



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

April 20, 2015

Ms. Lauren Downey  
Assistant Attorney General  
Public Information Coordinator  
General Counsel Division  
Office of the Attorney General  
P.O. Box 12548  
Austin, Texas 78711-2548

OR2015-07623

Dear Ms. Downey:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. The two requests you ask about were originally received by the Open Records Division ("ORD") of this office and assigned identification number 562206 (Attorney General PIR No. 15-40649 and 15-41145). Because ORD possessed documents responsive to the requests, preparation of this ruling has been assigned to the Opinion Committee.

The Office of the Attorney General (the "OAG") received a Public Information Act request from Mr. Russell Carollo for documents related to Google, Inc. The OAG subsequently received a request from Mr. Rolfe Winkler for documents related to the OAG's antitrust examination of Google, Inc. Because the information requested by Mr. Winkler is the same as a portion of the information requested by Mr. Carollo, you have asked that we rule on Mr. Winkler's request alongside Mr. Carollo's request, and we agree to do so. You indicate that the OAG has released some of the requested information with redactions allowed by law. You state that other responsive information is excepted from disclosure under sections 552.101, 552.107, 552.108 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the information you have submitted as Exhibits B-E.

## **I. Records Pertaining to Child Abuse Investigations**

As Exhibit B, you have submitted a sample of information pertaining to criminal investigations being conducted by the OAG's Criminal Prosecutions and Law Enforcement divisions.<sup>1</sup> You explain that the investigations encompass charges of sexual assault of children and trafficking persons under 18 years of age.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." TEX. GOV'T CODE ANN. § 552.101 (West 2012). While you raise section 552.101 with regard to all of the documents in Exhibit B, you raise three different statutes as the underlying basis for confidentiality of the various documents. We will address each of these statutes in turn.

Section 261.201(a) of the Family Code provides, in relevant part:

(a) Except as provided by Section 261.203, the following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

TEX. FAM. CODE ANN. § 261.201(a) (West 2014). The OAG explains that a portion of the documents in Exhibit B include files, reports, records, communications, or working papers used and developed in child abuse investigations being conducted by the OAG under chapter 261. The OAG states that it has not adopted a rule governing the release of this type of information. Upon review of these documents, it is apparent that the requested documents are confidential pursuant to section 261.201 of the Family Code. Accordingly, the OAG

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<sup>1</sup>We assume the representative sample of records submitted to this office is truly representative of the requested records as a whole. This ruling 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.

must withhold these documents from disclosure under section 552.101 of the Government Code as information made confidential by law.

Also included within Exhibit B are documents from OAG's Law Enforcement Division that relate to criminal investigations and prosecutions involving juvenile offenders engaged in conduct that occurred after September 1, 1997. Section 552.101 encompasses subsection 58.007(c) of the Family Code. Tex. Att'y Gen. OR2015-05964, at 1. Section 58.007 of the Family Code provides, in relevant part, that "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 . . ." TEX. FAM. CODE ANN. § 58.007(c) (West 2014). For purposes of subsection 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 reported conduct. *See id.* § 51.02(2)(A). Upon review of the documents in Exhibit B marked under section 58.007, we conclude that they involve juvenile delinquent conduct occurring after September 1, 1997, and are therefore confidential. The OAG must therefore withhold these documents from disclosure under section 552.101 of the Government Code as information made confidential by law.

You have also included in Exhibit B documents pertaining to criminal investigations conducted by the OAG, some of which are ongoing criminal investigations and others that are closed investigations where no charges were filed. Section 552.108 of the Government Code provides, in relevant part:

Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if:

- (1) release of the information would interfere with the detection, investigation, or prosecution of crime; [or]
- (2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication[.]

TEX. GOV'T CODE ANN. § 552.108(a) (West 2012). For the documents in Exhibit B pertaining to ongoing criminal investigations conducted by the OAG, you claim that release of the documents would interfere with the investigation of a crime. Upon review of these documents and your representation, we conclude that the release of this information would interfere with the detection, investigation, or prosecution of crime. The OAG may therefore withhold the marked documents under subsection 552.108(a)(1).

