



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 20, 2014

Ms. Claire Yancey
Assistant District Attorney
Civil Division
County of Denton
P.O. Box 2850
Denton, Texas 76202

OR2014-03163

Dear Ms. Yancey:

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# 514501.

Denton County (the "county") received a request for e-mails sent to or from a named county employee's e-mail account during a specified time period.¹ You claim some of the requested information is not subject to the Act and, in the alternative, the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.108, 552.111, 552.117, 552.1325, 552.130, 552.137, and 552.147 of the Government Code.² We have

¹We note the county asked for and received clarification regarding this request. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information); *see City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (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).

²Although you also raise section 552.1175 of the Government Code, we note section 552.117 is the proper exception to raise for information held by the county in an employment context.

considered the exceptions you claim and reviewed the submitted representative sample of information.³

Initially, you argue some of the submitted information does not consist of public information subject to the Act. The Act is applicable only to "public information." See Gov't Code §§ 552.002, .021. Section 552.002(a) defines "public information" as

information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

- (1) by a governmental body;
- (2) for a governmental body and the governmental body:
 - (A) owns the information;
 - (B) has a right of access to the information; or
 - (C) spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information; or
- (3) by an individual officer or employee of a governmental body in the officer's or employee's official capacity and the information pertains to official business of the governmental body.

Id. § 552.002(a). Thus, virtually all the information in a governmental body's physical possession constitutes public information and is subject to the Act. *Id.*; see Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). You inform us the information you have submitted as Exhibits H and P is not subject to the Act because it is purely personal in nature and does not contain information related to the transaction of official business of the county. After reviewing the information at issue, we agree the information in Exhibits H and P does not constitute "information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business" by or for the county. See Gov't Code § 552.002(a); 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).

³We assume 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.

Accordingly, Exhibits H and P are not subject to the Act and the county is not required to release this information in response to this request.⁴

Next, we address your assertion that some of the remaining information constitutes judicial records not subject to the Act. As previously noted, the Act generally requires the disclosure of information maintained by a "governmental body." Gov't Code § 552.002(a)(1). A governmental body under the Act "does not include the judiciary." *Id.* § 552.003(1)(B). However, in Open Records Decision No. 646 (1996), this office determined that a community supervision and corrections department is a governmental body for purposes of the Act, and that its administrative records such as personnel files and other records reflecting the day-to-day management of the department are subject to the Act. ORD 646 at 5; *see also Benavides v. Lee*, 665 S.W.2d 151 (Tex. App.—San Antonio 1983, no writ) (in determining whether governmental entity falls within judiciary exception, this office looks to whether governmental entity maintains relevant records as agent of judiciary with regard to judicial, as opposed to administrative, functions). In contrast, specific records held by a community supervision and corrections department that concern individuals who are on probation and subject to the direct supervision of a court are not subject to the Act, because such records are held on behalf of the judiciary. ORD 646 at 5. You state the information submitted as Exhibit E constitutes specific records held by the county that concern individuals who are or were on probation and subject to the direct supervision of a court, and which are held on behalf of the judiciary. Thus, we agree Exhibit E consists of records of the judiciary not subject to the Act and need not be released in response to the instant request.⁵

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 information other statutes make confidential such as section 290dd-2 of title 42 of the United States Code, which provides in part:

(a) Records of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any program or activity relating to substance abuse education, prevention, training, treatment, rehabilitation, or research, which is conducted, regulated, or directly or indirectly assisted by any department or agency of the United States shall, except as provided in subsection (e) of this section, be confidential and be disclosed only for the purposes and under the circumstances expressly authorized under subsection (b) of this section.

⁴As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

⁵As our ruling on this information, and the duplicate information in Exhibit D, is dispositive, we need not address your remaining arguments against its disclosure.

42 U.S.C. § 290dd-2(a); *see also* 42 C.F.R. §§ 2.1 (records of identity, diagnosis, prognosis, or treatment of any patient maintained in connection with performance of drug abuse prevention function conducted, regulated, or directly or indirectly assisted by any department or agency of United States are generally confidential), .12(b) (discussing when alcohol abuse or drug abuse program is considered federally assisted). Thus, section 290dd-2 makes confidential the records of substance abuse patients that are created and maintained as part of their participation and treatment in a federally assisted substance abuse program. *See* 42 U.S.C. § 290dd-2(a). You state Exhibit D relates to potential participants in the county Veterans Treatment Court Program (the "program"). You explain this program is an alternative to incarceration to divert non-violent offenders who are honorably discharged veterans from prosecution and a criminal record to court-supervised treatment programs. You state the county applied for federal funding for the program. Upon review, we find none of the information submitted as Exhibit D consists of records of the identity, diagnosis, prognosis, or treatment of a patient maintained in connection with the performance of a program or activity relating to substance abuse education, prevention, training, treatment, rehabilitation, or research. Accordingly, the county may not withhold Exhibit D under section 552.101 of the Government Code under section 290dd-2 of title 42 of the United States Code.

