ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 28, 2014

Ms. Elizabeth Hanshaw Winn
Assistant County Attorney
County of Travis
P.O. Box 1748
Austin, Texas 78767

OR2014-05176

Dear Ms. Winn:

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# 518151.

The Travis County Attorney's Office (the "county attorney's office") received a request for seven categories of information pertaining to the removal case of a named Travis County (the "county") official.[1] You state the county attorney's office will release some of the requested information. You claim the submitted information is excepted from disclosure under section 552.107 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.[2]

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[1]You state the county attorney's office sought and received clarification of the information requested. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also 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 overbroad request for information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

[2]We 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 those records contain substantially different types of information than that submitted to this office.

Initially, you state the county attorney's office has previously released some of the requested information in response to a prior request for information. We note the Act does not permit the selective disclosure of information. *See* Gov't Code §§ 552.007(b), .021; Open Records Decision No. 463 at 1-2 (1987). If information has been voluntarily released to any member of the public, then that same information may not subsequently be withheld unless public disclosure of the information is expressly prohibited by law or the information is confidential under law. *See* Gov't Code § 552.007(a); Open Records Decision Nos. 518 at 3 (1989), 490 at 2 (1988); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Accordingly, the county attorney's office may not withhold previously released information unless its release is expressly prohibited by law or the information is confidential under law. You claim the information at issue is protected by the attorney-client privilege of section 552.107(1) of the Government Code. However, section 552.107(1) is a discretionary exception and may be waived. *See* Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). As such, the attorney-client privilege neither prohibits public disclosure of information nor makes information confidential under law. Therefore, the county attorney's office may not withhold any portion of the information that has been previously released under the attorney-client privilege of section 552.107(1). However, we will consider your arguments against disclosure of the information that has not previously been released.

Next, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

> (a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:
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> > (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;
> >
> > . . .
> >
> > (3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body; [and]
> >
> > . . .

> (16) information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege[.]

Gov't Code § 552.022(a)(1), (3), (16). Some of the submitted information is part of a completed investigation that is subject to subsection 552.022(a)(1). The county attorney's office must release the completed investigation pursuant to subsection 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or is made confidential under the Act or other law. *See id.* § 552.022(a)(1). The submitted information also contains information in accounts and invoices that are subject to subsection 552.022(a)(3) and attorney fee bills that are subject to section 552.022(a)(16). These documents must be released unless they are made confidential under the Act or other law. *See id.* § 552.022(a)(3), (16). You raise section 552.107(2) of the Government Code for the information at issue. Section 552.107(2) allows a governmental body to withhold information if "a court by order has prohibited disclosure of the information." *Id.* § 552.107(2). However, section 552.022(b) provides a court may not order a governmental body to withhold from public inspection any category of information described by section (a) unless the category of information is expressly made confidential under the Act or other law. *Id.* § 552.022(b). Because section 552.022(b) prohibits a court from ordering documents subject to section 552.022 to be withheld, we conclude the county attorney's office may not withhold the information subject to section 552.022 of the Government Code under section 552.107(2) of the Government Code. You also seek to withhold some of the information subject to section 552.022 under section 552.107(1) of the Government Code. As noted above, section 552.107(1) is a discretionary exception and does not make information confidential under the Act. *See* ORDs 676 at 10-11, 665 at 2 n.5, 663 at 5. Therefore, the information subject to section 552.022, which we have marked, may not be withheld under section 552.107(1) of the Government Code. However, the Texas Supreme Court has held the Texas Rules of Evidence are "other law" within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). We will therefore consider your assertion of the attorney-client privilege under rule 503 of the Texas Rules of Evidence for the information at issue. Further, because section 552.101 of the Government Code applies to confidential information and because sections 552.1175, 552.130, 552.136, and 552.137 of the Government Code make information confidential under the Act, we will also consider the applicability of these exceptions for the information at issue.[3] Finally, we will consider your arguments under subsections 552.107(1) and 552.107(2) of the Government Code for the submitted information not subject to section 552.022.

We first address your argument under the attorney-client privilege of Texas Rule of Evidence 503. Rule 503(b)(1) provides as follows:

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[3]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).

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:
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> > (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
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> > (B) between the lawyer and the lawyer's representative;
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> > (C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
> >
> > (D) between representatives of the client or between the client and a representative of the client; or
> >
> > (E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if it is 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).

Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show the communication is confidential by explaining it was not intended to be disclosed to third persons and it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You assert the portions of the submitted fee bills that have not been previously released should be withheld under rule 503. You assert the portions of the fee bills at issue consist of privileged attorney-client communications between a special prosecutor for the county attorney's office and an official of the county in his capacity as a client. You state the communications at issue were made for the purpose of the rendition of legal services to the county. You indicate the communications at issue have not been, and were not intended to be, disclosed to third parties. Based on your representations and our review of the

information at issue, we find the county attorney's office has established the information we have marked constitutes attorney-client communications under rule 503. Thus, the county attorney's office may withhold the information we have marked within the attorney fee bills pursuant to rule 503 of the Texas Rules of Evidence. However, we find the remaining information at issue documents communications with individuals you have not identified, and thus you have not demonstrated are privileged parties, or does not document communications. Thus, you have not demonstrated how the remaining information at issue documents a privileged attorney-client communication for purposes of rule 503. Accordingly, no portion of the remaining information at issue may be withheld on that basis.

