



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 29, 2015

Ms. Caroline L. Cross
Assistant District Attorney
Civil Division
Dallas County
411 Elm Street, 5th Floor
Dallas, Texas 75202

OR2015-08328

Dear Ms. Cross:

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# 561786.

The Dallas County Criminal District Attorney's Office (the "district attorney's office") received a request for all e-mails to and from a named individual during a specified time period. You state the district attorney's office will provide the requestor with some information. We note the district attorney's office has redacted motor vehicle record information pursuant to section 552.130(c) of the Government Code.¹ You claim some of the submitted information is not subject to the Act. You also claim the submitted information is excepted from disclosure under sections 552.107 and 552.116 of the Government Code. We have considered your claims and reviewed the submitted information, a portion of which you indicate is a representative sample.²

¹Section 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 the attorney general. *See* 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).

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

The Act is applicable only to “public information.” *See* Gov’t Code §§ 552.002, .021. Section 552.002(a) defines “public information” as

information 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.

(a-1) Information is in connection with the transaction of official business if the information is created by, transmitted to, received by, or maintained by an officer or employee of the governmental body in the officer’s or employee’s official capacity, or a person or entity performing official business or a governmental function on behalf of a governmental body, and pertains to official business of the governmental body.

(a-2) The definition of “public information” provided by Subsection (a) applies to and includes any electronic communication created, transmitted, received, or maintained on any device if the communication is in connection with the transaction of official business.

Id. § 552.002(a)-(a-2). Thus, virtually all the information in a governmental body’s physical possession constitutes public information and is subject to the Act. *Id.*; *see* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). You state the e-mails in Exhibit B, which you contend are purely personal in nature, involve an employee’s *de minimis* use of the district attorney’s office’s resources. You further state the information was not collected, assembled, or maintained regarding the transaction of official district attorney’s office’s business. Based on your representations and our review, we find the information in Exhibit B does not constitute public information for purposes of the Act. Gov’t Code

§ 552.002; *see also* Open Records Decision No. 635 at 4 (1995) (section 552.002 not applicable to personal information unrelated to official business and created or maintained by state employee involving no or *de minimis* use of state resources). Therefore, Exhibit B is not subject to the Act, and the district attorney's office is not required to release it in response to this request.

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

(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:

...

(3) information in an account, voucher or contract relating to the receipt or expenditure of public or other funds by a governmental body; [.]

Gov't Code § 552.022(a)(3). The submitted information includes information that is subject to section 552.022(a)(3). The district attorney's office asserts the information subject to section 552.022 is excepted from release under section 552.108 of the Government Code. However, this section is discretionary and does not make information confidential under the Act. *See id.* § 552.007; Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 177 at 3 (1977) (statutory predecessor to Gov't Code § 552.108 subject to waiver). Therefore, the district attorney's office may not withhold the information subject to section 552.022, which we have marked, under section 552.108. However, these documents contain information subject to sections 552.130 and 552.136 of the Government Code.³ Because sections 552.130 and 552.136 make information confidential for purposes of section 552.022, we will consider the applicability of these sections to the information we have marked under section 552.022 of the Government Code. Further, we will address the district attorney's office's arguments for the information not subject to section 552.022.

Section 552.107(1) of the Government Code protects information coming 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. Open Records Decision No. 676 at 6-7 (2002).

³The 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).

First, a governmental body must demonstrate that 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. *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, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). 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.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those: (A) to whom disclosure is made to further the rendition of professional legal services to the client; or (B) 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. *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, except for the e-mails you marked as not privileged, the e-mails in Exhibit C consist of attorney-client privileged communications between attorneys and employees of the district attorney’s office, made for the purpose of effectuating legal representation to the district attorney’s office and Dallas County. You further state the communications have been kept confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, except for the e-mails you marked as not privileged, the district attorney’s office may withhold Exhibit C under section 552.107(1) of the Government Code.

Section 552.108(a)(1) of the Government Code excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov’t Code § 552.108(a)(1). A governmental body claiming section 552.108(a)(1) must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.*

§§ 552.108(a)(1).301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). Section 552.108 may be invoked by the proper custodian of information relating to a pending investigation or prosecution of criminal conduct. *See Open Records Decision No. 474 at 4-5 (1987)*. Where a governmental body has custody of information relating to a pending case of a law enforcement agency, the custodian of the records may withhold the information if it provides this office with a demonstration that the information relates to the pending case and a representation from the law enforcement agency that it wishes to have the information withheld.