The remaining documents within Exhibit B pertain to investigations that were conducted by the OAG and are now closed. You tell us that no charges were filed based on those

investigations. Upon review of these documents, we conclude that the OAG may withhold the marked documents under subsection 552.108(a)(2).

## **II. Records Produced in Response to an OAG Civil Investigative Demand**

As part of Exhibit C, you have submitted a representative sample of information obtained pursuant to Civil Investigative Demands (“CIDs”) issued by the OAG. Section 552.101 of the Government Code also excepts from disclosure information considered confidential by sections 15.10 and 17.61 of the Business and Commerce Code. Tex. Att’y Gen. OR2013-17778, at 1-2, OR2015-04909, at 1-2. Subsection 15.10(b) authorizes the OAG to issue a CID when the attorney general has reason to believe “any person may be in possession, custody, or control of any documentary material or may have any information relevant to a civil antitrust investigation.” TEX. BUS. & COM. CODE ANN. § 15.10(b) (West 2011). Subsection 15.10(i)(1) provides:

Except as provided in this section or ordered by a court for good cause shown, no documentary material, answers to interrogatories, or transcripts of oral testimony, or copies or contents thereof, shall be available for examination or used by any person without the consent of the person who produced the material, answers, or testimony and, in the case of any product of discovery, of the person from whom the discovery was obtained.

*Id.* § 15.10(i)(1).

Similarly, section 17.61 authorizes the OAG to issue a CID when the Consumer Protection Division of the OAG has reason to believe any person may be in possession, custody, or control of material relevant to an investigation of a possible violation of the Texas Deceptive Trade Practices Act. *Id.* § 17.61(a). Subsection 17.61(f) provides:

No documentary material produced pursuant to a demand under this section, unless otherwise ordered by a court for good cause shown, shall be produced for inspection or copying by, nor shall its contents be disclosed to any person other than the authorized employee of the office of the attorney general without the consent of the person who produced the material.

*Id.* § 17.61(f).

You assert that portions of the information in Exhibit C, which you have marked, were provided to the OAG in response to CIDs issued by the OAG’s Consumer Protection Division to certain companies under its authority in sections 15.10 or 17.61. You state that none of the permitted disclosures in subsection 15.10(i) or subsection 17.61(f) apply in this instance. The requested documents are therefore confidential pursuant to subsection 15.10(i) or 17.61(f) of the Business and Commerce Code. Accordingly, the OAG must withhold

these marked documents in Exhibit C from disclosure under section 552.101 of the Government Code as information made confidential by law.

### **III. Records Produced in Response to Federal Agencies' Civil Investigative Demands**

As the remainder of Exhibit C, you have submitted documents that constitute information that was originally obtained by the Federal Trade Commission ("FTC") and the United States Department of Justice ("DOJ") through CIDs or the Hart-Scott-Rodino Antitrust Improvements Act ("HSR Act") and then subsequently provided to the OAG's Consumer Protection Division as part of combined federal and multistate investigations into Google, Inc.

Section 552.101 of the Government Code also excepts from disclosure information considered confidential under federal law. Information is not confidential when in the hands of a Texas agency simply because the same information is confidential in the hands of a federal agency. Tex. Att'y Gen. OR2015-03214, at 3. However, in the interests of comity between state and federal authorities and to ensure the flow of information from federal agencies to Texas governmental bodies, "when information in the possession of a federal agency is 'deemed confidential' by federal law, such confidentiality is not destroyed by the sharing of the information with a governmental body in Texas." Tex. Att'y Gen. ORD-561 (1990) at 7.

