



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 5, 2012

Ms. Michelle T. Rangel  
Assistant County Attorney  
Fort Bend County  
301 Jackson Street, Suite 728  
Richmond, Texas 77469

OR2012-10358

Dear Ms. Rangel:

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# 458073.

Fort Bend County (the "county") received a request for all e-mails sent from three specified individuals' accounts since January 1, 2012. The county received another request from a second requestor for the same information requested in the first request, all text messages sent between two of the specified individuals since January 1, 2012, and itemized cellular telephone bills for six specified individuals for January 1, 2012, through May 6, 2012. You state the county does not have any information responsive to the request for text messages. You claim the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.108, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information, which is in part a representative sample.<sup>1</sup>

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<sup>1</sup>We 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. Additionally, we understand Exhibit G to be submitted for informational purposes only. This ruling does not address the public availability of non-responsive information, and the county is not required to release non-responsive information in response to this request.

Initially, you claim some of the requested information is not subject to the Act. We note the Act is applicable to "public information." See Gov't Code §§ 552.002, .021. Section 552.002(a) provides that "public information" consists of

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). 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). The Act also encompasses information a governmental body does not physically possess, if the information is collected, assembled, or maintained for the governmental body, and the governmental body owns the information or has a right of access to it. Gov't Code § 552.002(a)(2); see Open Records Decision Nos. 558 at 2 (1990), 462 at 4 (1987).

We further note that the characterization of information as "public information" under the Act is not dependent on whether the requested records are in the possession of an individual or whether a governmental body has a particular policy or procedure that establishes a governmental body's access to the information. See Open Records Decision No. 635 at 3-4 (1995) (finding that information does not fall outside definition of "public information" in Act merely because individual member of governmental body possesses information rather than governmental body as whole); see also Open Records Decision No. 425 (1985) (concluding, among other things, that information sent to individual school trustees' homes was public information because it related to official business of governmental body) (overruled on other grounds by Open Records Decision No. 439 (1986)). Thus, the mere fact that the county does not possess the information at issue does not take the information outside the scope of the Act. See ORD 635 at 6-8. Furthermore, we note information in a public official's personal cellular telephone records may be subject to the Act where the public official uses the personal cellular telephone to conduct public business. See *id.* at 6-7 (appointment calendar owned by a public official or employee is subject to the Act when it is maintained by another public employee and used for public business).

You state the e-mails you have submitted in Exhibit B submitted in response to the first request are personal e-mails of the specified individuals and were not created in or maintained in connection with the transaction of official business of the county. See ORD 635 at 4 (section 552.002 not applicable to personal information unrelated to official business and created or maintained by state employee involving *de minimis* use of state resources). Upon review of the information at issue, we find this information is not

collected, assembled, or maintained for the county or the county does not own or have a right of access to such information. Therefore, we conclude the information submitted in Exhibit B in response to the first request is not subject to the Act and need not be released in response to this request.

Additionally, you contend the county does not maintain or have a right of access to the requested text messages. You state that to the extent any responsive text messages exist, they are in the sole possession of Sprint Solutions, Inc. ("Sprint"), the county's cellular service provider.<sup>2</sup> Pursuant to section 552.303 of the Government Code, we asked the county for a copy of its contract with Sprint.<sup>3</sup> You state the named employees' cellular telephones are issued and paid for by the county and are to be used in their performance of their official duties. You represent the county does not know whether the requested text messages relate to the official business of the county because the county does not have copies of the text messages and the employees cannot recall whether the text messages at issue were sent regarding official business or for purely personal matters. You further represent the county has no physical copies of business or personal text messages and has no legal right of access to the requested text messages stored in Sprint facilities.<sup>4</sup> Based upon your representations, we find this information is not collected, assembled, or maintained for the county or the county does not own or have a right of access to such information. Thus, we conclude the requested text messages are not subject to disclosure under the Act and need not be released to the requestor.

Next, we note a portion of the submitted information, which we have marked, is not responsive to the instant requests for information because it was created after the date the first request was received. This ruling does not address the public availability of any information that is not responsive to the instant requests and the county is not required to release that information in response to these requests.<sup>5</sup>

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<sup>2</sup>We note that whether a party to a contract with a governmental body is an independent contractor and/or an agent is not dispositive of whether information held by the party is subject to the Act. *See* Open Records Decision No. 462 at 4-5 (1987). We also note a governmental body cannot compromise its obligations under the Act simply by deciding to enter into a contract. *See* Open Records Decision Nos. 541 at 4 (1990), 514 at 1 (1988).

<sup>3</sup>*See* Gov't Code § 552.303(c)-(d) (if attorney general determines information in addition to that required by section 552.301 is necessary to render decision, written notice of that fact shall be given to governmental body and requestor, and governmental body shall submit necessary additional information to attorney general not later than seventh calendar day after date of receipt of notice).

