ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 18, 2013

Mr. Robert C. Wendland
Counsel for Town of Northlake
Rapier, Wilson & Wendland, P.C.
1333 West McDermott, Suite 100
Allen, Texas 75013-3091

OR2013-04442

Dear Mr. Wendland:

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# 481529.

The Town of Northlake (the "town"), which you represent, received seven requests for any and all e-mails from the town's administrator to four named individuals regarding citation revenues or number of citations written from February 9, 2012 to the date of the request; any employment related documents for a named former employee; any open records request from a named individual from February 2012 to the date of the request; requests from potential employers regarding a named individual, all information released, and any records or tangible items concerning this named individual from February 2012 to the date of the request; all text messages to or from the town's mayor on the cellular telephone paid for by the town; any e-mails and attachments to or from the town's mayor from July 2011 to the date of the request, including deleted and archived e-mails; all text messages to or from the town's administrator on the cellular telephone paid for by the town; and e-mails and attachments to or from the town's administrator to or from two named individuals from July 1, 2011 to the date of the request, including any deleted or archived e-mails. You state you have released some information to the requestor. You claim some of the requested information is not subject to the Act. You claim a portion of the requested information is excepted from disclosure under sections 552.101 and 552.107 of the Government Code. We have considered your claims and reviewed the submitted information, a portion of which consists of representative

samples of information.[1] We have also received and considered the requestor's comments. *See* Gov't Code § 552.304 (interested party may submit written comments regarding availability of requested information).

Initially, we note the submitted information contains an e-mail between the town's attorney and the town's administrator which is not responsive to the present request for information. Additionally, the submitted information includes text messages received after the request for information was received that are not responsive to the instant request for information. We have marked this non responsive information. This ruling does not address the public availability of nonresponsive information, and the town is not required to release nonresponsive information in response to this request.

Next, we address your claim that portions of the requested information are not subject to the Act. The Act applies to "public information," which is defined in section 552.002 of the Government Code 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.

Gov't Code § 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).

You state portions of the submitted information in Exhibit B, which you have marked, relate to text message communications that are entirely personal in nature involving the town's administrator named in the request. Furthermore, you contend the information at issue in Exhibits C and D are e-mail communications between the town administrator and two other named individuals which are also entirely personal in nature. You state the communications at issue were not made by the town administrator in his official capacity and do not relate to official town business. After reviewing this information, we agree the information you have marked in Exhibit B, and the information at issue in Exhibits C and D, does not constitute "information that is collected, assembled, or maintained under a law or ordinance or in

[1] 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.

connection with the transaction of official business" by or for the town. *See* Gov't Code § 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 town need not release it in response to this request.

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 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. *See* 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 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 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, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *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, *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. *See 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 the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state the information at issue in Exhibit E consists of communications between the town's attorney and the town's mayor and other town employees, in their capacity as clients. You state these communications were made in furtherance of the rendition of professional legal services to the town and have remained confidential. Based on your representations and

our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue in Exhibit E. Accordingly, the town may generally withhold the information at issue in Exhibit E under section 552.107(1) of the Government Code. We note however, one e-mail string includes an e-mail that was received from and sent to non-privileged parties. Furthermore, if the e-mail sent to or received from non-privileged parties is removed from the e-mail string and stands alone, it is responsive to the present request for information. Therefore, to the extent the non-privileged e-mail, which we have marked, is maintained by the town separate and apart from the otherwise privileged e-mail string in which it appears, it may not be withheld under section 552.107(1) of the Government Code.

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, 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 satisfied. *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. *See* 540 S.W.2d 668, 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 No. 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Upon review, we find the information we have marked is highly intimate or embarrassing information of no legitimate public concern and must be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

We note a portion of the remaining information is subject to section 552.117 of the Government Code.[2] Section 552.117(a)(1) 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 that 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 a personal cellular telephone number as long as the cellular service is not paid for by a governmental body. *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

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

particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the town may only withhold information under section 552.117(a)(1) on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Accordingly, if the individuals whose information is at issue timely elected to keep their personal information confidential pursuant to section 552.024, the town must withhold the information we have marked under section 552.117(a)(1), including the personal cellular telephone number if the individual pays for the cellular telephone services with personal funds. The town may not withhold the marked information under section 552.117 if the individuals did not make timely elections to keep the information confidential or if the cellular telephone service is paid for by a governmental body.

Section 552.137 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* Gov't Code § 552.137(a)-(c). The e-mail addresses at issue are not excluded by subsection (c). Therefore, the town must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure.[3]

In summary, the information the town has marked in Exhibit B, and the information at issue in Exhibits C and D is not subject to the Act and the town need not release this information in response to the present request. The town may generally withhold the information in Exhibit E under section 552.107(1) of the Government Code. However, if the non-privileged e-mail we have marked exists separate and apart from the otherwise privileged e-mail string in which it appears, the town may not withhold the non-privileged e-mail under section 552.107(1) of the Government Code. The town must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The town must withhold the information we have marked under section 552.117(a)(1) of the Government Code if the individuals whose information is at issue timely elected to keep their information confidential pursuant to section 552.024 of the Government Code, and if the individual pays for the cellular telephone service with personal funds. The town must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their release. The remaining information must be released.

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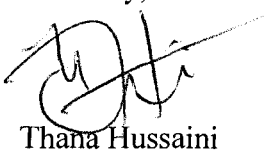
[3]Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

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,



Thana Hussaini
Assistant Attorney General
Open Records Division

TH/som

Ref: ID# 481529

Enc. Submitted documents

c: Requestor
(w/o enclosures)