You explain that some of the information in Exhibit C was originally obtained by the FTC pursuant to its own CID authority. *See* 15 U.S.C.A. § 57b-1(c)(1) (West 2009) (authorizing the FTC to issue CIDs). The federal law authorizing the FTC to issue CIDs provides:

Any material which is received by the [FTC] in any investigation, a purpose of which is to determine whether any person may have violated any provision of the laws administered by the [FTC], and which is provided pursuant to any compulsory process under this subchapter or which is provided voluntarily in place of such compulsory process *shall not be required to be disclosed under section 552 of Title 5, or any other provision of law, except as provided in paragraph (2)(B) of this section.*

*Id.* § 57b-2(f)(1) (emphasis added).

You further explain that some of the information was originally obtained by the DOJ under authority of the HSR Act. *See, e.g., id.* § 18a(d), (e)(1)(A) (authorizing the DOJ to require the submission of information related to a proposed acquisition to determine whether such acquisition would violate federal antitrust laws). The HSR Act provides, in relevant part:

Any information or documentary material filed with the Assistant Attorney General or the [FTC] pursuant to this section shall be exempt from disclosure

under section 552 of Title 5, and *no such information or documentary material may be made public*, except as may be relevant to any administrative or judicial action or proceeding.

*Id.* § 18a(h) (emphasis added).

When information is transferred “from a federal agency to a governmental body in Texas, the comprehensive exception from public disclosure for ‘information deemed confidential by law’ . . . will preserve the confidentiality of the information.” Tex. Att’y Gen. ORD-561 (1990) at 6-7. You explain that the FTC, DOJ, and the OAG shared a common litigation interest and were involved in joint federal and multi-state investigations of Google, Inc. You further state that the confidentiality of these documents has not been waived. The requested documents are therefore confidential pursuant to federal law. Accordingly, the OAG must withhold these marked documents in Exhibit C from disclosure under section 552.101 of the Government Code as information made confidential by law.

#### **IV. Records Protected by Common-Law Privacy**

As Exhibit D, you have submitted documents containing medical information, the personal financial decisions of private citizens, and information identifying juvenile victims of abuse and juvenile offenders. Section 552.101 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 demonstrated. *See id.*

The Texas Supreme Court has explained the types of information that it considers intimate and embarrassing in *Industrial Foundation*. *Id.* at 683. Construing that decision, this office has concluded that some kinds of medical information are highly intimate or embarrassing. *See Tex. Att’y Gen. ORD-455* (1987) at 8-9. Additionally, this office has found that personal financial information not relating to a financial transaction between an individual and a governmental body is generally intimate or embarrassing. *See generally Tex. Att’y Gen. ORD-545* (1990), *ORD-523* (1989), *ORD-373* (1983). Whether the public’s interest in obtaining personal financial information is sufficient to justify its disclosure must be determined on a case-by-case basis. *See Tex. Att’y Gen. ORD-373* (1983) at 4. This office has also found that common-law privacy generally protects the identifying information of juvenile victims of abuse or neglect as well as the identities of juvenile offenders. *See Tex. Att’y Gen. ORD-394* (1983) at 4; *cf. TEX. FAM. CODE ANN. §§ 58.007(c), 261.201* (West 2014).

Upon review, we find the information submitted in Exhibit D satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Therefore, the OAG must

withhold the information under section 552.101 of the Government Code in conjunction with common-law privacy.

#### **V. Records Reflecting Attorney-Client Communications**

You explain that a portion of the information submitted in Exhibit E consists of privileged attorney-client communications. Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. TEX. GOV'T CODE ANN. § 552.107(1) (West 2012). 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. Tex. Att'y Gen. ORD-676 (2002) at 6-7. First, a governmental body must demonstrate "the information constitutes or documents a communication." *Id.* at 7. Second, the communication must have been made "to facilitate 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. *See In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding), mand. denied, 12 S.W.3d 807 (Tex. 2000) (attorney-client privilege does not apply if attorney is 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 to further the rendition of professional legal services to the client [or those] reasonably necessary to transmit 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 [mand. denied]). 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) (orig. proceeding) (privilege extends to "entire communication, including facts contained therein").

