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ATTORNEY GENERAL OF TEXAS

November 16, 2016

Ms. Katie Anderson
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Strasburger & Price, LLP
901 Main Street, Suite 4400
Dallas, Texas 75202-3794

OR2016-25499

Dear Ms. Anderson:

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# 634328 (DCS internal reference #W000853-080416).

Dallas County Schools ("DCS"), which you represent, received a request for e-mails between the LeMaster Group ("LeMaster") and named individuals during a specified period of time. You state you have released some information. You claim the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.110 of the Government Code.¹ Additionally, you state the proprietary interests of LeMaster may be implicated. Accordingly, you notified LeMaster of the request and of its right to submit arguments to this office explaining why its information should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in certain circumstances). We have considered your arguments and reviewed the submitted representative sample of

¹The proper exceptions to raise when asserting the attorney-client privilege and the attorney work product privilege for information not subject to section 552.022 of the Government Code are sections 552.107 and 552.111 of the Government Code, respectively. *See* Open Records Decision Nos. 677 (2002), 676 at 6. We note that although you raise the work product privilege encompassed by section 552.111 of the Government Code, you make no arguments to support this exception. Therefore, we assume you have withdrawn your claim this section applies to the submitted information. *See* Gov't Code §§ 552.301, .302.

information.² 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).

Initially, we must address the requestor's claim DCS failed to comply with the procedural obligations under the Act. Section 552.301 of the Government Code prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. *See id.* § 552.301(b). Pursuant to section 552.301(d) of the Government Code, a governmental body must, within ten business days of receiving the request for information, provide the requestor with (1) a written statement the governmental body wishes to withhold the requested information and has asked for a decision from the attorney general, and (2) a copy of the governmental body's written communication to the attorney general. *Id.* § 552.301(d). Additionally, under section 552.301(e), a governmental body that seeks a decision is required to submit to the attorney general within fifteen business days of receiving the request (1) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See id.* § 552.301(e).

The request at issue was sent to DCS after business hours on August 4, 2016 and you state DCS was closed on August 5, 2016. Therefore, DCS is considered to have received the request for information on August 8, 2016. This office does not count the date the request was received or days a governmental body is closed for the purpose of calculating a governmental body's deadlines under the Act. You state, and provide documentation showing, on August 22, 2016, DCS provided the requestor with a cost estimate and a request for a deposit. *See id.* §§ 552.2615(a), .263(a). You also state DCS received payment on August 30, 2016. Thus, August 30, 2016, is the date on which DCS is deemed to have received the request. *See id.* § 552.263(e) (if governmental body requires deposit or bond for anticipated costs pursuant to section 552.263, request for information is considered to have been received on date that the governmental body receives deposit or bond). We note DCS was closed on September 5, 2016, in observance of the Labor Day holiday. Accordingly, the ten-business-day deadline for requesting a ruling from this office and notifying the requestor pursuant to section 552.301(d) was September 14, 2016, and the fifteen-business-day deadline was September 21, 2016. You provided the documentation required by section 552.301(b) on September 13, 2016, and the information required by

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.

section 552.301(e) on September 20, 2016. Additionally, we note the correspondence DCS submitted to this office requesting a ruling reflects the requestor was copied on the correspondence. Therefore, we find DCS complied with the procedural requirements of section 552.301 of the Government Code in requesting this decision.

Next, although you raise section 552.110 of the Government Code for some of the submitted information, that exception is designed to protect the interests of third parties, not the interests of a governmental body. *See* Gov't Code § 552.110 (excepts from disclosure trade secret or commercial or financial information obtained from another person). Thus, we do not address your argument under section 552.110. We also note an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should not be released. *See id.* § 552.305(d)(2)(B). As of the date of this letter, we have not received arguments from LeMaster. Thus, LeMaster has not demonstrated it has a protected proprietary interest in any of the submitted information. *See id.* § 552.110(a)–(b); Open Records Decision Nos. 661 at 5–6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, DCS may not withhold the submitted information on the basis of any proprietary interests LeMaster may have in the information.

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. 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).

You state Exhibits 1, 2, and 3 consist of communications involving attorneys for DCS and DCS employees, representatives, and officials in their capacities as clients. You state these communications were made in furtherance of the rendition of professional legal services to DCS. You state these communications were intended to be, and have remained, 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. Accordingly, DCS may withhold Exhibits 1, 2, and 3 under section 552.107(1) of the Government Code.

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.³ *See* Gov’t Code § 552.117(a)(1). 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. Therefore, to the extent the individual whose information is at issue timely requested confidentiality under section 552.024 of the Government Code, DCS must withhold the information we have marked under section 552.117(a)(1) of the Government Code.

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.

³The 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).

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 the information we have marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Therefore, DCS must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find you have not demonstrated how any of the remaining information at issue is highly intimate or embarrassing and not of legitimate public concern. Thus, none of the remaining information may be withheld under section 552.101 in conjunction with common-law privacy.

In summary, DCS may withhold Exhibits 1, 2, and 3 under section 552.107(1) of the Government Code. To the extent the individual whose information is at issue timely requested confidentiality under section 552.024 of the Government Code, DCS must withhold the information we have marked under section 552.117(a)(1) of the Government Code. DCS must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. 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, 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,



Paige Lay
Assistant Attorney General
Open Records Division

PL/som

Ref: ID# 634328

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Third Party
(w/o enclosures)