



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 3, 2009

Ms. Donna L. Clarke
Assistant Criminal District Attorney
Lubbock County
P.O. Box 10536
Lubbock, Texas 79408-3536

OR2009-15678

Dear Ms. Clarke:

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# 360321.

The Lubbock County Criminal District Attorney (the "county") received a request for all e-mails from a named judge's computer during a specified time period. You state that the county will release some of the requested information upon receipt of payment from the requestor. You state that some of the submitted information is not subject to the Act. In addition, you claim that the remaining submitted information is excepted from disclosure under sections 552.101, 552.105, 552.107, 552.111, 552.117, 552.131, 552.136, and 552.137 of the Government Code.¹ We have considered your arguments and reviewed the submitted information. We have also considered comments from the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

The Act is applicable to "public information." *See id.* § 552.021. Section 552.002 of the Act 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

¹Although you raised section 552.108 of the Government Code in your initial brief, you make no arguments explaining the applicability of this exception to the submitted information. Therefore, we assume you have withdrawn this exception.

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). You inform us that Exhibit A consists of personal e-mails that have no connection with county business. After reviewing the information at issue, we agree that Exhibit A 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. *See id.* § 552.021; *see also* Open Records Decision No. 635 (1995) (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 need not release it in response to this request.

Next, we address the requestor’s contention that the county failed to comply with section 552.301 of the Government Code in requesting this decision. Section 552.301 prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Gov’t Code § 552.301. Section 552.301(b) requires that a governmental body ask for a decision from this office and state which exceptions apply to the requested information by the tenth business day after receiving the request. *Id.* § 552.301(b). Section 552.301(e) requires a governmental body to submit to this office within fifteen business days of receiving the request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See id.* § 552.301(e)(1)(A)-(D). The county states, and the submitted documents reflect, that the county received this request for information on August 18, 2009. We note that this office does not count the date the request was received or a holiday as business days for the purpose of calculating a governmental body’s deadlines under section 552.301. We further note that the county informs us that September 7, 2009, was a county holiday. Accordingly, the fifteenth business day after the receipt of the instant request was September 9, 2009. The county submitted the documents at issue and written comments bearing a postmark date of September 8, 2009. *See id.* § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Therefore, we find the county complied with its fifteen-business-day deadline under section 552.301(e). However, although the county timely raised sections 552.101, 552.107, 552.111, 552.117, 552.131, 552.136, and 552.137 of the Government Code pursuant to section 552.301(b), you did not raise section 552.105 until September 8, 2009. Thus, with respect to section 552.105, the county failed to comply with the procedural requirements mandated by section 552.301.

Generally, a governmental body’s failure to comply with section 552.301 results in the waiver of its claims under the exception at issue, unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *City of*

Dallas v. Abbott, 279 S.W.3d 806, 811 (Tex. App.—2007, pet. granted); *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). Generally, a compelling reason exists when third party interests are at stake or when information is confidential under other law. Open Records Decision No. 177 (1977). Section 552.105 is a discretionary exception that protects a governmental body's interests and may be waived. *See* Gov't Code § 552.007; Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions), 564 (1990) (statutory predecessor to Gov't Code § 552.105 subject to waiver). In failing to comply with section 552.301, the county has waived section 552.105 of the Government Code and may not withhold any of the submitted information under this exception. However, we will consider the applicability of your claims under sections 552.101, 552.107, 552.111, 552.117, 552.131, 552.136, and 552.137, which were timely raised. *See* Gov't Code § 552.302; *see also* Open Records Decision No. 150 at 2 (1977).

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 exception encompasses the Texas Homeland Security Act (the "HSA"), chapter 418 of the Government Code. Section 418.176 of the HSA provides in part:

(a) Information is confidential if the information is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, responding to, or investigating an act of terrorism or related criminal activity and:

- (1) relates to staffing requirements of an emergency response provider, including law enforcement agency, a fire-fighting agency, or an emergency services agency;
- (2) relates to a tactical plan of the provider; or
- (3) consists of a list or compilation of pager or telephone numbers, including mobile and cellular telephone numbers, of the provider.

Id. § 418.176(a). The fact that information may relate to a governmental body's security measures does not make the information *per se* confidential under the HSA. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). Furthermore, the mere recitation of a statute's key terms is not sufficient to demonstrate the applicability of the claimed provision. As with any exception to disclosure, a claim under the HSA must be accompanied by an adequate explanation of how the responsive records fall within the scope of the claimed provision. *See* Gov't Code

§ 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

In this instance, you seek to withhold Exhibit B, which you state relates to emergency services of the county. You seek to withhold this information under section 552.101 in conjunction with section 418.176 of the Government Code. You further explain that the information at issue relates to emergency cellular projects and training of the Emergency Response Team. You have not, however, specifically explained how or why the information in Exhibit B is related to the staffing requirements, a tactical plan, or the pager or telephone numbers of an emergency response provider. *See id.* § 418.176(a)(1)-(3). Accordingly, the county may not withhold the information at issue under section 552.101 in conjunction with section 418.176 of the Government Code

Section 552.101 also encompasses the doctrine of common-law privacy, which protects information that (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 demonstrated. *Id.* at 681-83. This office has found that personal financial information not relating to a financial transaction between an individual and a governmental body is generally intimate or embarrassing. *See* Open Records Decision No. 545 (1990). Upon review, we agree that portions of Exhibit D constitute personal financial information not relating to a financial transaction between an individual and a governmental body. Further, we find there is not a legitimate public interest in the release of this information. Therefore, the county must withhold the information we have marked in Exhibit D under section 552.101 in conjunction with common-law privacy. However, no portion of the remaining information is either highly intimate or embarrassing and of no legitimate public interest. Accordingly, no portion of the remaining information may be withheld under section 552.101 on this basis.

