



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 20, 2012

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OR2012-09502

Dear Mr. Schultz:

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# 456628.

Denton County (the "county") received a request for e-mails sent or received by a named individual for a specified time period, excluding specified e-mails.¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.110, 552.136, and 552.139 of the Government Code.² You also state the submitted information may implicate the interests of third parties. Accordingly, you notified third parties of this request for information and of their rights to submit arguments to this office as to why the information should not be released. *See* Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to

¹You indicate the county received clarification from the requestor. *See* Gov't Code § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

²Although you raise sections 552.102, 552.108, 552.111, 552.117, 552.130, and 552.147 of the Government Code, you have submitted no arguments explaining how these exceptions apply to the submitted information. Therefore, we assume you have withdrawn these exceptions. *See* Gov't Code §§ 552.301, .302.

rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances). Further, you also notified individuals and governmental bodies of the request for information and of their rights to submit arguments to this office as to why the information should not be released. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have received comments from the Texas Alcoholic Beverage Commission ("TABC"); the Texas Comptroller of Public Accounts (the "comptroller's office"); Linebarger Goggan Blair & Sampson, LLP; and McCreary, Veselka, Bragg and Allen, P.C. We have considered the submitted arguments and reviewed the submitted representative sample of information.³

You raise section 552.110 of the Government Code for Exhibit D; however, section 552.110 is designed to protect the interests of third parties, not the interests of a governmental body. As such, a governmental body may not raise section 552.110 on behalf of a third party. Therefore, if we do not receive comments from a third party explaining why the information at issue should not be released, we will conclude section 552.110 is not applicable. An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should not be released. *See id.* § 552.305(d)(2)(B). As of the date of this ruling, we have not received comments from any of the remaining third parties. Thus, we have no basis to conclude any of the remaining third parties has a protected proprietary interest in the submitted information. *See id.* § 552.110(a)-(b); 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. Accordingly, the county may not withhold any of the information at issue on the basis of any proprietary interest the remaining third parties may have in the information.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes. Section 262.030(c) provides a competitive proposal procedure for the purchase of high technology items by a county, and states in pertinent part:

(c) If provided in the request for proposals, proposals shall be opened so as to avoid disclosure of contents to competing offerors and kept secret during the process of negotiation. All proposals that have been submitted shall be available and open for public inspection after the contract is awarded, except

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.

for trade secrets and confidential information contained in the proposals and identified as such.

Local Gov't Code § 262.030(c). In general, section 552.101 only excepts information from disclosure where the express language of a statute makes certain information confidential or states that information shall not be released to the public. Open Records Decision No. 478 (1987). The plain language of section 262.030(c) does not expressly make bid proposals confidential. Accordingly, we determine the requested information is not confidential pursuant to section 262.030(c). Thus, the county may not withhold any portion of the information at issue pursuant to section 552.101 of the Government Code in conjunction with section 262.030 of the Local Government Code.

Section 552.103 of the Government Code provides in relevant part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date of the receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

This office has held that "litigation" within the meaning of section 552.103 includes contested cases conducted in a quasi-judicial forum. *See, e.g.*, Open Records Decision Nos. 474 (1987), 368 (1983), 301 (1982). For instance, this office has held that cases conducted under the Texas Administrative Procedure Act (the "APA"), chapter 2001 of the Government Code, constitute "litigation" for purposes of section 552.103. *See, e.g.*, Open

Records Decision Nos. 588 at 7 (1991) (construing statutory predecessor to the APA). We further note a contested case before the State Office of Administrative Hearings (the "SOAH") is considered litigation for purposes of the APA. *See id.* In determining whether an administrative proceeding is conducted in a quasi-judicial forum, this office has considered the following factors: 1) whether the dispute is, for all practical purposes, litigated in an administrative proceeding where a) discovery takes place, b) evidence is heard, c) factual questions are resolved, d) a record is made; and 2) whether the proceeding is an adjudicative forum of first jurisdiction, i.e., whether judicial review of the proceeding in district court is an appellate review and not the forum for resolving a controversy on the basis of evidence. *See* ORD 588.

