



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

June 23, 2016

Ms. Mallory J. Craig  
Counsel for the Oakmont Public Utility District  
Coats Rose, P.C.  
9 Greenway Plaza, Suite 1100  
Houston, Texas 77046

OR2016-14333

Dear Ms. Craig:

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# 615491.

The Oakmont Public Utility District (the "district"), which you represent, received a request for all e-mails sent to or received by district officials during a specified time period.<sup>1</sup> You claim some of the submitted information is not subject to the Act. Additionally, you claim some of the submitted information is excepted from disclosure under sections 552.107 and 552.136 of the Government Code.<sup>2</sup> We have considered the submitted arguments and reviewed the submitted information.

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<sup>1</sup>We understand the district sought and received clarification of the request. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for public information, the ten-business-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

<sup>2</sup>Although you raise section 552.101 of the Government Code in conjunction with section 552.107 and Texas Rule of Evidence 503, this office has concluded section 552.101 does not encompass other exceptions found in the Act and does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Moreover, we note the proper exception to raise when asserting the attorney-client privilege in this instance is section 552.107 of the Government Code, rather than Texas Rule of Evidence 503. *See* Open Records Decision Nos. 676 at 1-2, 677 (2002).

Initially, you assert the marked e-mail address, passwords, and username contained in Exhibits H and I are not subject to the Act. The Act is applicable only to “public information.” 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.

*Id.* § 552.002(a). In Open Records Decision No. 581 (1990), this office determined that certain computer information, such as source codes, documentation information, and other computer programming, that has no significance other than its use as a tool for the maintenance, manipulation, or protection of public property is not the kind of information made public under section 552.021 of the Government Code. We understand you to assert the information at issue has no significance other than its use as tools for the maintenance, manipulation, or protection of public information. Based on your representation and our review, we find the username in Exhibit I and passwords in Exhibits H and I do not constitute public information under section 552.002 of the Government Code. Therefore, we conclude this information is not subject to the Act and need not be released to the requestor.<sup>3</sup> However, based upon the your representations and our review, we find the district maintains the marked e-mail address in Exhibit H in connection with the transaction of its official business. Thus, the information at issue constitutes “public information” as defined by section 552.002(a). Accordingly, this information is subject to the Act and the district must release it, unless it falls within an exception to public disclosure under the Act.

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

See Gov't Code §§ 552.006, .021, .301, .302. Therefore, we will address the arguments against the release of the information that is subject to the Act.

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. ORD 676 at 6-7. 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 the information at issue consists of communications between district employees and an attorney for the district. You state the communications were made in confidence for the purpose of facilitating the rendition of professional legal services to the district and these communications have remained confidential. Upon review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Therefore, the district may generally withhold Exhibits B through G under section 552.107(1). However, we note some of the otherwise privileged e-mail strings include e-mails sent to non-privileged parties. Furthermore, if these e-mails are removed from the e-mail strings and stand alone, they are responsive to the instant request. Therefore, if the district maintains

these non-privileged e-mails, which we have marked, separate and apart from the otherwise privileged e-mail strings in which they appear, then the district may not withhold the non-privileged e-mails under section 552.107(1).

Section 552.117(a)(1) of the Government Code 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 or official of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code.<sup>4</sup> *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* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). 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 or official 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. We note the information at issue contains the cellular telephone number of a district board member. Therefore, if the individual at issue timely requested confidentiality under section 552.024 and a governmental body does not pay for the cellular telephone service, the district must withhold the marked cellular telephone number under section 552.117(a)(1). Conversely, if the individual at issue did not timely request confidentiality under section 552.024 or if a governmental body pays for the cellular telephone service, the district may not withhold the marked cellular telephone number under section 552.117(a)(1).

Section 552.136 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." Gov't Code § 552.136(b); *see id.* § 552.136(a) (defining "access device"). Upon review, we find the information you have marked in Exhibit H is not of the type made confidential under section 552.136 and thus, the district may not withhold it on that ground.

In summary, the username in Exhibit I and passwords in Exhibits H and I are not subject to the Act and need not be released to the requestor. The district may generally withhold Exhibits B through G under section 552.107(1) of the Government Code. However, if the district maintains the non-privileged e-mails, which we have marked, separate and apart from the otherwise privileged e-mail strings in which they appear, then the district may not withhold the non-privileged e-mails under section 552.107(1) of the Government Code. If the individual at issue timely requested confidentiality under section 552.024 of the

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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).

Government Code and a governmental body does not pay for the cellular telephone service, the district must withhold the marked cellular telephone number under section 552.117(a)(1) of the Government Code. The remaining 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](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 "Cole Hutchison". The signature is written in a cursive style with a large, stylized "C" and "H".

Cole Hutchison  
Assistant Attorney General  
Open Records Division

CH/akg

Ref: ID# 615491

Enc. Submitted documents

c: Requestor  
(w/o enclosures)