ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 3, 2014

Mr. Kenneth E. East
Counsel for the Town of Lakeside
Foster & East
9001 Airport Freeway, Suite 675
North Richland Hills, Texas 76180

OR2014-05545

Dear Mr. East:

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# 517269.

The Town of Lakeside (the "town") and the Lakeside Municipal Court (the "court"), which you represent, received two requests from the same requestor for (1) all tickets written on a specified date and the probation status of those tickets; and (2) all correspondence, e-mails, and text messages for a specified time period about or involving three named individuals.[1] The town received another request from a different requestor for information pertaining to a specified incident involving a named individual. You claim some of the submitted information is not subject to the Act. Additionally, you claim the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.130, and 552.147 of the Government Code.[2] We have considered your arguments and reviewed the submitted information. We have also received and considered comments submitted by a representative

[1]You state, and provide documentation demonstrating, the first requestor clarified his request for information. *See* Gov't Code § 552.222(b) (stating that if information requested is unclear to governmental body or if a large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used).

[2]Although you also raise section 552.022 of the Government Code, we note section 552.022 is not an exception to disclosure. Rather, section 552.022 enumerates categories of information that are not excepted from disclosure unless they are made confidential under the Act or other law. *See* Gov't Code § 552.022.

of the first requestor. *See* Gov't Code § 552.304 (providing that interested party may submit written comments regarding why information should or should not be released).

Initially, we note the request received from the second requestor is narrower than the requests for information received from the first requestor. Thus, the town need not release information to the second requestor that is not responsive to her request for information.

Next, we address your argument that some of the information submitted as responsive to the requests received from the first requestor is not subject to the Act. The Act is applicable to information "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[.]" *Id.* § 552.002(a)(1). However, the Act's definition of "governmental body" "does not include the judiciary." *Id.* § 552.003(1)(B). Information "collected, assembled, or maintained by or for the judiciary" is not subject to the Act but instead is "governed by rules adopted by the Supreme Court of Texas or by other applicable laws and rules." *Id.* § 552.0035(a); *cf.* Open Records Decision No. 131 (1976) (applying statutory predecessor to judiciary exclusion under Gov't Code § 552.003(1)(B) prior to enactment of Gov't Code § 552.0035). You contend some of the submitted information is not subject to the Act because it constitutes court records maintained by the court. Accordingly, to the extent the submitted information is maintained solely by the court, we agree it consists of records of the judiciary that are not subject to the Act and need not be released in response to the first request.[3] However, to the extent the information at issue is also maintained by the town, and is not maintained solely by the court, it is subject to the Act and must be released unless the information falls within an exception to disclosure under the Act. *See* Gov't Code §§ 552.006, .021, .301, .302. In that instance, we will address your remaining arguments against disclosure of this information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. This section encompasses information protected by other statutes such as section 58.007 of the Family Code, which provides, in pertinent part, as follows:

> (c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:
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> > (1) if maintained on paper or microfilm, kept separate from adult files and records;

[3]In that instance, as our ruling is dispositive, we need not address your remaining arguments against disclosure of the information that is not subject to the Act.

> (2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and
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> (3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapters B, D, and E.

Fam. Code § 58.007(c). Juvenile law enforcement records relating to delinquent conduct or conduct indicating a need for supervision that occurred on or after September 1, 1997, are confidential under section 58.007. *See id.* § 51.03(a), (b) (defining "delinquent conduct" and "conduct indicating a need for supervision"). For purposes of section 58.007(c), "child" means a person who is ten years of age or older and under seventeen years of age at the time of the conduct at issue. *See id.* § 51.02(2). Some of the information at issue involves children engaged in delinquent conduct or conduct indicating a need for supervision that occurred after September 1, 1997. As such, this information constitutes juvenile law enforcement records that are confidential pursuant to section 58.007(c). It does not appear that any of the exceptions to confidentiality under section 58.007 apply in this instance. Accordingly, to the extent the information at issue is not maintained solely by the court and is therefore subject to the Act, the town must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 58.007 of the Family Code.[4]

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

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

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 some of the remaining information constitutes e-mail communications that contain privileged attorney-client communications. Although you do not identify the parties to the communications at issue, we are able to discern from the face of the documents that certain individuals are privileged parties, including the town attorney and employees of the town. *See* ORD 676 at 8 (governmental body must inform this office of identities and capacities of individuals to whom each communication at issue has been made; this office cannot necessarily assume that communication was made among only categories of individuals identified in rule 503). *See generally* Gov't Code § 552.301(e)(1)(A). We understand these communications were made for the purpose of providing legal services to the town. Additionally, we understand these communications were intended to be confidential and have remained confidential.