You claim Exhibit F pertains to a pending administrative case with TABC that was filed prior to the date the county received the request. We note TABC hearings are conducted by the SOAH and governed by the APA. *See* Alco. Bev. Code § 5.43 (designating SOAH to conduct certain administrative hearings), 16 TAC § 37.2 (requiring all contested cases under the Alcohol and Beverage Code to comply with the APA). However, we note the county is not a party to these proceedings. In such a situation, we require an affirmative representation from a governmental body with the litigation interest that the governmental body wants the information at issue withheld from disclosure under section 552.103. TABC has submitted comments to this office stating it objects to release of the information at issue because it relates to pending litigation against TABC. Based on your representations and those of TABC, we determine the litigation was pending on the date the county received the request for information. TABC states the information at issue relates to issues raised in the pending litigation. Thus, we find Exhibit F is related to the pending litigation for the purposes of section 552.103. Accordingly, the county may withhold Exhibit F under section 552.103 of the Government Code on behalf of TABC.

However, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Further, the applicability of section 552.103(a) ends once the litigation has concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

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, 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 Exhibit D consists of confidential communications between county attorneys, county employees and elected officials, and outside counsel. You state these communications were exchanged for legal advice and were intended to be confidential and that the confidentiality has been maintained. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to Exhibit D. Accordingly, the county may generally withhold Exhibit D under section 552.107(1) of the Government Code. However, we note one of the individual e-mails at issue was communicated with an individual you have not established is a privileged party. Therefore, we find you have failed to demonstrate this communication constitutes a privileged attorney-client communication; thus, this e-mail may not be withheld under section 552.107. Accordingly, with the exception of the marked non-privileged e-mail, the county may withhold Exhibit D under section 552.107(1).

Section 552.136 of the Government Code provides in part 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.” Gov’t Code § 552.136(b); *see id.* § 552.136(a) (defining “access device”). Upon review, we find the county must withhold the account numbers we have marked in Exhibit C under section 552.136 of the Government Code.

You indicate you will redact e-mail addresses of members of the public under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).⁴ However, we note the comptroller's office seeks to withhold an institutional e-mail address under section 552.137. 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). *Id.* § 552.137(a)-(c). Section 552.137 is not applicable to an institutional e-mail address, an Internet website address, the general e-mail address of a business, an e-mail address of a person who has a contractual relationship with a governmental body, or an e-mail address maintained by a governmental entity for one of its officials or employees. Thus, the county may not withhold the e-mail address the comptroller's office seeks to withhold under section 552.137 of the Government Code. However, the county must withhold the e-mail addresses of members of the public under section 552.137 of the Government Code, unless the owners of the addresses affirmatively consent to their release.

You also raise section 552.139 of the Government Code for Exhibit C. Section 552.139 provides, in part:

(a) Information is excepted from [required public disclosure] if it is information that relates to computer network security, to restricted information under Section 2059.055 [of the Government Code], 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, a computer program, network, system, or system interface, 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 containing sensitive or critical information is vulnerable to alteration, damage, erasure, or inappropriate use[.]

⁴We note Open Records Decision No. 684 is 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 opinion.

Id. § 552.139(a), (b)(1)-(2). Section 2059.055 of the Government Code provides in pertinent part:

(b) Network security information is confidential under this section if the information is:

(1) related to passwords, personal identification numbers, access codes, encryption, or other components of the security system of a state agency;

(2) collected, assembled, or maintained by or for a governmental entity to prevent, detect, or investigate criminal activity; or

(3) related to an assessment, made by or for a governmental entity or maintained by a governmental entity, of the vulnerability of a network to criminal activity.

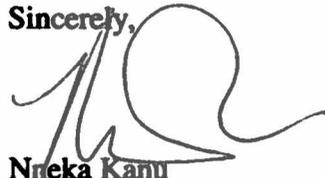
Id. § 2059.055(b). You state the information at issue contains usernames, user-IDs, passwords, badge numbers, and computer program and network information. You explain that the release of this information would make the county vulnerable to unauthorized access or harm. Based on your representations and our review, we find some of the information at issue falls within the scope of section 552.139. As such, we conclude the county must withhold this information, which we have marked, under section 552.139 of the Government Code. However, we find you have failed to demonstrate the remaining information for which you raise section 552.139 relates to computer network security, the design, operation, or defense of the computer network, or an assessment of the computer network vulnerabilities. Consequently, none of the remaining information in Exhibit C may be withheld under section 552.139.

In summary, the county may withhold Exhibit F under section 552.103 of the Government Code on behalf of TABC. With the exception of the marked non-privileged e-mail, the county may withhold Exhibit D under section 552.107(1) of the Government Code. The county must withhold the information we have marked in Exhibit C under section 552.136 of the Government Code. The county must withhold the e-mail addresses of members of the public under section 552.137 of the Government Code, unless the owners of the addresses affirmatively consent to their release. The county must withhold the information we have marked under section 552.139 of the Government Code. 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,



Nneka Kanu
Assistant Attorney General
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NK/bhf

Ref: ID# 456628

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