You also raise section 552.101 of the Government Code in conjunction with the confidentiality provisions found in chapter 55 of the Code of Criminal Procedure for some of the submitted information. Articles 55.01 through 55.05 of the Code of Criminal Procedure provide for the expunction of criminal records in certain limited circumstances. Article 55.03 prescribes the effect of an expunction order and provides:

When the order of expunction is final:

- (1) the release, maintenance, dissemination, or use of the expunged records and files for any purpose is prohibited;
- (2) except as provided in Subdivision (3) of this article, the person arrested may deny the occurrence of the arrest and the existence of the expunction order; and
- (3) the person arrested or any other person, when questioned under oath in a criminal proceeding about an arrest for which the records have been expunged, may state only that the matter in question has been expunged.

Crim. Proc. Code art. 55.03. Article 55.04 imposes sanctions for violations of an expunction order and provides in part:

Sec. 1. A person who acquires knowledge of an arrest while an officer or employee of the state or of any agency or other entity of the state or any political subdivision of the state and who knows of an order expunging the records and files relating to that arrest commits an offense if he knowingly releases, disseminates, or otherwise uses the records or files.

Id. art. 55.04, § 1. This office has determined records subject to an expunction order are not subject to public disclosure under the Act. *See* Open Records Decision No. 457 at 2 (1987) (governmental body prohibited from releasing or disseminating arrest records subject to expunction order, as “those records are not subject to public disclosure under the [Act]”). You contend the information submitted as Exhibit M is the subject of expunction orders, and you seek to withhold that information under article 55.03 of the Code of Criminal Procedure. However, you have not submitted a copy of the expunction orders for the information submitted as Exhibit M. We nevertheless conclude to the extent Exhibit M is the subject of expunction orders, the county must withhold any such information under section 552.101 of the Government Code in conjunction with article 55.03 of the Code of Criminal Procedure. To the extent Exhibit M is not the subject of any expunction order, the county may not withhold it under section 552.101 on the basis of article 55.03.

Section 552.101 of the Government Code encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person and (2) 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. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. This office has found personal financial information not relating to the financial transaction between an individual and a governmental body is excepted from disclosure under common-law privacy. *See* Open Records Decision No. 600 (1992) (public employee’s withholding allowance certificate, designation of beneficiary of employee’s retirement benefits, direct deposit authorization, and employee’s decisions regarding voluntary benefits programs, among others, protected under common-law privacy). However, information pertaining to the work conduct and job performance of public employees is subject to a legitimate public interest and therefore generally not protected from disclosure under common-law privacy. *See* Open Records Decision Nos. 444 at 5-6 (1986) (public has interest in public employee’s qualifications and performance and circumstances of public employee’s resignation or termination), 423 at 2 (1984). Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). We note the fact that a public employee is sick is public information, but specific information about illnesses is excepted from disclosure. *See* ORD 470 at 4.

Upon review, we find the information we have marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the county must withhold

the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The county has failed to demonstrate, however, how the remaining information is highly intimate or embarrassing and not of legitimate public interest. Therefore, the county may not withhold any portion of the remaining information under section 552.101 in conjunction with common-law privacy.

Section 552.102(a) of the Government Code excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” Gov’t Code § 552.102(a). The Texas Supreme Court held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S. W.3d 336 (Tex. 2010). We have marked dates of birth of applicants that may be subject to section 552.102(a) of the Government Code. Therefore, to the extent the applicants are current or former employees of the county, the county must withhold the information we have marked under section 552.102(a). However, the county may not withhold this information under section 552.102(a) if the applicants concerned are not current or former employees of the county.

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 Exhibit G consists of communications between county attorneys and county employees that were made for the purpose of facilitating the rendition of professional legal services to the county. You also state the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find the county may withhold Exhibit G under section 552.107(1) of the Government Code.⁶

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 . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov’t Code § 552.108(a)(1). 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). You state the information submitted as Exhibits F, J, K, and L relate to pending criminal prosecutions being conducted by the county district attorney’s office. Based upon this representation, we find 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). Accordingly, the county may withhold Exhibits F, J, K, and L under section 552.108(a)(1) of the Government Code.⁷

Section 552.111 of the Government Code excepts from disclosure “[a]n 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. This exception 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*

⁶As our ruling on this information is dispositive, we need not address your remaining arguments against its disclosure.

