to keep their personal information confidential pursuant to section 552.024, the college must withhold the information we have marked in Tabs 2 and 5 under section 552.117(a)(1). However, the college must withhold the cellular telephone number we have marked only if the employee pays for the cellular telephone service with personal funds. In addition, the college may not withhold the information we have marked under section 552.117 if the employees did not make a timely election to keep the information confidential.

We note some of the information in Tab 3 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. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). 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.

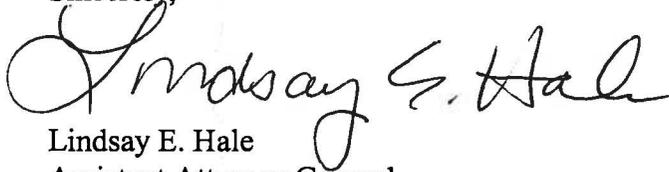
In summary: (1) the college may withhold the information in Exhibits B and C of Tab 5 under section 552.107(1) of the Government Code; and (2) to the extent the employees whose information is at issue timely-elected confidentiality under section 552.024 and the employee whose cellular telephone number is at issue pays for the cellular service with personal funds, the college must withhold the information we have marked under section 552.117(a)(1) of the Government Code. The college must release the remaining information; however, any information protected by copyright may only be released in accordance with copyright law.

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,

A handwritten signature in black ink that reads "Lindsay E. Hale". The signature is written in a cursive style with a large initial "L".

Lindsay E. Hale
Assistant Attorney General
Open Records Division

LEH/em

Ref: ID# 424515

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Ms. Patricia Meurin
8915 Gathering Pass
Converse, Texas 78109
(w/o enclosures)

Ms. Maegan Stansell
1210 Weeping Willow
San Antonio, Texas 78232
(w/o enclosures)