



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 17, 2013

Mr. Brian S. Wilson
General Counsel
Lone Star College System
5000 Research Forest Drive
The Woodlands, Texas 77381-4356

OR2013-06296

Dear Mr. Wilson:

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# 484280 (LSCS File Nos. PR13-0125-00060, PR13-0124-00058, PR13-0123-00056).

The Lone Star College System (the "system") received a request for any recordings of a specified shooting incident, any emergency calls placed by the system's police department (the "department") regarding the incident, any department audio or video recordings of the incident, and any department, campus security dispatch, or officer to officer audio recordings regarding the incident. The system received a second request from a separate requestor for all records regarding the campus wide alert pertaining to the incident and any e-mails sent or received by four specified system employees during a specified time period on January 22, 2013.¹ The system received a third request from a separate requestor for the schedule of officers assigned to the campus on the day of the incident, 9-1-1 calls, radio transmissions to or from employees, department dispatch records, and any recordings made

¹We note the system sought and received clarification from the requestor regarding the request. See Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); see also *City of Dallas v. Abbott*, 304 S.W.3d 380 (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).

by system employees on January 22, 2013. You inform us the system does not have information responsive to portions of the first and third requests.² You also inform us the system has released some information responsive to the second and third requests. You state you will redact the personal e-mail address you have marked pursuant to Open Records Decision No. 684 (2009).³ You claim some of the submitted information is not subject to the Act and some of the submitted information is excepted from disclosure under sections 552.101, 552.104, 552.107, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note you have marked a portion of the submitted information as not responsive to one of the instant requests. We have also marked portions of the submitted information which are not responsive to the request at issue because they were created after the request was received or do not fit the categories of information specified in that request. This ruling does not address the public availability of non-responsive information, and the system is not required to release non-responsive information in response to this request.

Next, you assert the usernames and passwords you have marked are not subject to the Act. In Open Records Decision No. 581 (1990), this office determined certain computer information, such as source codes, documentation information, and other computer programming, that has no significance other than its use as a tool for the maintenance, manipulation, or protection of public property is not the kind of information made public under section 552.021 of the Government Code. You inform us the information you have marked is used for accessing websites and other “user information.” Upon review of the information at issue, we find the usernames and passwords you have marked are used solely as tools to maintain, manipulate, or protect public property and have no other significance. *Id.* Therefore, the usernames and passwords you have marked are not subject to the Act, and the system need not release them in response to this request. However, we find you failed to assert how the school identification number you have marked is used solely as a tool to maintain, manipulate, or protect public property, and that the school identification number has no other significance. Accordingly, we find the school identification number is “public 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. Section 552.101 encompasses the doctrine of common-law privacy,

²The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

³Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain 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.

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. This office has found some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). We note, however, the public generally has a legitimate interest in information that relates to public employment and public employees. *See* Open Records Decision Nos. 542 (1990), 470 at 4 (public has legitimate interest in job qualifications and performance of public employees), 444 at 5-6 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 432 at 2 (1984) (scope of public employee privacy is narrow). Upon review, we find the information we have marked is highly intimate or embarrassing and of no legitimate public interest. Accordingly, the system must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find none of the remaining information at issue is highly intimate or embarrassing and of no legitimate public concern. Accordingly, none of the remaining information may be withheld under section 552.101 of the Government Code on the basis of common-law privacy.

Section 552.104 of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. The purpose of section 552.104 is to protect the purchasing interests of a governmental body in competitive bidding situations where the governmental body wishes to withhold information in order to obtain more favorable offers. *See* Open Records Decision No. 592 (1991). Section 552.104 protects information from disclosure if the governmental body demonstrates potential harm to its interests in a particular competitive situation. *See* Open Records Decision No. 463 (1987). Generally, section 552.104 does not except information from disclosure after bidding is completed and the contract has been awarded. *See* Open Records Decision No. 541 (1990).

You seek to withhold the e-mail you have indicated under section 552.104. You state the system "is in current negotiations with a specific entity[] . . . and release of the information to the general public would harm the advantage of the [s]ystem's negotiating position." Upon review of your arguments and the submitted information, however, we find you have not demonstrated the release of the information at issue would cause specific harm to the

system's interests in a competitive bidding situation. Accordingly, the system may not withhold any of the information at issue under section 552.104 of the Government Code.