However, upon review, we find two of the e-mails you seek to withhold have been shared with an individual you have not demonstrated is a privileged party. Therefore, we conclude you have failed to establish how these two e-mails constitute privileged communications for the purposes of section 552.107(1). Thus, the town may not withhold these two e-mails under section 552.107(1). Based upon your representations and our review of the remaining information at issue, we find the information we have marked consists of privileged attorney-client communications the town may generally withhold under section 552.107(1). We note, however, some of these privileged e-mail strings include e-mails and attachments received from or sent to non-privileged parties. Furthermore, if the e-mails and attachments received from or sent to non-privileged parties are removed from the e-mail strings and stand alone, they are responsive to the first requestor's requests for information. Therefore, if these non-privileged e-mails and attachments, which we have marked, are maintained by the town separate and apart from the otherwise privileged e-mail strings in which they appear, then the town may not withhold these non-privileged e-mails and attachments under section 552.107(1).

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. We note the doctrine of common-law privacy generally protects the identifying information of juvenile offenders. *See* Open Records Decision No. 394 (1983); *cf.* Fam. Code § 58.007. Additionally, a compilation of an individual's criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *Cf. U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (when considering prong regarding individual's privacy interest, court recognized distinction between public records found in courthouse files and local police stations and compiled summary of information and noted that individual has significant privacy interest in compilation of one's criminal history). Moreover, we find a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. We note, however, that records relating to routine traffic violations are not considered criminal history information. *See* Gov't Code § 411.082(2)(B) (criminal history record information does not include driving record information). Upon review, we find portions of the remaining information satisfy the standard articulated by the Texas Supreme Court in *Industrial Foundation.* Accordingly, the town must withhold the information we have marked under section 552.101 in conjunction with common-law privacy.[5]

Section 552.101 of the Government Code also encompasses article 45.0217 of the Code of Criminal Procedure. Article 45.0217 addresses the confidentiality of records and files relating to a child in certain circumstances. As you acknowledge, the Eighty-third Texas Legislature adopted the three following bills amending article 45.0217: Senate Bills 393 and 394 and House Bill 528. *See* Act of May 23, 2013, 83rd Leg., R.S., ch. 1407, § 4, 2013 Tex. Gen. Laws 3731 (Senate Bill 393); Act of May 22, 2013, 83rd Leg., R.S., ch. 1257, § 3, 2013 Tex. Gen. Laws 3180-81 (House Bill 528); Act of May 16, 2013, 83rd Leg., R.S., ch. 1319, § 2, 2013 Tex. Gen. Laws 3500-01 (Senate Bill 394). As a result, there are currently two versions of article 45.0217 of the Code of Criminal Procedure. As amended by Senate Bills 393 and 394, article 45.0217 provides the following, in pertinent part:

> (a) This article applies only to a misdemeanor offense punishable by fine only, other than a traffic offense.
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> (a-1) Except as provided by Article 15.27 [of the Code of Criminal Procedure] and Subsection (b), all records and files, including those held by

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[5]As our ruling is dispositive, we need not address your arguments against disclosure of this information.

> law enforcement, and information stored by electronic means or otherwise, from which a record or file could be generated, relating to a child who is convicted of and has satisfied the judgment for or who has received a dismissal after deferral of disposition for an offense described by Subsection (a) are confidential and may not be disclosed to the public.

Crim. Proc. Code art. 45.0217(a)-(a-1). As amended by House Bill 528, article 45.0217 provides, in pertinent part, the following:

> (a) Except as provided by Article 15.27 [of the Code of Criminal Procedure] and Subsection (b), all records and files, including those held by law enforcement, and information stored by electronic means or otherwise, from which a record or file could be generated, relating to a child who is charged with, is convicted of, is found not guilty of, had a charge dismissed for, or is granted deferred disposition for a fine-only misdemeanor offense other than a traffic offense are confidential and may not be disclosed to the public.

