



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 26, 2012

Ms. Donna L. Johnson  
For Harris County  
Olson & Olson, L.L.P  
2727 Allen Parkway, Suite 600  
Houston, Texas 77019

OR2012-11623

Dear Ms. Johnson:

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# 460035 (Ref: 12PIA0235).

The Harris County Attorney's Office (the "county attorney's office"), which your represent, received a request for cellular telephone records, text messages, and videos or photos from a specified time period from any Harris County (the "county") issued cellular telephone assigned to a named individual.<sup>1</sup> You state the county attorney's office has released some of the requested information. You claim the information submitted as Exhibit B is not subject to the Act. You also claim this information is excepted from disclosure under sections 552.101, 552.107, 552.117, 552.1175, 552.136, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative samples of information.<sup>2</sup>

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<sup>1</sup>You inform us that the county attorney's office received clarification from the requestor regarding his request. See Gov't Code § 552.222(b) (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 governmental entity, acting in good faith, requests clarification or narrowing of unclear or overbroad request for public information, ten-day period to request attorney general ruling is measured from date request is clarified or narrowed).

<sup>2</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.

Initially, we note you have marked portions of Exhibit B as being non-responsive to the request. Upon review, we find most of this information, and the additional information we have marked, is not responsive to the request because it is not from the specified time period. This decision does not address the public availability of the non-responsive information, and the county attorney's office need not release that information in response to the request. However, a portion of the information you have marked as non-responsive, which we have marked, is from the specified time period and, thus, is responsive to the present request. Accordingly, we will consider the arguments you raise for this and the remaining responsive information.

Next, you assert the responsive information in Exhibit B is not subject to the Act. The Act is applicable only to "public information." See Gov't Code §§ 552.002, .021. Section 552.002(a) of the Government Code defines "public information" as:

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 that 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 No. 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 attorney's office does not possess the information at issue does not take the information outside the scope of the Act. See *id.* 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 ORD 635

at 6-7 (appointment calendar owned by public official or employee is subject to Act when it is maintained by another public employee and used for public business).

You inform us that the named individual, not the county attorney's office, owns the cellular telephone at issue and has sole access to his cellular telephone records, text messages, videos, and photos. However, you state this individual uses his cellular telephone in the performance of his official duties with the county attorney's office. You also acknowledge that the county provides the named individual with a stipend for his cellular telephone. We reiterate that information is within the scope of the Act if it relates to the official business of a governmental body and is maintained by a public official or employee of the governmental body. *See* Gov't Code § 552.002(a). You state some of the information at issue is purely personal and was not transmitted for purposes of the county attorney's office's official business. After reviewing this information, we agree the information we have marked in Exhibit B does not constitute "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business" by or for the county attorney's office. *See id.* § 552.021; *see also* ORD 635 (statutory predecessor not applicable to personal information unrelated to official business and created or maintained by state employee involving *de minimis* use of state resources). Therefore, this information is not subject to the Act, and the county attorney's office need not release it in response to this request.<sup>3</sup> However, the remaining information at issue consists of information related to the transaction of the county attorney's office's business. Thus, this information consists of public information under the Act. Accordingly, we will address your arguments against disclosure under the Act for this information and the remaining information at issue.

You raise common-law and constitutional privacy for the remaining information in Exhibit B. 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 section encompasses the doctrines of common-law and constitutional privacy. The doctrine of 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 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. 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. 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). This office has also determined common-law

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<sup>3</sup>As our ruling for this information is dispositive, we need not address your arguments against the disclosure of this information under the Act.

privacy encompasses certain types of personal financial information. Personal financial information related only to an individual ordinarily satisfies the first element of the common-law privacy test, but the public has a legitimate interest in the essential facts about a financial transaction between an individual and a governmental body. *See* Open Records Decision Nos. 545 at 4 (1990) (attorney general has found kinds of financial information not excepted from public disclosure by common-law privacy to generally be those regarding receipt of governmental funds or debts owed to governmental entities), 523 at 4 (1989) (noting distinction under common-law privacy between confidential background financial information furnished to public body about individual and basic facts regarding particular financial transaction between individual and public body), 373 at 4 (1983) (determination of whether public's interest in obtaining personal financial information is sufficient to justify its disclosure must be made on case-by-case basis).