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). 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.*, 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 inform us the information you have marked consists of confidential communications made in furtherance of professional legal services rendered to the system. You explain these communications were exchanged between the system's general counsel and system employees for the purpose of providing legal advice on a certain course of action. You state these communications 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 the information at issue. Accordingly, the

system may withhold the e-mails you have marked under section 552.107(1) of the Government Code.

Section 552.108(a)(1) of the Government Code excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov’t Code 552.108(a)(1). Generally, a governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). Section 552.108 may be invoked by the proper custodian of information relating to an investigation or prosecution of criminal conduct. *See Open Records Decision No. 474 at 4-5 (1987)*. Where a governmental body possesses information relating to a pending case of a law enforcement agency, the governmental body may withhold the information under section 552.108 if (1) it demonstrates that the information relates to the pending case and (2) this office is provided with a representation from the law enforcement entity that the law enforcement entity wishes to withhold the information.

You state the submitted recordings, the information you have marked in the submitted dispatch detail page, and the e-mails you have indicated relate to a criminal prosecution pending with the Harris County District Attorney’s Office (the “district attorney’s office”). You also inform us the district attorney’s office objects to the release of the information at issue. Based upon these representations, we conclude section 552.108(a)(1) is applicable and the release of the information at issue would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests that are present in active cases), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976).

We note section 552.108 does not except from disclosure “basic information about an arrested person, an arrest, or a crime.” Gov’t Code § 552.108(c). Basic information refers to the information held to be public in *Houston Chronicle*. *See* 531 S.W.2d at 186-88; *see also* Open Records Decision No. 127 (1976) (summarizing the types of information considered to be basic information). In Open Records Decision No. 649 (1996), this office concluded the information contained in a CAD report is substantially the same as basic information. *See* ORD 649 at 3; *see also* Open Records Decision No. 394 at 3 (1983) (there is no qualitative difference between information contained in radio cards or radio logs and front-page offense report information expressly held to be public in *Houston Chronicle*; thus, such information is generally public). Thus, with the exception of basic information, which must be released, the system may withhold the submitted recordings, the information you have marked in the submitted dispatch detail page, and the e-mails you have indicated under section 552.108(a)(1) of the Government Code on behalf of the district attorney’s office.

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 owner of the e-mail address consents to its release or the e-mail address falls within the scope of section 552.137(c). *See* Gov’t Code § 552.137(a)-(c). Section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address maintained by a governmental entity for one of its officials or employees. *See id.* § 552.137(c). The system must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure.

The remaining responsive information contains cellular telephone numbers of peace officers, which are subject to section 552.117(a)(2) of the Government Code.⁴ Section 552.117(a)(2) excepts from public disclosure the home addresses, home 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 of the Government Code or section 552.1175 of the Government Code.⁵ *Id.* § 552.117(a)(2). Section 552.117(a)(2) also encompasses a peace officer’s cellular telephone or pager number, unless the cellular or pager service is paid for by a governmental body. *See* Open Records Decision No. 506 at 5-7 (1988) (statutory predecessor to section 552.117 not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). Therefore, the system must withhold the cellular telephone numbers we have marked under section 552.117(a)(2) of the Government Code, unless the cellular telephone service is paid for by a governmental body.

In summary, the usernames and passwords you have marked are not subject to the Act, and the system need not release them in response to this request. The system must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The system may withhold the e-mails you have marked under section 552.107(1) of the Government Code. Except for basic information, which must be released, the system may withhold the recordings, the information you have marked in the submitted dispatch detail page, and the e-mails you have indicated under section 552.108(a)(1) of the Government Code on behalf of the district attorney’s office. The system must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure, and the cellular telephone numbers we have marked under section 552.117(a)(2) of the Government Code, unless the cellular telephone service is paid for by a governmental body. The remaining responsive information must be released.

⁴The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

⁵“Peace officer” is defined by Article 2.12 of the Texas Code of Criminal Procedure.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,

A handwritten signature in cursive script, reading "Kathryn R. Mattingly". The signature is written in black ink and is positioned above the typed name and title.

Kathryn R. Mattingly
Assistant Attorney General
Open Records Division

KRM/bhf

Ref: ID# 484280

Enc. Submitted documents

c: 3 Requestors
(w/o enclosures)