Next, the county attorney's office argues the information not subject to section 552.022 of the Government Code is subject to a protective order (the "order") that prohibits release of the information at issue. As noted above, section 552.107(2) excepts information from public disclosure if "a court by order has prohibited disclosure of the information." *See* Gov't Code § 552.107(2). The county attorney's office has submitted a copy of the order, which was entered by the court in *The State of Texas v. Rosemary Lehmberg*, No. D-1-GV-13-000421, in the 98th District Court of Travis County, Texas. The order states,

> All documents produced by Defendant in response to any discovery request from Plaintiff in this action, as well as all copies of such documents, including documents or copies given by Defendant to Plaintiff voluntarily prior to a required response to a discovery request are included in this Agreed Protective Order and are hereinafter referred to as "Included Documents." Any documents or copies of documents acquired by Plaintiff from any other source than from Defendant in response to a discovery request, even if such documents or copies of such documents were included by Defendant in response to a discovery request, are not included in this Agreed Protective Order.

Agreed Protective Order, *The State of Texas v. Rosemary Lehmberg*, Cause No. D-1-GV-13-000421 (98th Dist. Ct., Travis Co., Tex.). The order sets forth several individuals and entities with whom, and several purposes for which, the Included Documents may be shared, and states, "Plaintiff may not share Included Documents with any other person or entity." *Id.* The order goes on to state, "If Plaintiff receives a request to view . . . the Included Documents pursuant to the [Act], either before or during the pendency of this litigation, Plaintiff will oppose such request . . . in a request for an Open Records Decision from the Attorney General of Texas." *Id.* Finally, the order states, "This order shall continue to be binding after the conclusion of this litigation, except there shall be no restriction on documents that are used as exhibits in Court." *Id.*

You inform us the litigation at issue was no longer pending on the date the county attorney's office received the request for information. Thus, we agree the order prohibits the release

of any Included Documents, as that term is defined by the order. We note the information not subject to section 552.022 of the Government Code consists of correspondence between the county attorney's office and several third parties, copies of checks issued by a third party and payable to potential witnesses in the litigation at issue, and handwritten notes concerning payments to several third parties. Thus, because the defendant did not produce the information at issue, we find no portion of the information at issue consists of Included Documents. Therefore, the county attorney's office may not withhold any portion of the submitted information not subject to section 552.022 of the Government Code under section 552.107(2) of the Government Code.

Section 552.101 of the Government Code excepts "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 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. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). 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. 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). However, we note common-law privacy is not applicable to information filed with a court or presented in open court. *See Star-Telegram v. Walker*, 834 S.W.2d 54 (Tex. 1992). Upon review, we find the information we have marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation.* Therefore, the county attorney's office must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy.

Some of the remaining information may be subject to section 552.1175 of the Government Code. Section 552.1175 provides in part:

> (a) This section applies only to:
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> . . .
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> (5) employees of a district attorney, criminal district attorney, or county or municipal attorney whose jurisdiction includes any criminal law or child protective services matters[.]

> (b) Information that relates to the home address, home telephone number, emergency contact information, date of birth, or social security number of an individual to whom this section applies, or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:
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> (1) chooses to restrict public access to the information; and
>
> (2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Gov't Code § 552.1175. Some of the remaining information relates to an individual who is an employee of a district attorney's office. Accordingly, the county attorney's office must withhold the information at issue, which we have marked, under section 552.1175 of the Government Code if the individual whose information is at issue elects to restrict access to the information in accordance with section 552.1175(b). Conversely, if the individual at issue does not elect to restrict access to the information in accordance with section 552.1175(b), the county attorney's office may not withhold the marked information under section 552.1175.

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. *See id.* § 552.130. Accordingly, the county attorney's office must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code.[4]

Section 552.136 of the Government Code provides, "[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"). Accordingly, the county attorney's office must withhold the routing and bank account numbers we have marked under section 552.136 of the Government Code.[5]

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[4]We note section 552.130 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). However, 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).

[5]Section 552.136(c) of the Government Code allows a governmental body to redact the information described in section 552.136(b) without the necessity of seeking a decision from the attorney general. *See* Gov't Code § 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). *See id.* § 552.136(d), (e).

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 at issue are not excluded by subsection (c). Therefore, the county attorney's office 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.[6]

We note some of the materials at issue may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, the county attorney's office may withhold the information we have marked within the attorney fee bills pursuant to rule 503 of the Texas Rules of Evidence. The county attorney's office must withhold (1) the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy; (2) the information we marked under section 552.1175 of the Government Code, if the individual whose information is at issue elects to restrict access to the information in accordance with section 552.1175(b); (3) the motor vehicle record information we have marked under section 552.130 of the Government Code; (4) the routing and bank account numbers we have marked under section 552.136 of the Government Code; and (5) 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. The county attorney's office must release the remaining information; however, any information that is subject to copyright may be released only in accordance with copyright law.[7]

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.

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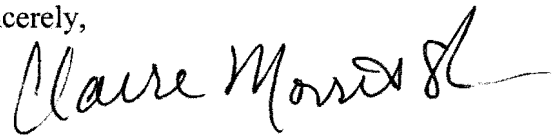
[6]We note Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold certain information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney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

[7]We note the information being released contains a partial social security number. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office. *See* Gov't Code § 552.147(b).

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,



Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/som

Ref: ID# 518151

Enc. Submitted documents

c: Requestor
(w/o enclosures)