



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 4, 2013

Mr. Thomas D. McClure
Assistant General Counsel
Texas Department of State Health Services
P.O. Box 149347
Austin, Texas 78714-9347

OR2013-15370

Dear Mr. McClure:

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# 498336 (DSHS File Nos. 21747/2013 and 21820/2013).

The Texas Department of State Health Services (the "department") received two requests for information from the same requestor. The first request seeks the requestor's personnel file and e-mails from five named individuals where the requestor is the subject of discussion. The second request seeks the requestor's personnel file, all Office of the Inspector General investigation notes regarding the requestor's testimony in a specified investigation, and e-mails between the five named individuals where the requestor's name is in the subject line or body of the e-mail. You indicate you have released or will release some of the requested information. You claim portions of the submitted information are excepted from disclosure under sections 552.101 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative samples of information.¹

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information that other statutes make

¹We assume that the "representative samples" of records submitted to this office are 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.

confidential. Section 552.101 has been found by this office to encompass information made confidential by federal regulations. *See Rainbow Group, Ltd. v. Tex. Employment Comm'n*, 897 S.W.2d 946 (Tex. App.—Austin 1995, writ denied) (court approves office of attorney general finding to withhold, under section 552.101, unemployment compensation identification numbers as made confidential by federal regulations).

The Special Supplemental Nutrition Program for Women, Infants, and Children (“WIC”) is regulated by title 7 of the Code of Federal Regulations. *See* 7 C.F.R. § 246.1. Section 246.26(e) of this title provides for the confidentiality of certain information about a WIC program vendor:

Confidential vendor information is any information about a vendor (whether it is obtained from the vendor or another source) that individually identifies the vendor, except for vendor’s name, address, telephone number, Web site/e-mail address, store type, and authorization status. Except as otherwise permitted by this section, the State agency must restrict the use or disclosure of confidential vendor information to [specific entities].

Id. § 246.26(e). The purpose for protecting vendor information by limiting its use and disclosure is two-fold: “to encourage vendors to provide the information necessary to authorize and monitor vendors and to avoid compromising State agency investigative techniques.” 65 Fed. Reg. 83248, 83275 (2000); *see also* 64 Fed. Reg. 32308, 32333 (1999). However, vendors’ names, addresses, telephone numbers, Web site/e-mail addresses, store type, and authorization statuses are not protected under this provision. *See* 7 C.F.R. § 246.26(e). Moreover, these limitations on use and disclosure are not applicable to aggregate data about WIC vendors and other data that do not individually identify a vendor. *See* 65 Fed. Reg. 83248, 83276 (2000). Furthermore, section 246.26(e) provides for the release of confidential vendor information in certain circumstances. *See* 7 C.F.R. § 246.26(e)(1)-(4).

You state that the information you have highlighted consists of vendor account numbers, passwords, and other vendor access information related to WIC vendor electronic benefits transfer accounts, and you state this information individually identifies WIC vendors. You further state that none of the release provisions apply in this instance. Based on your representations and our review of the information at issue, we find that most of the information you have highlighted, and the additional information we have marked, consists of individually identifying information of WIC vendors. Accordingly, we find this information is subject to section 246.26(e) of title 7 of the Code of Federal Regulations. However, we note some of the information you have highlighted consists of information that does not individually identify any WIC vendor. Therefore, this information, which we have marked for release, is not subject to section 246.26(e) of title 7 of the Code of Federal Regulations, and the department may not withhold it under section 552.101 of the Government Code on that basis. Thus, with the exception of the information we have marked for release, the department must withhold the marked information under

section 552.101 of the Government Code in conjunction with section 246.26(e) of title 7 of the Code of Federal Regulations.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. Gov't Code § 552.107(1). 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 to only 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 to only 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 state the e-mails and attachments you have marked under section 552.107 constitute communications between department attorneys, department program management staff, and a human resource specialist with the Texas Health and Human Services Commission (the "commission"), which provides human resources services to the department pursuant

to state law.² You further explain these communications were made for the purpose of providing legal services to the department. You state the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find the information you have marked consists of privileged attorney-client communications the department may withhold under section 552.107(1) of the Government Code.

We note some of the remaining information may be subject to section 552.117 of the Government Code.³ Section 552.117(a)(1) excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee or official of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. *See Gov't Code § 552.117(a)(1)*. We note section 552.117 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See Open Records Decision No. 506 at 5-6 (1988)* (section 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 employee or official 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. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee or official who did not timely request under section 552.024 the information be kept confidential. Therefore, the department must withhold the cellular telephone numbers we have marked under section 552.117(a)(1) of the Government Code if the individuals whose information is at issue timely requested confidentiality under section 552.024 of the Government Code and a governmental body does not pay for the cellular telephone service. Conversely, to the extent the individuals at issue did not timely request confidentiality under section 552.024 or the cellular telephone service is paid for by a governmental body, department may not withhold the marked information under section 552.117(a)(1).

In summary, with the exception of the information we have marked for release, the department must withhold the marked information under section 552.101 of the Government Code in conjunction with section 246.26(e) of title 7 of the Code of Federal Regulations. The department may withhold the information you have marked under section 552.107 of the Government Code. The department must withhold the cellular telephone numbers we have

²Section 531.0055 of the Government Code provides the commission is responsible for providing human resources services to health and human services agencies, including the department. *See Gov't Code § 531.0055*.

³The 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)*.

marked under section 552.117(a)(1) of the Government Code if the individuals whose information is at issue timely requested confidentiality under section 552.024 of the Government Code and a governmental body does not pay for the cellular telephone service. The department must release the remaining information.

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Kristi L. Wilkins
Assistant Attorney General
Open Records Division

KLW/bhf

Ref: ID# 498336

Enc. Submitted documents

c: Requestor
(w/o enclosures)