



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

January 13, 2017

Ms. Ashley D. Fourt  
Assistant Criminal District Attorney  
Tarrant County  
401 West Belknap, 9<sup>th</sup> Floor  
Fort Worth, Texas 76196-0201

OR2017-00993

Dear Ms. Fourt:

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# 641552.

The Tarrant County Elections Office (the "county") received a request for (1) all e-mails to or from a named individual during a specified time period relating to certain topics, (2) all e-mails between the county and the Tarrant County District Attorney's Office pertaining to a previous open records request for information, (3) a full accounting of the money, time, and personnel spent fulfilling a previous open records request for information, and (4) certain information pertaining to the 2016 Republican Primary.<sup>1</sup> You state you will release some information to the requestor. You claim some of the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.108, and 552.139 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, you assert some of the submitted information is not responsive to the request for information because it either does not pertain to the specified topics or falls outside of the date range specified in the first portion of the request. Upon review, we agree some of the

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<sup>1</sup>You state, and provide documentation showing, the county sought and received clarification of the request for information. See Gov't Code § 552.222(b) (stating 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, 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).

submitted information, which we have marked, is not responsive to the instant request. This ruling does not address the public availability of any information that is not responsive to the request, and the county is not required to release that information in response to the request. However, we note the remaining information at issue is responsive to the third portion of the instant request. Thus, this information is responsive to the instant request. Accordingly, we will consider your argument against the disclosure of this information.

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).

You state some of the responsive information consists of communications between county employees and attorneys for the county. You also state the communications were made in confidence for the purpose of facilitating the rendition of professional legal services to the county and these communications have remained confidential. Upon review, we find you have demonstrated the applicability of the attorney-client privilege to most of the information at issue. Accordingly, the county may generally withhold the information we have marked

under section 552.107(1) of the Government Code. However, upon review, we find the remaining information at issue consists of a communication with an individual the county has not demonstrated is a privileged party. Therefore, the county may not withhold this information, which we have marked for release, under section 552.107(1) of the Government Code. 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 county 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 county may not withhold the non-privileged e-mails under section 552.107(1) of the Government Code.

Section 552.101 of the Government Code excepts from public 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, such as section 32.076 of the Election Code, which provides as follows:

(a) Except as provided by Subsection (b), an e-mail address or personal phone number of an election judge or clerk collected or maintained by the authority conducting the election is confidential and does not constitute public information for purposes of [the Act].

(b) An e-mail address or phone number described by Subsection (a) shall be made available on request to:

(1) any entity eligible to submit lists of election judges or clerks for that election; or

(2) the state executive committee of a political party with a county chair eligible to submit lists of election judges or clerks for that election.

Elec. Code § 32.076. Upon review, we find portions of the remaining responsive information consist of the personal phone numbers of election judges or clerks collected or maintained by the authority conducting the election. Further, we find none of the exceptions in section 32.076(b) apply in this instance. Therefore, the personal phone numbers we have marked are confidential under section 32.076 of the Election Code and must be withheld under section 552.101 of the Government Code. However, we find you have failed to demonstrate the remaining information at issue consists of an e-mail address or personal phone number of an election judge or clerk collected or maintained by the authority conducting the election. Thus, the county may not withhold the remaining information at issue under section 552.101 of the Government Code in conjunction with section 32.076 of the Election Code.