Next, you claim Exhibit C is excepted under section 552.107 of the Government Code. Section 552.107(1) of the Government Code protects information that comes 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. *See* 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. *See 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). Third, the privilege applies only to communications between or among clients, client

representatives, lawyers, and lawyer representatives. *See* 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, 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. *See 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 that Exhibit C consists of confidential communications between the county representative and employees and the county’s attorneys made for the purpose of facilitating the rendition of professional legal services. You have identified the parties to the communications. Based on your representations and our review, we find that the county may withhold Exhibit C under section 552.107 of the Government Code.²

Next, you claim that Exhibit E is excepted from disclosure under section 552.111 of the Government Code. Section 552.111 excepts from public disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” Gov’t Code § 552.111. Section 552.111 encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined that section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5. A governmental body’s policymaking functions do not encompass routine internal administrative or personnel matters, and

²As our ruling is dispositive, we do not address your remaining argument for this information.

disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. The Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. *See* Open Records Decision No. 631 at 3 (1995). Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *See* ORD 615 at 5. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

Section 552.111 can also encompass communications between a governmental body and a third-party consultant. *See* Open Records Decision Nos. 631 at 2 (1995) (section 552.111 encompasses information created for governmental body by outside consultant acting at governmental body's request and performing task that is within governmental body's authority), 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process), 462 at 14 (1987) (section 552.111 applies to memoranda prepared by governmental body's consultants). For section 552.111 to apply, the governmental body must identify the third party and explain the nature of its relationship with the governmental body. Section 552.111 is not applicable to a communication between the governmental body and a third party unless the governmental body establishes it has a privity of interest or common deliberative process with the third party. *See* ORD 561 at 9.

You claim that portions of the remaining information are privileged under section 552.111 of the Government Code. The information at issue consists of an e-mail communications between the named judge and county employees, a potential vendor, and a third party consultant. However, this information consists of general administrative information or information that is purely factual in nature. You have failed to demonstrate, and the information does not reflect on its face, that this information consists of advice, recommendations, or opinions that pertain to policymaking. Further, we note that a portion of the remaining information consists of a communications with third parties. We find that the county has not established privity of interest or common deliberative process with these parties. Accordingly, the county may not withhold any portion of the remaining information under section 552.111 of the Government Code.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that the information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117. Section 552.117 also encompasses a personal cellular telephone number, provided that a

governmental body does not pay for the cell phone service. *See* Open Records Decision No. 506 at 5-6 (1988) (Gov't Code § 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). 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 be withheld under section 552.117(a)(1) only 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. You do not inform us that the individual whose information is at issue elected to withhold his personal information under section 552.024 prior to the date of this request. Therefore, to the extent the employee timely elected to keep his personal information confidential, the county must withhold the information you have highlighted under section 552.117(a)(1) of the Government Code. However, to the extent the employee did not make a timely election or if the county pays for the cellular phone service, the information may not be withheld.

Next, you raise section 552.131 of the Government Code for Exhibit E. Section 552.131(b) provides that "[u]nless and until an agreement is made with [a] business prospect, information about a financial or other incentive being offered to the business prospect by the governmental body or by another person is excepted from [required public disclosure]." Gov't Code § 552.131(b). You state that the information at issue is related to ongoing negotiations with a business prospect. However, you have not demonstrated the information in Exhibit E reveals financial or other incentives that are being offered to the prospect. Therefore, we conclude that the county may not withhold Exhibit E under section 552.131(b).

Section 552.136(b) of the Government Code states that "[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." *Id.* § 552.136(b); *see id.* § 552.136(a) (defining "access device"). Therefore, the county must withhold the access device number you have marked pursuant to 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). The e-mail addresses you have highlighted, and the additional e-mail addresses we have marked, are not of a type specifically excluded by section 552.137(c). You do not inform us that an owner has affirmatively consented to the release of the marked e-mail addresses. Therefore, unless the county receives consent to release, the county must withhold the marked e-mail addresses in the remaining information under section 552.137.

In summary, Exhibit A is not subject to the Act and the county need not release it in response to this request. The county may withhold Exhibit C under section 552.107 of the Government Code. The county must withhold the information we have marked in Exhibit D under section 552.101 in conjunction with common-law privacy. To the extent the employee timely elected to keep his personal information confidential, the county must withhold the information you have marked under section 552.117(a)(1) of the Government Code. The county must withhold the access device number you have marked pursuant to section 552.136 of the Government Code. Unless the county receives consent to release, the county must withhold the marked e-mail addresses under section 552.137 of the Government Code. The remaining information must be released.

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

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

Sincerely,



Tamara Wilcox
Assistant Attorney General
Open Records Division

TW/dls

Ref: ID# 360321

Enc. Submitted documents

c: Requestor
(w/o enclosures)