



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 4, 2015

Mr. Travis J. Koehn
County District Attorney
County of Austin
One East Main
Bellville, Texas 77418

OR2015-10978

Dear Mr. Koehn:

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# 566136.

The County Judge's Office of Austin County (the "county's judge's office") received a request for the Internet browser history, e-mail correspondence, telephone logs, and text messages of three specified employees of Austin County (the "county") over a specified time period, and certain data usage statistics by employees of a specified county office over a specified time period. You state you do not have information responsive to a portion of the instant request.¹ You claim some of the requested information is not subject to the Act. You also claim the submitted information is excepted from disclosure under sections 552.101, 552.104, 552.107, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.² We have also received and considered comments from the requestor, an interested third party, and the Office of the Attorney General ("the OAG"). *See Gov't Code*

¹We note the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

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.

§ 552.304 (permitting interested third party to submit to attorney general reasons why requested information should or should not be released).

You state the county judge's office asked the requestor to clarify portions of the request. *See id.* § 552.222 (if request for information is unclear, governmental body may ask requestor to clarify request). You inform us the requestor has not responded to the request for clarification. Nonetheless, a governmental body must make a good-faith effort to relate a request to information that is within its possession or control. *See* Open Records Decision No. 561 at 8 (1990). Because you have submitted information for our review and raised exceptions to disclosure for this information, we understand the county-judge's office has made a good-faith effort to determine the submitted information is responsive to the request. Therefore, we will address the applicability of the claimed exceptions to the submitted information.

Next, we note some of the submitted information is not responsive to the request because it was either created after the request for information was received or it does not pertain to the time period specified in the request. This ruling does not address the public availability of that information, and the county judge's office need not release any non-responsive information.³

Next, you assert some of the responsive information is not subject to the Act. The Act applies to "public information," which is defined in section 552.002(a) of the Government Code 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; or
- (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

³As we reach this determination, we need not address your arguments against disclosure of the information at issue.

(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.

Gov't Code § 552.002(a). 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).

The Act also encompasses information that a governmental body does not physically possess. Information that is written, produced, collected, assembled, or maintained by a third party may be subject to disclosure under the Act if a governmental body owns, has a right of access, or spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information. Gov't Code § 552.002(a); *see* Open Records Decision No. 462 at 4 (1987). Information is "in connection with the transaction of official business" if the information is created by, transmitted to, received by, or maintained by a person or entity performing official business or a government function on behalf of a governmental body and the information pertains to official business of the governmental body. *See* Gov't Code § 552.002(a-1). Furthermore, the Act provides the definition of public information "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-2).

We further note that the characterization of information as "public information" under the Act is not dependent on whether the requested records are in the possession of an individual or whether a governmental body has a particular policy or procedure that establishes a governmental body's access to the information. *See* Open Records Decision No. 635 at 3-4 (1995) (finding that information does not fall outside definition of "public information" in Act merely because individual member of governmental body possesses information rather than governmental body as whole); *see also* Open Records Decision No. 425 (1985) (concluding, among other things, that information sent to individual school trustees' homes was public information because it related to official business of governmental body) (overruled on other grounds by Open Records Decision No. 439 (1986)). Thus, if the information at issue is related to the county's business, the mere fact it is not in the county's possession does not remove the information from the scope of the Act. *See* ORD 635 at 6-8 (stating that information maintained on a privately-owned medium and actually used in connection with the transaction of official business would be subject to the Act).

Additionally, this office has found information in a public official's personal e-mail account may be subject to the Act where the public official uses the personal e-mail account to conduct public business. *See id.* We note the Act's definition of "public information" does not require a public employee or official to create the information at the direction of the governmental body. *See* Gov't Code § 552.002. Accordingly, the mere fact that a public employee or official generates business-related information using personal resources does not take the information outside the scope of the Act.

You state the information at issue consists of information obtained from a specified employee's personal e-mail account and personal text message conversations and is not public information. Further, you state the information at issue consists of "personal conversations with friends and neighbors" and other personal text messages. Thus, the county judge's office indicates this information does not concern the business of the county and was not written, produced, collected, or assembled and is not maintained pursuant to any law or ordinance or in connection with the transaction of the county's business. Based on these representations and our review of the responsive information, we find some of the information at issue does not constitute "information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business" by or for the county. *See* Gov't Code § 552.002. Therefore, we conclude the information we have marked does not constitute public information for purposes of section 552.002 of the Government Code. *See* ORD 635. Accordingly, the county judge's office is not required to release the information we have marked in response to the request for information. However, we note the remaining responsive information reflects it was written, produced, collected, assembled, or maintained under a law or ordinance in connection with the transaction of official business by or for the county. Accordingly, the remaining responsive information constitutes public information under the Act.

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). However, we find you have not demonstrated how any of the responsive information is highly intimate or embarrassing and not of legitimate public concern. Thus, the county judge's office may not withhold any portion of the remaining responsive information under section 552.101 in conjunction with common-law privacy.

Section 552.101 of the Government Code also encompasses the doctrine of constitutional privacy, which consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy," which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common-law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing

Ramie v. City of Hedwig Village, Texas, 765 F.2d 490 (5th Cir. 1985)). Upon review, we find you have failed to demonstrate any portion of the responsive information falls within the zones of privacy or implicates an individual's privacy interests for purposes of constitutional privacy. Therefore, the county judge's office may not withhold any of the remaining responsive information under section 552.101 of the Government Code on the basis of constitutional privacy.

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). 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).

The county judge's office states some of the responsive information consists of a communication involving attorneys for the county and other county employees and officials. The county judge's office states the communication was made for the purpose of facilitating the rendition of professional legal services to the county and the county judge's office indicates the communication has remained confidential. Upon review, we find the county judge's office has demonstrated the applicability of the attorney-client privilege to the

information we have marked. Thus, the county judge's office may withhold the information we have marked 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 non-law enforcement agency has custody of information that would otherwise qualify for exception under section 552.108 as information relating to the pending case of a law enforcement agency, the custodian of the records may withhold the information if it provides this office with a demonstration the information relates to the pending case and a representation from the law enforcement agency that it wishes to have the information withheld. On behalf of the Department of Public Safety (the "department"), the OAG informs us it objects to disclosure of a specific portion of the submitted information that it has indicated because its release would interfere with the department's pending criminal investigation and prosecution. Based on this representation, we conclude section 552.108(a)(1) is applicable to the information the OAG has indicated. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests that are present in active cases), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Accordingly, the county judge's office may withhold the information we have marked under section 552.108(a)(1) of the Government Code on behalf of the department.

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."⁴ Gov't Code § 552.136(b); *see id.* § 552.136(a) (defining "access device"). Accordingly, the county judge's office must withhold the information we have marked under section 552.136 of the Government Code.

In summary, the county judge's office is not required to release the information we have marked as not subject to the Act. The county judge's office may withhold the information we have marked under section 552.107(1) of the Government Code. The county judge's office may withhold the information we have marked under section 552.108(a)(1) of the Government Code on behalf of the department. The county judge's office must withhold the

⁴The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body but ordinarily will not raise other exceptions. *See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987)*.

information we have marked under section 552.136 of the Government Code. The remaining responsive information must be released.

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,



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Assistant Attorney General
Open Records Division

JB/som

Ref: ID# 566136

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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