Section 552.108(b)(1) of the Government Code excepts from disclosure the internal records and notations of law enforcement agencies and prosecutors when their release would

interfere with law enforcement and crime prevention. Gov't Code § 552.108(b)(1); *see also* Open Records Decision No. 531 at 2 (1989). Section 552.108(b)(1) is intended to protect “information which, if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate the laws of this State.” *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no pet.). To demonstrate the applicability of this exception, a governmental body must meet its burden of explaining how and why release of the requested information would interfere with law enforcement and crime prevention. Open Records Decision No. 562 at 10 (1990). This office has concluded section 552.108(b)(1) excepts from public disclosure information relating to the security or operation of a law enforcement agency. *See, e.g.*, Open Records Decision Nos. 531 (release of detailed use of force guidelines would unduly interfere with law enforcement), 252 (1980) (section 552.108 is designed to protect investigative techniques and procedures used in law enforcement), 143 (1976) (disclosure of specific operations or specialized equipment directly related to investigation or detection of crime may be excepted). Section 552.108(b)(1) is not applicable, however, to generally known policies and procedures. *See, e.g.*, ORDs 531 at 2–3 (Penal Code provisions, common law rules, and constitutional limitations on use of force not protected), 252 at 3 (governmental body failed to indicate why investigative procedures and techniques requested were any different from those commonly known).

We note section 552.108 applies only to a law enforcement agency or prosecutor. In this instance, you have not demonstrated the county is a law enforcement agency for the purposes of section 552.108. However, where a governmental body has custody of information, the custodian of the records may withhold the information if it provides this office with a demonstration that release of the information interferes with law enforcement and a representation from a law enforcement entity that it wishes to have the information withheld. *See* Open Records Decision Nos. 474 (1987), 372 (1983). You have not provided a representation from a law enforcement agency with a law enforcement interest objecting to the release of the information at issue. Therefore, we find you have failed to demonstrate section 552.108(b)(1) of the Government Code is applicable to the information at issue, and the county may not withhold any portion of it on that basis.

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).<sup>2</sup> *See* Gov't Code § 552.137(a)-(c). The e-mail addresses at issue are not excluded by subsection (c). Therefore, the county must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure.

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<sup>2</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).

Section 552.139 of the Government Code provides, in part:

(a) Information is excepted from [required public disclosure] if it is information that relates to computer network security, to restricted information under Section 2059.055 [of the Government Code], or to the design, operation, or defense of a computer network.

(b) The following information is confidential:

(1) a computer network vulnerability report; [and]

(2) any other assessment of the extent to which data processing operations, a computer, a computer program, network, system, or system interface, or software of a governmental body or of a contractor of a governmental body is vulnerable to unauthorized access or harm, including an assessment of the extent to which the governmental body's or contractor's electronically stored information containing sensitive or critical information is vulnerable to alteration, damage, erasure, or inappropriate use[.]

*Id.* § 552.139(a), (b)(1)-(2). Section 2059.055 of the Government Code provides in pertinent part:

(b) Network security information is confidential under this section if the information is:

(1) related to passwords, personal identification numbers, access codes, encryption, or other components of the security system of a state agency;

(2) collected, assembled, or maintained by or for a governmental entity to prevent, detect, or investigate criminal activity; or

(3) related to an assessment, made by or for a governmental entity or maintained by a governmental entity, of the vulnerability of a network to criminal activity.

*Id.* § 2059.055(b). You state some of the remaining information pertains to security key card access. However, upon review, we find you have failed to demonstrate this information relates to computer network security, to restricted information under section 2059.055, or the design, operation, or defense of a computer network or consists of a computer network vulnerability report or assessment as contemplated by section 552.139. Accordingly, the county may not withhold the information at issue on the basis of section 552.139 of the Government Code.

In summary, the county may generally withhold the information we have marked under section 552.107(1) of the Government Code. However, if the county 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 county may not withhold the non-privileged e-mails under section 552.107(1) of the Government Code. The county must withhold personal phone numbers we have marked under section 552.101 of the Government Code in conjunction with section 32.076 of the Election Code. The county must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure. The county must release the remaining responsive information.<sup>3</sup>

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,



Cole Hutchison  
Assistant Attorney General  
Open Records Division

CH/eb

Ref: ID# 641552

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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<sup>3</sup>We note the information being released contains the requestor's e-mail address, which the requestor has a right of access to under section 552.137(b) of the Government Code. See Gov't Code § 552.137(b).