



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

January 6, 2004

Mr. Martin Hubert  
Deputy Commissioner  
Texas Department of Agriculture  
P.O. Box 12847  
Austin, Texas 78711

OR2004-0086

Dear Mr. Hubert:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 192937.

The Texas Department of Agriculture (the "department") received a request for tape recordings of board meetings of the Texas Agricultural Finance Authority ("TAFE") since January, 2000, and an "explicit list" of all non-performing loans or guarantees during the present administration of the department.<sup>1</sup> In addition, the requestor asks to review the files of loans to Custom Feeds, Pogue Seed, and Texas Truss. You indicate that you are releasing most of the requested tape recordings. You claim, however, that portions of the requested information are excepted from disclosure under sections 552.101, 552.103, 552.107, 552.130, 552.136, and 552.137 of the Government Code. You also indicate that the release of portions of the requested information may implicate the proprietary interests of third parties, although you indicate that the department takes no position as to the release of such information. Accordingly, you state, and provide documentation showing, that you notified five third parties of the request and of their right to submit arguments to this office as to why the information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Public Information Act in certain circumstances). We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>2</sup>

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<sup>1</sup>You advise that the Texas Agricultural Finance Authority is part of the department, and is administered by department staff.

<sup>2</sup>We assume that 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 that those records contain substantially different types of information than that submitted to this office.

As a preliminary matter, we note that some of the requested loan file information is the subject of a previous determination of this office issued as Open Records Letter No. 98-1028 (1998). We are not aware of any change in the facts and circumstances at issue in Open Records Letter No. 98-1028. Accordingly, the department must comply with Open Records Letter No. 98-1028 with respect to the responsive loan file information that was addressed in that ruling. *See* Open Records Decision No. 673 (2001) (information subject to previous determination when 1) information at issue is precisely the same information previously submitted to this office pursuant to section 552.301(e)(1)(D); 2) governmental body which received the request is same governmental body that previously requested and received a ruling from the attorney general; 3) attorney general's prior ruling concluded that the precise information is or is not excepted from disclosure; and 4) law, facts, and circumstances on which prior attorney general ruling was based have not changed since the issuance of the ruling).

We next turn to the information submitted as Exhibit J. As noted, you state that release of this information may implicate the proprietary interests of third parties. We note that an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why requested information relating to that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received any comments from any of the third parties at issue explaining how release of the requested information would affect their proprietary interests.<sup>3</sup> Therefore, we have no basis to conclude that any third party has a protected proprietary interest in any of the submitted information. *See* Gov't Code § 551.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 639 at 4 (1996), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990).

Next, you contend that the information in Exhibits B-1 through B-5 is protected by the attorney-client privilege.<sup>4</sup> 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>3</sup>The submitted documents reflect that you notified the following third parties of the present request pursuant to section 552.305: Mr. Clyde D. Oatis; Omnibank, N.A.; First Nichols National Bank; Pogue Agri Partners; and Houston Small Business Development Corporation.

<sup>4</sup>We note you assert the attorney-client privilege under sections 552.101, 552.103, and 552.107 of the Government Code. Section 552.107 is the proper exception for your claim of attorney-client privilege in this instance. *See* Open Records Decision No. 676 (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 Texas 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). Because government attorneys often act in capacities other than that of professional legal counsel, including as administrators, investigators, or managers, 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. Finally, 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 the definition of a confidential communication 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 writ). 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 that the information in Exhibits B-1 through B-3 consists of communications made for the purpose of facilitating the rendition of legal services, between department staff and department attorneys, among department attorneys, and between department attorneys and attorneys of the Office of the Attorney General and other outside counsel for the department. You also indicate, and the document reflects, that the document in Exhibit B-5 was communicated from department counsel to the Office of the Attorney General pursuant to the rendition of legal services to the department. You advise that the communications in Exhibits B-1, B-2, B-3, and B-5 were intended to be confidential, and you indicate that the confidentiality of this information has been maintained. We therefore find you have established that the information in Exhibits B-1, B-2, and B-5 is protected by the attorney-client privilege, as well as most of the information in Exhibit B-3. The department may withhold such information pursuant to section 552.107 of the Government Code. We find, however, that you have not established that the remaining information in Exhibit B-3, which we have marked, constitutes or reflects confidential communications between privileged

parties. Consequently, we find this information is not protected by the attorney-client privilege and we determine that the department may not withhold the information we have marked in Exhibit B-3 under section 552.107. Further, with respect to the attorney notes in Exhibit B-4 we find you have not established that this information consists of or reflects a confidential attorney-client communication. Accordingly, we find the department may not withhold the attorney notes submitted as Exhibit B-4 pursuant to section 552.107 of the Government Code.

We next address your claimed exceptions for the remainder of the submitted information. We note that you indicate that some of the remaining information may be confidential pursuant to the Medical Practice Act ("MPA"), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides in pertinent part:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Upon review, we find that the submitted documents do not contain any medical records that are subject to the MPA. Accordingly, the department may not withhold any portion of the submitted information pursuant to the MPA.