⁷As our ruling on this information is dispositive, we need not address your remaining arguments against its disclosure.

of San Antonio, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, writ *ref'd n.r.e.*); 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 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 disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. 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. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); *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, including a consultant or other party with a privity of interest. *See* Open Records Decision No. 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process). 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 id.* We note a governmental body does not have a privity of interest or common deliberative process with a private party with which the governmental body is engaged in contract negotiations. *See id.* (section 552.111 not applicable to communication with entity with which governmental body has no privity of interest or common deliberative process).

You explain Exhibit N and the remaining information in Exhibit D are part of the deliberative process of the Denton County Veterans Coalition. Upon review of your representation and the information at issue, we find the county may withhold the information we have marked under section 552.111. However, we find the remaining information in

Exhibits D and N consists of general administrative information, factual information, or communications with parties with whom you have not demonstrated the county shares a privity of interest or a common deliberative process. Therefore, we conclude you have failed to demonstrate the remaining information in Exhibits D and N constitutes internal communications containing advice, recommendations, or opinions reflecting the policymaking processes of the county. Consequently, the county may not withhold any of the remaining information in Exhibits D and N under section 552.111 of the Government Code.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home addresses and telephone numbers, social security numbers, emergency contact information, and family member information of current or former officials or employees of a governmental body who request this information be kept confidential under section 552.024 of the Government Code. *See Gov't Code § 552.117(a); Open Records Decision No. 622 (1994).* Whether a 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).* Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former 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. Section 552.117 encompasses a personal cellular telephone number, unless the cellular 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).

We note the submitted information contains home telephone numbers, home addresses, and family member information of county applicants and a current county employee. However, we are unable to discern which, if any of the applicants were hired. Therefore, to the extent the information we have marked pertains to applicants who were ultimately hired or to current county employees, the county must withhold such information under section 552.117(a)(1) if the individuals at issue timely requested confidentiality under section 552.024. Conversely, to the extent the individuals whose information we have marked were not ultimately hired or are county employees who did not timely request confidentiality under section 552.024, the county may not withhold their personal information under section 552.117(a)(1) of the Government Code. The marked cellular telephone numbers may only be withheld, however, if the cellular service was not paid for by a governmental body.

Section 552.130 of the Government Code provides information relating to a motor vehicle operator's license, driver's license, motor vehicle title or registration, or personal identification document issued by an agency of this state or another state or country is excepted from public release. Gov't Code § 552.130. Accordingly, the county must

withhold the motor vehicle record information we have marked under section 552.130 of the Government Code.⁸

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 id.* § 552.137(a)-(c). We note section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address a governmental entity maintains for one of its officials or employees. Therefore, the county must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their release.

Section 552.140 of the Government Code provides a military veteran’s DD-214 form or other military discharge record that is first recorded with, or that otherwise first comes into the possession of, a governmental body on or after September 1, 2003, is confidential for a period of seventy-five years and may only be disclosed in accordance with section 552.140 or in accordance with a court order.⁹ *See id.* § 552.140(a)-(b). We note the county came into possession of the DD-214 forms we have marked after September 1, 2003. Thus, the county must withhold the forms we have marked under section 552.140 of the Government Code.

In summary, Exhibits H and P are not subject to the Act and the county is not required to release this information in response to this request. Exhibit E consists of records of the judiciary not subject to the Act and need not be released in response to the instant request. To the extent Exhibit M is the subject of expunction orders, the county must withhold any such information under section 552.101 of the Government Code in conjunction with article 55.03 of the Code of Criminal Procedure. The county must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. To the extent the applicants at issue are current or former employees of the county, the county must withhold the information we have marked under section 552.102(a) of the Government Code. The county may withhold Exhibit G under section 552.107(1) of the Government Code. The county may withhold Exhibits F, J, K, and L under section 552.108(a)(1) of the Government Code. The county may withhold the information we have marked under section 552.111 of the Government Code. To the extent the information we have marked pertains to applicants who were ultimately hired or current

⁸We note section 552.130(c) of the Government Code allows a governmental body to redact the information described in subsection 552.130(a) without the necessity of seeking a decision from the attorney general. *See Gov’t Code* § 552.130(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). *See id.* § 552.130(d), (e).

⁹The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body. *See Open Records Decision* Nos. 481 (1987), 480 (1987), 470 (1987).

county employees, the county must withhold such information under section 552.117(a)(1) of the Government Code if the individuals at issue timely requested confidentiality under section 552.024 of the Government Code; however, the marked cellular telephone numbers may only be withheld if the cellular service was not paid for by a governmental body. The county must withhold the information we have marked under section 552.130 of the Government Code. The county must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their release. The county must withhold the DD-214 forms we have marked under section 552.140 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.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,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/som

Ref: ID# 514501

Enc. Submitted documents

c: Requestor
(w/o enclosures)