Id. In Attorney General Opinion GA-1035, our office addressed the question of how to reconcile the two versions, and found a court "may simultaneously comply with the amendments of both the Senate Bills and the House Bill. Therefore, . . . the Senate Bills and the House Bill do not irreconcilably conflict." Attorney General Opinion GA-1035 (2014). Neither version of article 45.0217 applies to traffic offenses. Crim. Proc. Code art. 45.0217(a). Upon review, we find the remaining information that is subject to the Act either consists of information pertaining to traffic offenses or consists of e-mails discussing open records requests, which do not constitute records, files, or information stored by electronic means from which a record or file could be generated relating to a child for the purposes of either version of article 45.0217. Accordingly, we find you have failed to demonstrate how the remaining information that is subject to the Act is confidential under either version of article 45.0217. Thus, the town may not withhold the remaining information that is subject to the Act under section 552.101 on either of these bases.

Section 552.130 of the Government Code provides information relating to a motor vehicle operator's or driver's license or permit, a motor vehicle title or registration, or a personal identification document issued by an agency of Texas or another state or country is excepted from public release. Gov't Code § 552.130(a). We conclude the town must withhold the information we have marked under section 552.130.[6] None of the remaining information is subject to section 552.130; thus, the town may not withhold the remaining information on this basis.

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[6]We 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 theattorney general. 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).

We note portions of the remaining information are subject to sections 552.136 and 552.137 of the Government Code.[7] Section 552.136 states, "Notwithstanding any other provision of this chapter, 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 also id.* § 552.136(a) (defining "access device"). Accordingly, the town must withhold the partial credit card number we have marked under section 552.136.[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 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). Section 552.137 is not applicable to an institutional e-mail address, an Internet website address, the general e-mail address of a business, an e-mail address of a person who has a contractual relationship with a governmental body, or an e-mail address maintained by a governmental entity for one of its officials or employees. The e-mail addresses we have indicated are not of the types specifically excluded by section 552.137(c). Accordingly, the town must withhold the e-mail addresses we have marked under section 552.137 of the Government Code unless the owners of the addresses affirmatively consent to their release.[9]

In summary, to the extent the submitted information is maintained solely by the court, it consists of records of the judiciary that are not subject to the Act and need not be released in response to this request. To the extent the information at issue is subject to the Act, the town must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 58.007 of the Family Code. The town may withhold the information we have marked under section 552.107(1) of the Government Code; however, the town may not withhold the non-privileged portions of the e-mails and attachments we have marked if they are maintained by the town separate and apart from the otherwise privileged e-mail strings in which they appear. The town must withhold the following information: (1) the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy; (2) the information we have

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[7]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).

[8]We note section 552.136(c) of the Government Code authorizes a governmental body to redact, without the necessity of requesting a decision from this office, the information described in section 552.136(b). Gov't Code § 552.136(c); *see also id.* § 552.136(d)-(e) (requestor may appeal governmental body's decision to withhold information under section 552.136(c) to attorney general and governmental body withholding information pursuant to section 552.136(c) must provide certain notice to requestor).

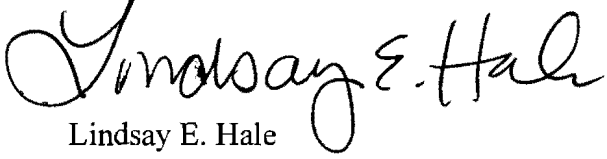
[9]We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity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

marked under section 552.130 of the Government Code; (3) the information we have marked under section 552.136 of the Government Code; and (4) the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the addresses affirmatively consent to their release. The town must release the remaining information that is subject to the Act to the first requestor.[10]

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,



Lindsay E. Hale
Assistant Attorney General
Open Records Division

LEH/akg

Ref: ID# 517269

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)

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[10]We note the first requestor has a right of access to his own personal e-mail addresses in the information that is being released to him. *See* Gov't Code § 552.137(b) (personal e-mail address of member of public may be disclosed if owner of address affirmatively consents to its disclosure). As previously noted, Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them 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. ORD 684. Thus, if the town receives another request for this same information from a person who does not have such a right of access, Open Records Decision No. 684 authorizes the town to redact this requestor's personal e-mail addresses without again seeking a ruling from this office. *See id.*