



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 5, 2012

Ms. Peggy Scheffler
Records Management Coordinator
BexarMet Water District
P.O. Box 245994
San Antonio, Texas 78224-5994

OR2012-00231

Dear Ms. Scheffler:

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# 439759.

The Bexar Metropolitan Water District (the "district") received a request for all e-mails between any of three individuals during a specified time period. You state you have provided the requestor with some of the requested information. You claim that a portion of the remaining requested information is not subject to the Act. You also raise sections 552.101, 552.103, 552.107, 552.111, 552.113, and 552.137 of the Government Code.¹ We have considered your arguments and reviewed the submitted information.

You argue portions of the submitted information are not subject to the Act. The Act is applicable only to "public information." *See* Gov't Code §§ 552.002, .021. Section 552.002(a) defines "public information" as:

[I]nformation that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

¹Although you raise section 552.101 of the Government Code in conjunction with the attorney-client privilege found in section 552.107 of the Government Code, this office has concluded section 552.101 does not encompass discovery privileges or other exceptions found in the Act. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Additionally, you raise Texas Rule of Evidence 503, however, we note section 552.107 is the proper exception to raise when asserting the attorney-client privilege for information not subject to required disclosure under section 552.022 of the Government Code. *See* Open Records Decision Nos. 677 (2002), 676 (2002).

(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). Thus, virtually all of the information in a governmental body's physical possession constitutes public information and, thus, is subject to the Act. *Id.* § 552.002(a)(1); *see* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). You contend that portions of the information at issue are simply an incidental use of e-mail by a district employee with regard to personal opinion. However, upon review, we find the e-mails at issue relate to official district business. Accordingly, this information constitutes public information subject to the Act, which must be released unless the district demonstrates that it falls within an exception to public disclosure under the Act. *See* Gov't Code §§ 552.006, .021, .301, .302. Thus, we will consider the district's remaining arguments against the disclosure of this information and the remaining 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." Gov't Code § 552.101. This exception encompasses information other statutes make confidential, including the Americans with Disabilities Act of 1990 (the "ADA"). *See* 42 U.S.C. § 12101 *et seq.* The ADA provides a covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of the applicant and may condition an offer of employment on the results of the examination, provided that information about the medical conditions and medical histories of applicants or employees must be (1) collected and maintained on separate forms, (2) kept in separate medical files, and (3) treated as a confidential medical record. *See* 42 U.S.C. § 12112(d)(3)(B); *see also* 29 C.F.R. § 1630.14(b); Open Records Decision No. 641 (1996). The district must withhold the information you have marked under section 552.101 of the Government Code in conjunction with the ADA.

Section 552.101 also encompasses the doctrines of common-law and constitutional privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus Found. v. Tex Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). 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. 540 S.W.2d at 683. 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), 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), information concerning the intimate relations between individuals and their family members, *see* Open Records Decision No. 470 (1987), and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). However, information pertaining to the work conduct and job performance of public employees is subject to a legitimate public interest, and, therefore, generally not protected from disclosure under common-law privacy. *See, e.g.*, Open Records Decision Nos. 470 at 4 (1987) (public has legitimate interest in job qualifications and performance of public employees), 455 (1987) (public employee's job performance or abilities generally not protected by privacy), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of governmental employees), 423 at 2 (1984) (scope of public employee privacy is narrow). Upon review, we find that the information we have marked is highly intimate or embarrassing information of no legitimate public interest. Therefore, the department must withhold this marked information under section 552.101 in conjunction with common-law privacy. However, no portion of the remaining information at issue is highly intimate or embarrassing information of no legitimate public concern. Therefore, no portion of the remaining information at issue may be withheld under section 552.101 in conjunction with common-law privacy.

Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common-law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). Upon review, we find that no portion of the remaining information falls within the zones of privacy or otherwise implicates an individual's privacy interests for purposes of constitutional privacy. Therefore, none of the remaining information may be withheld on that basis.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re 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)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5). Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no 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 information you have marked consists of communications between district attorneys and the district’s corporate counsel. You state these communications were made for the purpose of providing legal advice to the district. You state these communications were confidential, and the district has not waived the confidentiality of the information at issue. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information you have marked. Accordingly, the district may withhold the information you have marked under section 552.107 of the Government Code.²

Section 552.113 of the Government Code provides in relevant part as follows:

(a) Information is excepted from the requirements of [required public disclosure] if it is:

...

(2) geological or geophysical information or data, including maps concerning wells, except information filed in connection with an application or proceeding before an agency[.]

²As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

Gov't Code § 552.113(a)(2). In Open Records Decision No. 627 (1994), this office concluded section 552.113(a)(2) protects from public disclosure only (i) geological and geophysical information regarding the exploration or development of natural resources that is (ii) commercially valuable. ORD 627 at 3-4 (overruling rationale of Open Records Decision No. 504 (1988)). The decision explained the phrase "information regarding the exploration or development of natural resources" means "information indicating the presence or absence of natural resources in a particular location, as well as information indicating the extent of a particular deposit or accumulation." *Id.* at 4 n.4. However, section 552.113(a)(2) does not except general geological information about a particular location that is unrelated to the "presence or absence of natural resources." In order to be commercially valuable for purposes of Open Records Decision No. 627 and section 552.113, information must not be publicly available. Open Records Decision No. 669 (2000).

Upon review, we agree the information we have marked is commercially valuable geological or geophysical information regarding the exploration of or development of natural resources. Accordingly, the district must withhold this information pursuant to section 552.113 of the Government Code. However, we find the district has not demonstrated any of the remaining information at issue is commercially valuable geological or geophysical information regarding the exploration of or development of natural resources. Accordingly, the district may not withhold any of the remaining information at issue under section 552.113.

The district claims certain e-mail addresses in the remaining information are excepted from disclosure under section 552.137 of the Government Code. This section 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(c)(1) states an e-mail address "provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent" is not excepted from public disclosure. *Id.* § 552.137(c)(1). In this instance, some of the e-mail addresses at issue belong to individuals who have a contractual relationship with the district. Because these e-mail addresses are specifically excluded by section 552.137(c)(1), the district may not withhold them on this basis. Accordingly, the district must withhold only the e-mail addresses we have marked under section 552.137 of the Government Code unless the owners of the addresses have affirmatively consented to their release under section 552.137(b).³

In summary, the district must withhold the information you have marked under section 552.101 of the Government Code in conjunction with the ADA, and the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The district may withhold the information you have marked under

³We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including 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.

section 552.107 of the Government Code. The district must withhold the information we have marked under section 552.113 of the Government Code, and the e-mail addresses we have marked under section 552.137 of the Government Code, unless their owners have affirmatively consented to their release. The remaining information must be released.

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,



Lauren E. Kleine
Assistant Attorney General
Open Records Division

LEK/em

Ref: ID# 439759

Enc. Submitted documents

cc: Requestor
(w/o enclosures)