



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 30, 2014

Mr. Scott Seifert
Assistant Fire Chief
Spring Volunteer Fire Department
P.O. Box 121
Spring, Texas 77383-0121

OR2014-13191

Dear Mr. Seifert:

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# 531030.

The Spring Volunteer Fire Department (the "department") received two requests from the same requestor for "a complete snapshot" of several named individuals' e-mail mailboxes.¹ You claim the requested information is excepted from disclosure under sections 552.101, 552.107, and 552.137 of the Government Code. You also inform us you have notified interested third parties of their right to submit comments to this office as to why their information should not be released.² See Gov't Code § 552.304 (interested part

¹We note the department 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 3 80, 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).

²As of the date of this letter, this office has not received comments from any third party explaining why any of the submitted information should not be released.

may submit written comments regarding availability of requested information). We have considered the exceptions you claim and reviewed the submitted information.³

Initially, you claim the requests for information are over broad and expansive in scope. Although a governmental body is not required to create new information in response to a request, it does have a duty to make a good-faith effort to relate a request for information to information in existence at the time of the request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); *see also* Open Records Decision No. 561 at 8-9 (1990). Further, sections 552.232 and 552.275 of the Government Code provide governmental bodies with a method to handle repetitious or redundant requests, and requests that require large amounts of personnel time, respectively. However, a governmental body may not refuse to comply with a request on the ground of administrative inconvenience. *See Indus. Found v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 687 (Tex. 1976). You have submitted information that you indicate is responsive to the requests. Accordingly, we will address your arguments against public disclosure of the submitted information.

Next, we note some of the submitted information, which we have marked, is not responsive to the present requests because it was created after the department received the requests. This ruling does not address the public availability of non-responsive information, and the department need not release it in response to either request.

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. 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).

³We assume that 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.

Upon review, we find the information in Exhibit 8 satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Therefore, the department must withhold Exhibit 8 under section 552.101 of the Government Code in conjunction with common-law privacy.⁴

Section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege. 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. *See* 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. *See* 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. *See 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 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. *See 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 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 claim Exhibit 9 is protected by section 552.107(1) of the Government Code. You state the information at issue consists of communications involving an attorney for the department

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

and department employees. You indicate the communications were made for the purpose of facilitating the rendition of professional legal services to the department and that these communications have remained confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to Exhibit 9. Thus, the department may generally withhold the e-mails at issue under section 552.107(1) of the Government Code. We note, however, one of these e-mail strings includes an e-mail sent from individuals you have not demonstrated are privileged parties. Furthermore, if the e-mail sent from the non-privileged parties is removed from the e-mail string and stands alone, it is responsive to the requests for information. Therefore, if this non-privileged e-mail, which we have marked, is maintained by the department separate and apart from the otherwise privileged e-mail string in which it appears, then the department may not withhold this non-privileged e-mail under section 552.107(1) of the Government Code.

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* Gov’t Code § 552.137(a)-(c). The e-mail address at issue is not excluded by subsection (c). Therefore, the department must withhold the personal e-mail address we have marked under section 552.137 of the Government Code, unless the owner affirmatively consents to its public disclosure.⁵

In summary, the department must withhold Exhibit 8 under section 552.101 of the Government Code in conjunction with common-law privacy. The department may generally withhold Exhibit 9 under section 552.107(1) of the Government Code. If the non-privileged e-mail, which we marked, is maintained by the department separate and apart from the otherwise privileged e-mail string in which it appears, then the department may not withhold the non-privileged e-mail under section 552.107(1) of the Government Code and it must be released; however in releasing the marked non-privileged e-mail, the department must withhold the personal e-mail address we have marked under section 552.137 of the Government Code, unless the owner affirmatively consents to its public disclosure.

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/>

⁵We note Open Records Decision No. 684 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.

[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,



Paige Lay
Assistant Attorney General
Open Records Division

PL/som

Ref: ID# 531030

Enc. Submitted documents

c: Requestor
(w/o enclosures)