Constitutional privacy consists of two inter-related 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. *See Whalen v. Roe*, 429 U.S. 589, 599–600 (1977); Open Records Decision Nos. 600 at 3–5 (1992), 478 at 4 (1987), 455 at 3–7. 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. ORD 455 at 4. 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.* at 7. The scope of information protected by constitutional privacy is narrower than that under common-law privacy; constitutional privacy under section 552.101 is reserved for "the most intimate aspects of human affairs." *Id.* at 5 (quoting *Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985)).

Upon review, we find the information we have marked is highly intimate or embarrassing and of no legitimate public interest. Thus, the county attorney's office must withhold this information under section 552.101 of the Government Code in conjunction with common-law privacy.<sup>4</sup> However, we find you have not demonstrated that any of the remaining information at issue is highly intimate or embarrassing and not a matter of legitimate public interest. Furthermore, you have failed to demonstrate how any of this information falls within the zones of privacy or implicates an individual's privacy interests for purposes of constitutional privacy. Therefore, the county attorney's office may not withhold any of the remaining information under section 552.101 in conjunction with common-law or constitutional privacy.

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).

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<sup>4</sup>As our ruling for this information is dispositive, we need not address your remaining arguments against its disclosure.

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 raise section 552.107(1) for the remaining information in Exhibit B. You assert this information consists of communications between an attorney employed by the county attorney’s office and individuals seeking legal advice. You also inform us that these communications were not intended to be and have not been disclosed to any third parties. However, we note you have not identified any of the individuals who you state were seeking legal advice. Furthermore, you have not identified the information you contend is privileged. *See Gov’t Code § 552.301(e)(2)* (governmental body must label information to indicate which exceptions apply). Accordingly, we find you have failed to demonstrate how any of the information at issue consists of communications between privileged parties. Therefore, the county attorney’s office may not withhold any of the remaining information under section 552.107(1) of the Government Code.

You assert sections 552.117 and 552.1175 for portions of the remaining information in Exhibit B. Section 552.117(a)(2) of the Government Code excepts from public disclosure the home addresses and telephone numbers, emergency contact information, and social security number of a peace officer, as well as information that reveals whether the peace

officer has family members, regardless of whether the peace officer complies with section 552.024 or section 552.1175 of the Government Code. *See id.* § 552.117(a)(2). Section 552.117(a)(2) adopts the definition of peace officer found at article 2.12 of the Code of Criminal Procedure. We note section 552.117(a)(2) protects a peace officer's personal cellular telephone number if the officer pays for the cellular telephone service with his or her personal funds. *See* Open Records Decision No. 670 at 6 (2001) (section 552.117(a)(2) excepts from disclosure peace officer's cellular telephone number if officer pays for cellular telephone service). Upon review, the county attorney's office must withhold the information we have marked under section 552.117(a)(2) of the Government Code to the extent this information pertains to a peace officer currently or formerly employed by the county, including any cellular telephone numbers not paid for by a governmental body. However, you have not demonstrated how any of the remaining information consists of the home addresses or telephone numbers, emergency contact information, social security numbers, or family member information of a peace officer, and it may not be withheld under section 552.117(a)(2).

Section 552.117(a)(1) 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 this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). We note section 552.117(a)(1) encompasses an official's or employee's personal cellular telephone number if the official or employee pays for the cellular telephone service with his or her personal funds. *See* Open Records Decision No. 506 at 5-6 (1988) (statutory predecessor to section 552.117 not applicable to numbers for cellular mobile phones installed in county officials' and employees' private vehicles and intended for official business). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Accordingly, to the extent the information we have marked under section 552.117 of the Government Code is not protected by section 552.117(a)(2), the county attorney's office must withhold this information under section 552.117(a)(1) to the extent it pertains to a current or former county official or employee who timely requested confidentiality for the information under section 552.024 of the Government Code, including any cellular telephone numbers not paid for by a governmental body. However, you have not demonstrated how any of the remaining information consists of the home addresses or telephone numbers, emergency contact information, social security numbers, or family member information of a current or former county official or employee, and it may not be withheld under section 552.117(a)(1).

