



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

September 23, 2015

Mr. Mark Kennedy  
General Counsel  
Office of General Counsel  
County of Hays  
111 East San Antonio Street, Suite 202  
San Marcos, Texas 78666

OR2015-19981

Dear Mr. Kennedy:

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# 580443.

The Hays County Office of General Counsel (the "county") received a request for any e-mail communications sent to or received by seven named individuals that contain any of twenty-nine specified terms.<sup>1</sup> You claim the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.108, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>2</sup> We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (permitting interested third party to submit to attorney general reasons why requested information should or should not be released).

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<sup>1</sup>We note the requestor narrowed the scope 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 380, 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).

<sup>2</sup>We 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.

Initially, we note the county seeks to withdraw its request for an open records decision because it asserts the request for information was withdrawn by operation of law when the requestor failed to timely respond to a cost estimate for providing the requested records. Upon review of a copy of the cost estimate, we find it does not comply with the requirements of section 552.2615(a) of the Government Code. *See id.* § 552.2615(a). Accordingly, we conclude the request for information was not withdrawn by operation of law. *See id.* § 552.2615(b).

We note some of the submitted information may have been the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2015-18039 (2015). In Open Records Letter No. 2015-18039, we determined 1) the county must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 418.182 of the Government Code; 2) the county may withhold the information we marked under section 552.111 of the Government Code; 3) to the extent the individuals whose information is at issue are currently licensed peace officers as defined by article 2.12 of the Code of Criminal Procedure, the county must withhold the information we marked under section 552.117(a)(2) of the Government Code; however, the county may only withhold the marked cellular telephone numbers so long as the cellular telephone service is not paid for by a governmental body; 4) to the extent the individuals at issue are not peace officers and to the extent these individuals timely requested confidentiality under section 552.024 of the Government Code, the county must withhold the marked information under section 552.117(a)(1) of the Government Code; however, the county may only withhold the marked cellular telephone numbers so long as the cellular telephone service is not paid for by a governmental body; 5) the county must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code and common-law privacy; 6) the county must withhold the e-mail addresses we marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their disclosure; and 7) the county must release the remaining information. We have no indication the law, facts, or circumstances on which the prior ruling was based have changed. Accordingly, to the extent the submitted information is identical to the information previously submitted and ruled on by this office, we conclude the county may continue to rely on Open Records Letter No. 2015-18039 as a previous determination and withhold or release the information in accordance with that ruling. *See* Open Records Decision No. 673 at 6-7 (2001) (discussing criteria for first type of previous determination). To the extent the submitted information is not subject to Open Records Letter No. 2015-18039, we will address the county's arguments against disclosure of the submitted 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." Gov't Code § 552.101. This section encompasses information protected by other statutes, including section 418.176 of the Government Code, which was added to chapter 418 of the Government Code as part of the Texas Homeland Security Act. Section 418.176(a) reads as follows:

Information is confidential if the information is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, responding to, or investigating an act of terrorism or related criminal activity and:

- (1) relates to the staffing requirements of an emergency response provider, including a law enforcement agency, a fire-fighting agency, or an emergency services agency;
- (2) relates to a tactical plan of the provider; or
- (3) consists of a list or compilation of pager or telephone numbers, including mobile and cellular telephone numbers, of the provider.

*Id.* § 418.176(a). Section 418.182 provides as follows:

(a) Except as provided by Subsections (b) and (c), information, including access codes and passwords, in the possession of a governmental entity that relates to the specifications, operating procedures, or location of a security system used to protect public or private property from an act of terrorism or related criminal activity is confidential.

(b) Financial information in the possession of a governmental entity that relates to the expenditure of funds by a governmental entity for a security system is public information that is not excepted from required disclosure under [the Act].

(c) Information in the possession of a governmental entity that relates to the location of a security camera in a private office at a state agency, including an institution of higher education, as defined by Section 61.003, Education Code, is public information and is not excepted from required disclosure under [the Act] unless the security camera:

- (1) is located in an individual personal residence for which the state provides security; or
- (2) is in use for surveillance in an active criminal investigation.

*Id.* § 418.182. The fact that information may generally be related to emergency preparedness does not make the information *per se* confidential under section 418.176. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). Furthermore, the mere recitation by a governmental body of a statute's key terms is not sufficient to demonstrate the applicability of a claimed provision. As with any confidentiality provision, a governmental body asserting sections 418.176 and 418.182 must adequately explain how the responsive information falls within the scope of the statute. *See*

Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

You contend some of the submitted information is confidential under sections 418.176 and 418.182 of the Government Code. You state some of the information at issue contains "access codes and passwords that relate to the specifications, operating procedures, or location of a security system." Additionally, you generally state the information at issue contains "other information that relates to preventing, detecting, responding to, or investigating criminal activities." Upon review, we find the county has failed to establish any of the submitted information is confidential under either section 418.176 or section 418.182, and the county may not withhold any of the submitted information at issue under section 552.101 of the Government Code on those bases.