<sup>4</sup>We note the contract you have provided does not specifically grant or deny access to text data.

<sup>5</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

You raise section 552.101 of the Government Code for Exhibit C. 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 section 261.201 of the Family Code, which provides in relevant part:

[T]he following information is confidential, is not subject to public release under [the Act], and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

- (1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and
- (2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a). Although you raise section 261.201 for the information in Exhibit C, you have failed to demonstrate any portion of this information was used or developed in an investigation of alleged or suspected child abuse or neglect under section 261.201(a)(2). Furthermore, you have not established the information at issue is a report of alleged or suspected abuse or neglect made under section 261.201(a)(1). *See id.* § 261.001(1), (4) (defining “abuse” and “neglect” for purposes of Fam. Code ch. 261). Therefore, the county may not withhold Exhibit C under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code.

Section 552.101 of the Government Code also encompasses information protected by section 58.007 of the Family Code, which makes confidential juvenile law enforcement records relating to delinquent conduct or conduct indicating a need for supervision that occurred on or after September 1, 1997. *Id.* § 51.03(a), (b) (defining “delinquent conduct” and “conduct indicating a need for supervision”). Section 58.007 provides in relevant part:

(c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

- (1) if maintained on paper or microfilm, kept separate from adult files and records;

(2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and

(3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapters B, D, and E.

*Id.* § 58.007(c). You assert the information in Exhibit C is subject to section 58.007 of the Family Code. For purposes of section 58.007(c), a “child” is a person who is ten years of age or older and under seventeen years of age. *See id.* § 51.02(2). Upon review, we find you have failed to demonstrate the e-mails in Exhibit C consist of juvenile law enforcement records which involve a child engaged in delinquent conduct or conduct indicating a need for supervision. Therefore, the county may not withhold Exhibit C under section 552.101 of the Government Code in conjunction with section 58.007 of the Family Code.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which 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 highly 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 determined common-law privacy protects the identifying information of juvenile offenders. *See Open Records Decision No. 384* (1983); *cf.* Fam. Code § 58.007. In this instance, the submitted information contains the identity of an individual who may have been a juvenile offender. However, because the submitted information does not reflect this individual’s age, we must rule conditionally. Therefore, to the extent the information we have marked pertains to an offender who was between the ages of ten and sixteen at the time of the alleged conduct, the county must withhold the information we have marked in Exhibit C under section 552.101 of the Government Code in conjunction with common-law privacy. However, to the extent the information we have marked does not identify an offender who was between the ages of ten and sixteen at the time of the alleged conduct, the county may not withhold this information on that basis. Additionally, we find none of the remaining information in Exhibit C is intimate or embarrassing and of no legitimate public interest. Therefore, the county may not withhold any of the remaining information in Exhibit C under section 552.101 of the Government Code in conjunction with common-law privacy.

Next, you raise section 552.107 of the Government Code for the information submitted in Exhibit D. 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 in Exhibit D consists of confidential communications made in furtherance of professional legal services rendered to the county by the county attorneys. You state these communications were exchanged between county attorneys and county staff and contain the county attorneys’ legal advice and strategies. You state these communications were intended to be confidential and that the confidentiality has been maintained. Based on these representations, and our review, we agree section 552.107 is applicable to the information in Exhibit D, and the county may generally withhold this information under section 552.107(1) of the Government Code.

Section 552.108 of the Government Code provides in pertinent part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime; [or]

(2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication;

Gov't Code § 552.108(a)(1)-(2). Generally speaking, subsection 552.108(a)(1) is mutually exclusive of subsection 552.108(a)(2). Subsection 552.108(a)(1) protects information, the release of which would interfere with a particular pending criminal investigation or prosecution. In contrast, subsection 552.108(a)(2) protects information that relates to a concluded criminal investigation or prosecution that did not result in a conviction or deferred adjudication. A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why the exception it claims is applicable to the information the governmental body seeks to withhold. *See id.* § 552.301(e)(1)(A) (governmental body must provide comments explaining why claimed exceptions to disclosure apply). You raise section 552.108 for the information submitted in Exhibit E. However, you have not provided any arguments explaining how section 552.108 applies to the responsive e-mail in Exhibit E. Accordingly, we find you have failed to demonstrate how release of this information would interfere with the detection, investigation, or prosecution of crime, or how it relates to an investigation that did not result in conviction or deferred adjudication. Therefore, you may not withhold any of the submitted responsive information in Exhibit E under section 552.108 of the Government Code.