You state the information in Exhibit D-2 pertains to a United States Department of Justice (“DOJ”) compliance review audit of the district attorney’s office’s participation in an Equitable Sharing Program (the “program”). You state “the audit could result in a finding of non-compliance” and such non-compliance “can result in civil enforcement actions and, where warranted, federal criminal prosecution.” Upon review, we find the district attorney’s office has failed to establish the information at issue relates to a pending criminal case. Further, the district attorney’s office has not provided our office with any representation from a law enforcement agency conducting a criminal investigation indicating that the agency wishes to withhold the submitted information under section 552.108(a)(1) of the Government Code. Accordingly, the district attorney’s office may not withhold Exhibit D-2 on that basis.

Section 552.116 of the Government Code provides:

(a) An audit, working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, a municipality, a school district, a hospital district, or a joint board operating under Section 22.074, Transportation Code, including any audit relating to the criminal history background check of a public school employee, is excepted from [required public disclosure]. If information in an audit working paper is also maintained in another record, that other record is not excepted from [public disclosure] by this section.

(b) In this section:

(1) “Audit” means an audit authorized or required by a statute of this state or the United States, the charter or an ordinance of a municipality, an order of the commissioners court of a county, the bylaws adopted by or other action of the governing board of a hospital district, a resolution or other action of a board of trustees of a school district, including an audit by the district relating to the criminal history background check of a public school employee, or a resolution

or other action of a joint board described by Subsection (a) and includes an investigation.

(2) "Audit working paper" includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Id. § 552.116(a), (b)(1)–(2). You state the information in Exhibit D-1 consists of audit working papers prepared or maintained as part of an audit being conducted by the Dallas County Commissioner's Court (the "commissioner's court"). You state the commissioner's court is authorized to conduct an annual audit of the district attorney's office's seizure, forfeiture, receipt, and specific expenditure of all proceeds and property. Crim. Proc. Code art. 59.06(g)(1). Additionally, as noted above, you state the information in Exhibit D-2 consists of audit working papers prepared or maintained in the course of a DOJ annual and/or compliance review audit of a program that the district attorney's office participates in. You explain that "governmental bodies participating in the program are subject to periodic DOJ oversight and review for compliance with applicable statutes and program guidelines."

We note, however, section 552.116 is intended to protect the auditor's interests. The information at issue is maintained by the district attorney's office, who we understand is the auditee in Exhibits D-1 and D-2. As the auditee, the district attorney's office cannot assert section 552.116 in order to protect its own interest in withholding the information. Thus, section 552.116 is not applicable, and the district attorney's office may not withhold any of the information in Exhibits D-1 and D-2 under section 552.116 of the Government Code.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). Section 552.117 is also applicable to cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (statutory predecessor to section 552.117 not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for the information is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, a governmental body must withhold information under section 552.117(a)(1) on behalf of a current or former official or employee only if the individual made a request for confidentiality under section 552.024 prior to the date on which the request for information was made. Accordingly, the district

attorney's office must withhold the cellular telephone number we have marked under section 552.117(a)(1) of the Government Code if the individual whose information is at issue timely requested confidentiality pursuant to section 552.024 of the Government Code and the cellular telephone service is not paid for by a governmental body. The district attorney's office may not withhold this information if the individual whose information is at issue did not make a timely election to keep the information confidential or the cellular telephone service is paid for by a governmental body.

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 a personal identification document issued by an agency of this state or another state or country is excepted from public release. Gov't Code § 552.130. Upon review, we find the district attorney's office must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code.

Section 552.136(b) 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"). Upon review, the district attorney's office must withhold the bank account and partial credit card numbers we have marked under section 552.136 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 id.* § 552.137(a)-(c). Accordingly, the district attorney's office 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.

In summary, Exhibit B is not subject to the Act, and the district attorney's office need not release this information in response to this request. Except for the e-mails you marked as not privileged, the district attorney's office may withhold Exhibit C under section 552.107(1) of the Government Code. If the individual whose information is at issue timely requested confidentiality pursuant to section 552.024 of the Government Code and the cellular telephone service is not paid for by a governmental body, the district attorney's office must withhold the cellular telephone number we marked under section 552.117(a)(1) of the Government Code. The district attorney's office must withhold the information we have marked under section 552.130 and section 552.136 of the Government Code. The district attorney's office 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. The district attorney's office must release the remaining information.

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 cursive script that reads "Britni Fabian".

Britni Fabian
Assistant Attorney General
Open Records Division

BF/bhf

Ref: ID# 561786

Enc. Submitted documents

c: Requestor
(w/o enclosures)