Section 552.101 of the Government Code also encompasses the common-law physical safety exception. For many years, this office determined section 552.101, in conjunction with the common-law right to privacy, protected information from disclosure when "special circumstances" exist in which the disclosure of information would place an individual in imminent danger of physical harm. *See, e.g.*, Open Records Decision Nos. 169 (1977) (special circumstances required to protect information must be more than mere desire for privacy or generalized fear of harassment or retribution), 123 (1976) (information protected by common-law right of privacy if disclosure presents tangible physical danger). However, the Texas Supreme Court has held freedom from physical harm does not fall under the common-law right to privacy. *Tex. Dep't of Pub. Safety v. Cox Tex. Newspapers, L.P. & Hearst Newspapers, L.L.C.*, 343 S.W.3d 112, 117 (Tex. 2011) ("freedom from physical harm is an independent interest protected under law, untethered to the right of privacy"). Instead, in the *Cox* decision, the court recognized for the first time a separate common-law physical safety exception to required disclosure that exists independent of the common-law right to privacy. *Id.* at 118. Pursuant to this common-law physical safety exception, "information may be withheld [from public release] if disclosure would create a substantial threat of physical harm." *Id.* In applying this new standard, the court noted "deference must be afforded" law enforcement experts regarding the probability of harm, but further cautioned, "vague assertions of risk will not carry the day." *Id.* at 119.

The county argues some of the submitted information is confidential under the common-law physical safety exception because "there is a history of at least some looting in the [area of specified addresses]," and release of the information "could be seen as [providing] simple opportunities for individuals inclined to take what is not theirs." However, upon review, we conclude the county has not demonstrated release of any of the submitted information would subject anyone to a specific risk of harm. Accordingly, the county may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with the common-law physical safety exception.

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. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. See Open Records Decision No. 455 (1987). Upon review, we find some of the submitted information satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Therefore, the county must withhold this information, which we have marked, under section 552.101 of the Government Code in conjunction with common-law privacy.<sup>3</sup>

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. See 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. 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 "to facilitate 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, and lawyer representatives. See 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. Finally, 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. 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.*

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<sup>3</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure.

*DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

The submitted documentation reflects a portion of the remaining information consists of communications involving a county attorney and other county employees and officials. The county indicates the communications were made for the purpose of facilitating the rendition of professional legal services to the county and these communications have remained confidential. Upon review, we find the county has demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the county may withhold the information we have marked under section 552.107(1) of the Government Code.

Section 552.108(a) 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: (1) 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 information at issue 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, 710 (Tex. 1977).

You state some of the remaining information is excepted from disclosure under section 552.108(a)(1) of the Government Code. You state release of this information “could unduly interfere with the detection, investigation, and prosecution of the crime by releasing information that is material to the case.” You further state “publication of the information may interfere with other investigations relating to the matter being discussed” and “subject potential witnesses to intimidation or harassment.” Finally, you state release of the information “may identify or exploit weaknesses or cause a threat in the operating procedures of Hays County Law Enforcement.” However, you do not inform us the remaining information at issue relates to a specific open or pending criminal investigation. Further, we find you have failed to otherwise demonstrate release of the information at issue would interfere with law enforcement. Therefore, the county may not withhold any of the remaining information under section 552.108(a)(1) of the Government Code.

Section 552.117(a)(2) of the Government Code excepts from public disclosure a peace officer’s home address and telephone number, social security number, emergency contact information, and family member information regardless of whether the peace officer made an election under section 552.024 of the Government Code. *Id.* § 552.117(a)(2). Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. We note section 552.117(a)(2) also encompasses a peace officer’s cellular telephone number, unless the cellular telephone service is paid for by a governmental body. *See* Open Records Decision No. 506 at 5-7 (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). To the extent the individual whose information is at issue is currently a licensed peace officer as defined by article 2.12, the county must withhold the information we have marked under section 552.117(a)(2) of the

Government Code; however, the marked cellular telephone number may only be withheld if the cellular telephone service is not paid for by a governmental body.

To the extent the individual whose information is at issue is not a licensed peace officer, that individual's information may be subject to section 552.117(a)(1) of the Government Code. Further, we have marked information pertaining to additional county employees that may also be subject to section 552.117(a)(1) of the Government Code. Section 552.117(a)(1) excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(1). Section 552.117 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* ORD 506 at 5-6. Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Therefore, to the extent the individuals whose information is at issue timely requested confidentiality under section 552.024 of the Government Code, the county must withhold the information we have marked under section 552.117(a)(1) of the Government Code; however, the county may only withhold the marked cellular telephone numbers if the cellular telephone service is not paid for by a governmental body.

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).<sup>4</sup> *See id.* § 552.137(a)-(c). The e-mail addresses at issue are not excluded by subsection (c). Therefore, the county 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, to the extent the submitted information is identical to the information previously submitted and ruled on by this office, we conclude the county may continue to rely on Open Records Letter No. 2015-18039 as a previous determination and withhold or release the information in accordance with that ruling. The county must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The county may withhold the information we have marked under section 552.107(1) of the Government Code. To the extent the individual whose information is at issue is currently a licensed peace officer as defined by article 2.12, the county must

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<sup>4</sup>The 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).

withhold the information we have marked under section 552.117(a)(2) of the Government Code; however, the marked cellular telephone number may only be withheld if the cellular telephone service is not paid for by a governmental body. To the extent the individuals whose information is at issue timely requested confidentiality under section 552.024 of the Government Code, the county must withhold the information we have marked under section 552.117(a)(1) of the Government Code; however, the county may only withhold the marked cellular telephone numbers if the cellular telephone service is not paid for by a governmental body. The county 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 county 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](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,



Joseph Behnke  
Assistant Attorney General  
Open Records Division

JB/som

Ref: ID# 580443

Enc. Submitted documents

c: Requestor  
(w/o enclosures)