Section 552.108(b)(1) of the Government Code excepts from disclosure “[a]n internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution . . . if . . . release of the internal record or notation would interfere with law enforcement or prosecution[.]” *Id.* § 552.108(b)(1); *see City of Fort Worth v. Cornyn*, 86 S.W.3d at 327 (Gov't Code § 552.108(b)(1) protects information that, if released, would permit private citizens to anticipate weaknesses in police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate state laws). The statutory predecessor to section 552.108(b)(1) protected information that would reveal law enforcement techniques. *See, e.g.*, Open Records Decision Nos. 531 (1989) (detailed use of force guidelines), 456 (1987) (information regarding location of off-duty police officers), 413 (1984) (sketch showing security measures to be used at next execution). The statutory predecessor to section 552.108(b)(1) was not applicable to generally known policies and procedures. *See, e.g.*, Open Records Decision Nos. 531 at 2-3 (Penal Code provisions, common-law rules, and constitutional limitations on use of force not protected), 252 at 3 (1980) (governmental body failed to indicate why

investigative procedures and techniques requested were any different from those commonly known).

You state Exhibit F contains information regarding a planned policing sweep and suggested questions for polygraph examinations. Based on your representations, we have marked information the county may withhold under section 552.108(b)(1) of the Government Code. However, we find you have not demonstrated that release of any of the remaining information in Exhibit F would interfere with law enforcement or crime prevention. Therefore, the county may not withhold any of the remaining information in Exhibit F under section 552.108(b)(1) of the Government Code.

You also raise section 552.108(b)(1) to withhold the telephone numbers of confidential informants. You have marked such numbers in the information submitted in Exhibit B in response to the second request. You assert that the release of the telephone numbers of confidential informants would interfere with law enforcement by potentially allowing undue influence to be placed on the informants by the suspects and defendants. Based on your arguments and our review of the information at issue, we conclude that to the extent that the telephone numbers you have marked in Exhibit B submitted in response to the second request consist of the telephone numbers of confidential informants, the county may withhold that information under section 552.108(b)(1). *See also* Open Records Decision No. 636 at 4 (1995) (governmental body claiming section 552.108 exception for information contained in cellular telephone bill must (1) mark information it claims would tend to identify confidential informant or interfere with law enforcement and crime prevention if released and (2) detail how release of marked information would identify informant or interfere with law enforcement).

Next, you raise section 552.117(a)(2) of the Government Code for certain telephone numbers in Exhibit B submitted in response to the second request. Section 552.117(a)(2) excepts from public disclosure the home addresses, home telephone numbers, emergency contact information, and social security numbers of peace officers, as well as information that reveals whether the peace officers have family members, regardless of whether the peace officers comply with section 552.024 of the Government Code or section 552.1175 of the Government Code.<sup>6</sup> Gov't Code § 552.117(a)(2). Accordingly, to the extent the marked telephone numbers belong to family members of peace officers, the county must withhold the marked telephone numbers in Exhibit B submitted in response to the second request under section 552.117(a)(2) of the Government Code.

The remaining information contains account numbers subject to section 552.136 of the Government Code. Section 552.136(b) states “[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected,

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<sup>6</sup>“Peace officer” is defined by Article 2.12 of the Texas Code of Criminal Procedure.

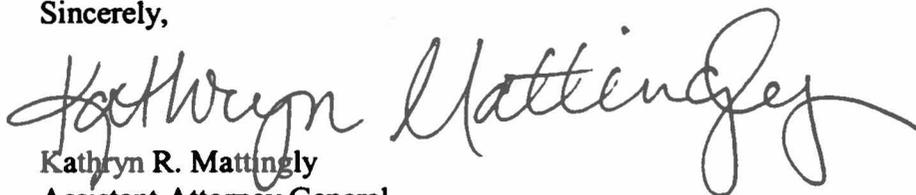
assembled, or maintained by or for a governmental body is confidential." *Id.* § 552.136(b). Therefore, the county must withhold the account numbers we have marked in Exhibit B submitted in response to the second request under section 552.136 of the Government Code.

In summary, the information you have submitted in Exhibit B in response to the first request and the requested text messages are not subject to the Act and need not be released in response to this request. The county must withhold the following: (1) the information we have marked in Exhibit C under section 552.101 of the Government Code in conjunction with common-law privacy, to the extent the offender was between the ages of ten and sixteen at the time of the alleged conduct; (2) the telephone numbers you have marked in Exhibit B submitted in response to the second request under section 552.117(a)(2) of the Government Code, to the extent the marked telephone numbers belong to family members of peace officers; and (3) the account numbers we have marked in Exhibit B submitted in response to the second request under section 552.136 of the Government Code. The county may withhold Exhibit D under section 552.107(1) of the Government Code. The county may withhold the information we have marked in Exhibit F and the marked telephone numbers in Exhibit B submitted in response to the second request, to the extent the marked telephone numbers consist of telephone numbers of confidential informants, under section 552.108(b)(1) of the Government Code. The remaining responsive information must be released to the requestor.

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](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,



Kathryn R. Mattingly  
Assistant Attorney General  
Open Records Division

KRM/dls

Ref: ID# 450873

Enc. Submitted documents

2 Requestors  
(w/o enclosures)