You state that the documents within Exhibit E consist of: (1) internal communications between and among OAG attorneys and staff regarding various legal issues; (2) communications between and among OAG and other states' attorneys general, the FTC, and the DOJ regarding federal and multistate investigations and lawsuits; and (3) internal ORD tracking sheets. You further state that a tracking sheet is "used in the process of reviewing and issuing open records letter rulings" and is "used by these attorneys to communicate their legal advice and opinions." You also state that all of the communications provided under Exhibit E "were not intended to be disclosed and have not been disclosed to any non-privileged parties." Based on your representations and our review, we conclude that the information you have marked as privileged under section 552.107 in Exhibit E is subject to the attorney-client privilege and may be withheld under section 552.107(1) of the Government Code.

## **VI. Records Reflecting OAG Core Work Product**

You state that the remaining documents in Exhibit E consist of interagency communications reflecting the deliberative process and core work product. Section 552.111 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." TEX. GOV'T CODE ANN. § 552.111 (West 2012). This exception encompasses the attorney work-product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Tex. Att'y Gen. ORD-677 (2002) at 4-8. Rule 192.5 defines work product as:

- (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or
- (2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5(a). A governmental body seeking to withhold information under this exception bears the burden of demonstrating the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. *Id.*; Tex. Att'y Gen. ORD- 677 (2002) at 6-8. In order for this office to conclude that the information was made or developed in anticipation of litigation, we must be satisfied that:

- a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and b) the party resisting discovery

believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

*Nat'l Tank Co. v. Brotherton*, 851 S.W.2d 193, 195, 207 (Tex. 1993). A “substantial chance” of litigation does not mean a statistical probability, but rather “that litigation is ‘more than merely an abstract possibility or unwarranted fear.’” *Brotherton*, 851 S.W.2d at 204 (citation omitted); Tex. Att’y Gen. ORD-677 (2002) at 7.

You state that some of the information in Exhibit E relates to concluded cases handled by the OAG’s Antitrust Section and its Financial Litigation, Tax, and Charitable Trusts divisions and was created by OAG attorneys and attorney representatives in anticipation of litigation. You state that this information contains mental impressions, opinions, conclusions, and legal theories of OAG attorneys and attorney representatives. Based upon your representations and our review, we find the marked information constitutes privileged attorney-work product the OAG may withhold under section 552.111 of the Government Code.

You explain that the remaining documents in Exhibit E constitute “drafts of Open Records Division letter rulings that have been released publicly in their final form.” Section 552.111 of the Government Code also protects advice, opinions, and recommendations in the decision-making processes of a governmental body and encourages open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, writ ref’d n.r.e.). In Open Records Decision No. 559, this office concluded that a preliminary draft of a document that is intended for public release in its final form necessarily represents the drafter’s advice, opinion, and recommendation with regard to the form and content of the final document, so as to be excepted from disclosure under section 552.111. Tex. Att’y Gen. ORD-559 (1990) at 2. Section 552.111 also protects factual information in the draft that will be included in the final version of the document. *See id.* at 2-3. Section 552.111 therefore encompasses the entire contents, including comments, underlining, deletions, and proofreading marks, of a preliminary draft of a policy-making document that will be released to the public in its final form. *See id.* at 2.

You state that the letter rulings have been released publically in their final form. You also explain that the “drafts were made in furtherance of the OAG’s policy of issuing open records letter rulings to maintain uniformity in application, operation, and interpretation of the PIA.” Based on your representations and our review, the letter ruling drafts may be withheld under section 552.111 of the Government Code.

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](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 that reads "Virginia K. Hoelscher". The signature is written in a cursive style with a large initial "V".

Virginia K. Hoelscher  
Assistant Attorney General  
Opinion Committee

VKH/sdk

Ref: ID# 562206

Enc. Submitted documents

c: 2 Requestors  
(w/o enclosures)