Section 552.1175 of the Government Code protects information relating to a peace officer, as defined by article 2.12 of the Code of Criminal Procedure, and employees of a district

attorney, criminal district attorney, or county or municipal attorney whose jurisdiction includes any criminal law or child protective services matters. *See* Gov't Code § 552.1175(a)(1), (5). Section 552.1175 provides in part:

(b) Information that relates to the home address, home telephone number, emergency contact information, or social security number of an individual to whom this section applies, or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

(1) chooses to restrict public access to the information; and

(2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

*See id.* § 552.1175(b). Section 552.1175(b) also encompasses an individual's personal cellular telephone number if the individual falls within the scope of section 552.1175(a) and pays for the cellular telephone service with his or her personal funds. Accordingly, to the extent the responsive information we have marked under section 552.117 of the Government Code is not protected by section 552.117(a)(1) or section 552.117(a)(2), the county attorney's office must withhold this information under section 552.1175 of the Government Code to the extent this information pertains to an individual who is or was employed by a governmental entity other than the county, falls within the scope of section 552.1175(a), and elects to restrict access to the information in accordance with section 552.1175(b), including any cellular telephone numbers not paid for by a governmental body. However, you have not demonstrated how any of the remaining information consists of the home addresses or telephone numbers, emergency contact information, social security numbers, or family member information of a peace officer or district attorney, criminal district attorney, or county or municipal attorney whose jurisdiction includes any criminal law or child protective services matters, and it may not be withheld under section 552.1175.

We understand you have redacted a cellular telephone account number and a foundation account number contained in the remaining information pursuant to section 552.136(c) of the Government Code.<sup>5</sup> We note the remaining information at issue contains a cellular telephone account number and partial cellular telephone account number. Section 552.136 provides in part that "[n]otwithstanding any other provision of this chapter, 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." *See id.* § 552.136(b); *see also id.*

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<sup>5</sup>Section 552.136 of the Government Code permits a governmental body to redact the information described in section 552.136(b) without the necessity of seeking a decision from this office. *See* Gov't Code § 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). *See id.* § 552.136(d), (e).

§ 552.136(a) (defining “access device”). Accordingly, the county attorney’s office must withhold the cellular telephone account number and partial cellular telephone account number we have marked under section 552.136 of the Government Code.

Section 552.137 of the Government Code 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 id.* § 552.137(a)-(c). Upon review, we find the remaining information does not contain any e-mail addresses. Accordingly, none of this information may be withheld under section 552.137 of the Government Code.

We note some of the submitted information may 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, the responsive information we have marked in Exhibit B is not subject to the Act, and the county attorney’s office need not release this information in response to the present request. The county attorney’s office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The county attorney’s office must withhold the information we have marked under section 552.117(a)(2) of the Government Code to the extent this information pertains to a peace officer currently or formerly employed by the county, including any cellular telephone not paid for by a governmental body. To the extent the information we have marked under section 552.117 of the Government Code is not protected by section 552.117(a)(2) of the Government Code, the county attorney’s office must withhold this information under section 552.117(a)(1) of the Government Code to the extent it pertains to a current or former county official or employee who timely requested confidentiality for the information under section 552.024 of the Government Code, including any cellular telephone numbers not paid for by a governmental body. To the extent the information we have marked under section 552.117 of the Government Code is not protected by section 552.117(a)(1) of the Government Code or section 552.117(a)(2) of the Government Code, the county attorney’s office must withhold this information under section 552.1175 of the Government Code to the extent this information pertains to an individual who is or was employed by a governmental entity other than the county, falls within the scope of section 552.1175(a) of the Government Code, and elects to restrict access to the information in accordance with section 552.1175(b) of the Government Code, including any cellular telephone numbers not paid for by a governmental body. The county attorney’s office must withhold the cellular telephone account number and partial cellular telephone account number we have marked

under section 552.136 of the Government Code. The county attorney's office must release the remaining information, but 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](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,



Kenneth Leland Conyer  
Assistant Attorney General  
Open Records Division

KLC/dls

Ref: ID# 460035

Enc. Submitted documents

c: Requestor  
(w/o enclosures)