



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 27, 2014

Ms. Claire Yancey
Assistant District Attorney
Civil Division
Denton County Criminal District Attorney's Office
P.O. Box 2850
Denton, Texas 76202

OR2014-03587

Dear Ms. Yancy:

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# 515177.

The Denton County Judge, the Denton County Criminal District Attorney's Office, and Denton County (collectively, the "county") received a request for "the entire contents of any form of personnel file" for two named individuals, including all documents regarding the conduct of the two named individuals "in the discharge of their mandatory duties" with the Denton County District Attorney's Office. You state you have released some of the responsive information to the requestor. You claim a portion of the submitted information is not subject to the Act. You also claim the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.108 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered the comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

You contend the information submitted as Exhibit G is not subject to the Act. The Act is applicable only to "public information." *See id.* §§ 552.002, .021. Section 552.002(a) defines "public information" as the following:

¹Although you raise section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503, this office has concluded section 552.101 does not encompass discovery privileges. *See* Open Records Decision No. 676 at 1-2 (2002). Further, section 552.107 of the Government Code is the proper exception to raise for information not subject to section 552.022 of the Government Code

[I]nformation 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. *See id.* § 552.002(a)(1); *see* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). *But see* Open Records Decision No. 635 at 4 (1995) (Gov't Code § 552.002 not applicable to personal information unrelated to official business and created or maintained by state employee involving *de minimis* use of state resources). You inform us Exhibit G consists of personal e-mails that are not associated with the official business of the county. We note, however, the request is for the personnel files of two named individuals. Additionally, Exhibit G consists of an e-mail string pertaining to a county personnel matter concerning one of the named individuals. Accordingly, we find Exhibit G consists of information that is maintained by the county for the transaction of official business. Thus, Exhibit G is subject to the Act and must be released, unless the information falls within an exception to public disclosure under the Act.

Section 552.108(b)(3) provides, in pertinent part:

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [required public disclosure] if:

...

(3) the internal record or notation:

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

Gov't Code § 552.108(b)(3)(B). A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why this exception is applicable to the information the governmental body seeks to withhold. *See id.* §§ 552.108, .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state Exhibit C contains internal records and notations which reflect the mental impressions or legal reasoning of attorneys representing the state. You further state the communications are maintained for internal use in matters relating to criminal prosecutions and were not intended for public disclosure. Upon review, we agree most of the information in Exhibit C reflects the mental impressions or legal reasoning of attorneys representing the state. However, you also state one of the e-mails was sent to opposing counsel. Upon review, we find you have failed to demonstrate how the information we marked in Exhibit C reflects the mental processes or legal reasoning of an attorney representing the state. Therefore, with the exception of the information we have marked for release, the county may withhold Exhibit C under section 552.108(b)(3) of the Government Code.

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 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 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. *Osborne*

v. Johnson, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). 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 seek to withhold Exhibit D under section 552.107 of the Government Code. You state the communication in Exhibit D was made between county attorneys and an employee of the Denton County Veterans Service Office (the “veterans service office”). You further state the communication was submitted for legal advice, and the communication contains legal advice. You also state the communication was originally confidential and has remained confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to Exhibit D. Thus, the county may withhold Exhibit D 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 information other statutes make confidential, such as article 35.29 of the Code of Criminal Procedure. Information collected about jurors in the jury selection process is governed by article 35.29, which provides in relevant part:

(a) Except as provided by Subsections (b) and (c), information collected by the court or by a prosecuting attorney during the jury selection process about a person who serves as a juror, including the juror’s home address, home telephone number, social security number, driver’s license number, and other personal information, is confidential and may not be disclosed by the court, the prosecuting attorney, the defense counsel, or any court personnel.

Crim. Proc. Code art. 35.29(a). Article 35.29 makes confidential certain personal information pertaining only to those individuals who actually served on the petit jury in a criminal trial. In addition to the confidential information listed in article 35.29, “other personal information” that is confidential pursuant to article 35.29 includes the juror’s present employer, business telephone number, and spouse’s employer. Juror names, however, are not made confidential by article 35.29, and are not “other personal information” that are confidential pursuant to article 35.29. You state Exhibit E contains juror information. We note article 35.29 applies to information obtained during the jury selection process. Exhibit E consists of a letter submitted to the county at the conclusion of a trial. Thus, we find the information in Exhibit E was not collected during the jury selection process. Therefore, the information in Exhibit E is not subject to article 35.29, and consequently, no portion of Exhibit E may be withheld under section 552.101 of the Government Code on that basis.

Section 552.101 of the Government Code also 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 a financial transaction between an individual and a governmental body is generally highly intimate or embarrassing. *See* Open Records Decision Nos. 600 (1992) (employee's designation of retirement beneficiary, choice of insurance carrier, election of optional coverages, direct deposit authorization, forms allowing employee to allocate pretax compensation to group insurance, health care or dependent care), 523 (1989) (common-law privacy protects credit reports, financial statements, and other personal financial information), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy). We note an individual's name is not ordinarily private information subject to common-law privacy. *See* Open Records Decision No. 554 (1990).

Upon review, we find the information we have marked in Exhibit G satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the county must withhold the information we have marked in Exhibit G under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find the county has failed to demonstrate the remaining information at issue is highly intimate or embarrassing and of no legitimate public concern. Therefore, the county may not withhold the remaining information at issue under section 552.101 of the Government Code in conjunction with common-law privacy.

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). *Id.* § 552.137(a)-(c). The e-mail address at issue is not a type specifically excluded by section 552.137(c) of the Government Code. Accordingly, 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 disclosure.²

In summary, except for the information we have marked for release in Exhibit C, the county may withhold the information in Exhibit C under section 552.108(b)(3) of the Government Code. The county may withhold Exhibit D under section 552.107 of the Government Code. The county must withhold the information we marked under section 552.101 in conjunction

²We note Open Records Decision No. 684 (2009) is a previous determination issued by this office authorizing all governmental bodies to withhold certain categories of information without the necessity of requesting an attorney general decision, including an e-mail address of a member of the public under section 552.137 of the Government Code.

with common-law privacy. 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 disclosure. The remaining submitted 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,

A handwritten signature in black ink, appearing to read 'Meredith L. Coffman', written over a horizontal line.

Meredith L. Coffman
Assistant Attorney General
Open Records Division

MLC/dls

Ref: ID# 515177

Enc. Submitted documents

c: Requestor
(w/o enclosures)