



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

January 13, 2017

Mr. Vance Hinds
Assistant County & District Attorney
County of Ellis
109 South Jackson
Waxahachie, Texas 75165

OR2017-00946

Dear Mr. Hinds:

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# 641622.

The Ellis County Commissioner's Office, Precinct 3 (the "county"), received a request for all e-mails involving either of two named individuals during a specified time period.¹ You claim some of the submitted information is excepted from disclosure under sections 552.107, 552.111, 552.117, 552.130, and 552.137 of the Government Code.² Additionally, you provide documentation showing you have notified an individual of the right to submit comments to this office why some of the submitted information should not

¹You state the county sought and received clarification 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 overbroad request for information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

²Although you raise Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5, we note the 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. 676 at 1-2 (2002), 677 (2002).

be released.³ *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have considered the submitted arguments and reviewed the submitted 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 some of the submitted information, which you have marked, consists of communications involving attorneys for the county and county employees and officials in their capacities as clients. You state these communications were made in furtherance of the

³As of the date of this letter, this office has not received comments from any third party explaining why any of the submitted information should not be released.

rendition of professional legal services to the county. 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, the county may withhold the information you marked under section 552.107(1) of the Government Code.⁴

Section 552.137 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). Gov’t Code § 552.137(a)-(c). Section 552.137 does not apply to an institutional e-mail address, the general e-mail address of a business, an e-mail address of a person who has a contractual relationship with a governmental body, an e-mail address of a vendor who seeks to contract with a governmental body, an e-mail address maintained by a governmental entity for one of its officials or employees, or an e-mail address provided to a governmental body on a letterhead. *See id.* § 552.137(c). We have marked representative samples of personal e-mail addresses contained within the remaining information. We are unable to determine whether the personal e-mail addresses at issue belong to county officials or employees. Further, we are unable to determine whether the e-mail addresses at issue are excluded by subsection (c). Thus, we rule conditionally. To the extent the types of e-mail addresses we marked are the personal e-mail addresses of government officials or employees, or to the extent subsection (c) applies, this information is not subject to section 552.137 and the county may not withhold such information on that basis. *See Austin Bulldog v. Leffingwell*, 490 S.W.3d 240 (Tex. App.—Austin 2016, no pet.) (holding personal e-mail addresses of government officials used to conduct official government business are not e-mail addresses of “members of the public” for purposes of Gov’t Code § 552.137(a)). However, to the extent the types of e-mail addresses we marked within the submitted information are not the personal e-mail addresses of government officials or employees and subsection (c) does not apply, the county must withhold such e-mail addresses under section 552.137, unless the owners of the e-mail addresses affirmatively consent to their release.

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. *See* Gov’t Code § 552.117(a)(1). We note 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). We note an e-mail address is not a “home address” for purposes of

⁴As our ruling is dispositive for this information, we need not address your remaining argument against its disclosure.

section 552.117(a) and may not be withheld under section 552.117. *See* Open Records Decision No. 622 at 4 (1994) (legislative history makes clear that purpose of Gov't Code § 552.117 is to protect public employees from being harassed at home). 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. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee or official who did not timely request under section 552.024 the information be kept confidential. We have marked a representative sample of cellular telephone numbers within the remaining information. However, we are unable to determine whether the information we marked consists of the personal cellular telephone numbers of officials or employees of the county that were not paid for by a governmental body. Therefore, to the extent the information we marked under section 552.117 consists of a personal cellular telephone number of an official or employee of the county who timely requested confidentiality under section 552.024 of the Government Code and a governmental body does not pay for the cellular telephone service, the county must withhold such information under section 552.117(a)(1) of the Government Code. Conversely, the county may not withhold the information we marked under section 552.117(a)(1) if: (1) the information we marked does not consist of a personal cellular telephone number of a county official or employee, (2) the official or employee whose information is at issue did not timely request confidentiality under section 552.024, or (3) a governmental body pays for the cellular telephone service. Upon review, however, we find the remaining information you marked under section 552.117 consists of personal e-mail addresses of government employees and officials, which are not subject to section 552.117, and the county may not withhold any portion of the remaining information you marked on that basis.

We note some of the materials at issue may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, the county may withhold the information you marked under section 552.107(1) of the Government Code. To the extent the e-mail addresses within the remaining information are not the personal e-mail addresses of government officials or employees and subsection (c) does not apply, the county must withhold the types of e-mail addresses we marked under section 552.137 of the Government Code, unless the owners of the e-mail

addresses affirmatively consent to their release. To the extent the information we marked under section 552.117 consists of a personal cellular telephone number of an official or employee of the county who timely requested confidentiality under section 552.024 of the Government Code and a governmental body does not pay for the cellular telephone service, the county must withhold such information under section 552.117(a)(1) of the Government Code. The county must release the remaining information; however, any information that is subject to copyright may be released only in accordance with copyright law.

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,



Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/som

Ref: ID# 641622

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Third Party
(w/o enclosures)