We note that the information submitted as Exhibit F and Exhibit H is protected by common-law privacy. Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," and encompasses the doctrine of common-law privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. In addition, this office has found that the following types of information are excepted from required public disclosure under common-law privacy: an individual's criminal history when compiled by a governmental body, *see* Open Records Decision No. 565 (*citing United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989)), personal financial information not relating to a financial transaction between an individual

and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990), some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). The department must withhold the information in Exhibit F and Exhibit H under section 552.101 in conjunction with common-law privacy.

The information submitted as Exhibit G consists of tax return information. Prior decisions of this office have held that section 6103(a) of title 26 of the United States Code renders tax return information confidential. *See* Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision Nos. 600 (1992) (W-4 forms), 226 (1979) (W-2 forms). Tax return information is defined as data furnished to or collected by the IRS with respect to the determination of possible existence of liability of any person under title 26 of the United States Code for any tax. *See* 26 U.S.C. § 6103(b). We determine that the department must withhold the information in Exhibit G under section 552.101 of the Government Code as information made confidential by federal law.

You also indicate that the social security numbers in the remaining submitted documents are excepted under section 552.101. We note that the information at issue contains social security numbers of members of the public, as well as the social security number of a department employee. We first address the social security number of the department employee, contained in Exhibit C. Section 552.117 of the Government Code excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who timely elect to keep this information confidential pursuant to section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is received by the governmental body. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the department may only withhold information under section 552.117 on behalf of current or former officials or employees who elected to keep information confidential pursuant to section 552.024 prior to the date on which the request for this information was made. Thus, in this case, if the department employee whose social security number appears in Exhibit C timely elected to keep the social security number confidential, the department must withhold the employee's social security number pursuant to section 552.117(a)(1) of the Government Code. Otherwise, the department may not withhold this social security number under section 552.117(a)(1).

We note, however, that the employee's social security number, as well as the social security numbers of members of the public appearing in the remaining information, may be excepted from disclosure under section 552.101 in conjunction with federal law. A social security number may be withheld in some circumstances under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained or maintained by a state agency or

political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that the social security numbers at issue are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the department pursuant to any provision of law enacted on or after October 1, 1990.

You assert that portions of the remaining submitted information are excepted under section 552.136 of the Government Code. Section 552.136 provides in relevant part:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

- (1) obtain money, goods, services, or another thing of value; or
- (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding 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.

The department must withhold the account number information that we have marked pursuant to section 552.136 of the Government Code.

The remaining submitted documents also contain information that is excepted under section 552.130 of the Government Code, which provides in pertinent part:

(a) Information is excepted from the requirements of Section 552.021 if the information relates to:

- (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]
- (2) a motor vehicle title or registration issued by an agency of this state[.]

We have marked information in the submitted documents that the department must withhold under section 552.130 of the Government Code.

Finally, the information in Exhibit I contains e-mail addresses that you contend are excepted from disclosure under section 552.137 of the Government Code. Section 552.137 provides:

(a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

(c) Subsection (a) does not apply to an e-mail address:

(1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;

(2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract; or

(4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.

(d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Act of June 2, 2003, 78<sup>th</sup> Leg., R.S., ch. 1089, § 1, 2003 Tex. Sess. Law Serv. 3124 (to be codified as amendment to Gov't Code § 552.137).

Section 552.137 requires a governmental body to withhold certain e-mail addresses of members of the public that are provided for the purpose of communicating electronically with the governmental body, unless the relevant members of the public have affirmatively consented to the release of the e-mail addresses. We note, however, that section 552.137 does not apply to the work e-mail addresses of officers or employees of a governmental body, a website address or Uniform Resource Locator, or the general e-mail address of a business. E-mail addresses within the scope of section 552.137(c) are also not excepted from

disclosure under section 552.137. We determine that the e-mail addresses in the submitted information are within the scope of section 552.137(a). You state that the department has not received affirmative consent to disclose any of the e-mail addresses at issue. Accordingly, we find the department must withhold the e-mail addresses we have marked under section 552.137 of the Government Code.

In summary, the department must follow Open Records Letter No. 98-1028 as a previous determination with respect to any responsive information at issue in the present request that was the subject of that ruling. The information submitted as Exhibits B-1, B-2, B-5, and part of B-3 is protected by the attorney-client privilege and may be withheld pursuant to section 552.107 of the Government Code; we have marked information in Exhibit B-3 that may not be withheld under the attorney-client privilege and must be released. The department must withhold the information in Exhibit F and Exhibit H under section 552.101 of the Government Code in conjunction with common-law privacy. The department must withhold the information in Exhibit G pursuant to section 552.101 in conjunction with federal law. If the department employee whose social security number appears in Exhibit C timely elected to keep the social security number confidential, the department must withhold this social security number under section 552.117(a)(1) of the Government Code. This social security number and the social security numbers of members of the public contained in the submitted documents may be excepted under section 552.101 in conjunction with federal law. The department must withhold the information we have marked under sections 552.130 and 552.136 of the Government Code, and the e-mail addresses we have marked under section 552.137 of the Government Code. The remainder of the submitted information must be released to the requestor.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public

records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



David R. Saldivar  
Assistant Attorney General  
Open Records Division

DRS/seg

Ref: ID# 192937

Enc: Submitted documents

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