



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

January 25, 2018

Ms. Denika Caruthers J.D.
Administrative Legal Advisor
Dallas County Juvenile Department
2600 Lone Star Drive, Box 5
Dallas, Texas 75212

OR2018-01732

Dear Ms. Caruthers:

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# 693036.

The Dallas County Juvenile Probation Department (the "department") received a request for information pertaining to e-mails sent by a named employee during a specified time period.¹ You state the department will release some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

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. Section 552.101 encompasses section 58.005 of the Family Code, which provides, in part:

¹You state the department sent the requestor cost estimates of charges pursuant to section 552.2615 of the Government Code, and the requestor accepted the cost estimates. *See* Gov't Code § 552.2615. The estimates of charges required the requestor to provide a deposit for payment of anticipated costs under section 552.263 of the Government Code. *See id.* § 552.263(a). You also inform us the department received the required deposit on October 26, 2017. *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 governmental body receives bond or deposit).

²We assume that 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.

(a) This section applies only to the inspection, copying, and maintenance of a record concerning a child and to the storage of information from which a record could be generated, including personally identifiable information, information obtained for the purpose of diagnosis, examination, evaluation, or treatment of the child or for making a referral for treatment of the child, and other records or information, created by or in the possession of:

- (1) the Texas Juvenile Justice Department;
- (2) an entity having custody of the child under a contract with the Texas Juvenile Justice Department; or
- (3) another public or private agency or institution having custody of the child under order of the juvenile court, including a facility operated by or under contract with a juvenile board or juvenile probation department.

(a-1) Except as provided by Article 15.27, Code of Criminal Procedure, the records and information to which this section applies may be disclosed only to:

- (1) the professional staff or consultants of the agency or institution;
- (2) the judge, probation officers, and professional staff or consultants of the juvenile court;
- (3) an attorney for the child;
- (4) a governmental agency if the disclosure is required or authorized by law;
- (5) a person or entity to whom the child is referred for treatment or services if the agency or institution disclosing the information has entered into a written confidentiality agreement with the person or entity regarding the protection of the disclosed information;
- (6) the Texas Department of Criminal Justice and the Texas Juvenile Justice Department for the purpose of maintaining statistical records of recidivism and for diagnosis and classification; or
- (7) with permission from the juvenile court, any other person, agency, or institution having a legitimate interest in the proceeding or in the work of the court.

Fam. Code § 58.005(a), (a-1). Under section 58.005 of the Family Code, a “child” means a person who is ten years of age or older and under seventeen years of age at the time of the reported conduct. *See id.* § 51.02(2) (defining “child” for purposes of title 3 of Family Code). You inform us the information you marked pertains to children who are residents in the custody of the department. You state the information includes personally identifying information about the children at issue that was “obtained for the purpose of diagnosis, examination, evaluation, or treatment or for making a referral for treatment by a public institution that has custody of the children under the order of the juvenile court and/or that provides supervision for the children.” Further, we have no indication the requestor is entitled to receive the information at issue under section 58.005(a-1). Therefore, we conclude the information we marked is confidential under section 58.005 of the Family Code, and the department must withhold it under section 552.101 of the Government Code on that basis.³ However, we note some of the remaining information at issue, which we marked for release, reflects the juvenile involved was seventeen at the time of the incident at issue. Because the legislature has chosen to protect the law enforcement records of only a child who is between the ages of ten and sixteen at the time of the reported conduct, we find the information at issue is not confidential under section 58.005 of the Family Code. *See Open Records Decision No. 478 at 2 (1987)* (language of confidentiality statute controls scope of protection). Therefore, the department may not withhold any portion of the information we marked for release under section 552.101 of the Government Code in conjunction of section 58.005 of the Family Code.

Further, the remaining information you marked does not reflect the ages of the juveniles involved. Because we are unable to determine the ages of the juveniles involved in these documents, we must rule conditionally. To the extent the remaining information you marked pertains to children who are ten years of age or older and under seventeen years of age, it is confidential pursuant to section 58.005(a) of the Family Code and must be withheld under section 552.101 of the Government Code.⁴ However, to the extent the information at issue pertains to children who are not ten years of age or older and under seventeen years of age, the department may not withhold the information at issue under section 58.005. In that event, we will address your remaining argument against the disclosure of this information.

Section 552.101 of the Government Code also encompasses section 58.007 of the Family Code, which provides in relevant part the following:

(b) Except as provided by Section 54.051 (d-1) and by Article 15.27, Code of Criminal Procedure, the records, whether physical or electronic, of a juvenile court, a clerk of court, a juvenile probation department, or a prosecuting

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

⁴In that event, our ruling is dispositive, and we do not address your remaining argument against disclosure of this information.

attorney relating to a child who is a party to a proceeding under [Title 3 of the Family Code] may be inspected or copied only by:

- (1) the judge, probation officers, and professional staff or consultants of the juvenile court;
- (2) a juvenile justice agency as that term is defined by Section 58.101;
- (3) an attorney representing a party in a proceeding under this title;
- (4) a person or entity to whom the child is referred for treatment or services, if the agency or institution disclosing the information has entered into a written confidentiality agreement with the person or entity regarding the protection of the disclosed information;
- (5) a public or private agency or institution providing supervision of the child by arrangement of the juvenile court, or having custody of the child under juvenile court order; or
- (6) with permission from the juvenile court, any other person, agency, or institution having a legitimate interest in the proceeding or in the work of the court.

Fam. Code § 58.007(b). We note section 58.007, like section 58.005, applies to records concerning a person who is ten years of age or older and under seventeen years of age at the time of the reported conduct. *See id.* § 51.02(2). As noted above, the information we marked for release reflects the juvenile involved was seventeen at the time of the incident at issue. Accordingly, we find the department may not withhold the information we marked for release under section 552.101 in conjunction with section 58.007(b) of the Family Code. Further, we are unable to determine the ages of the individuals involved in the remaining marked information. Therefore, to the extent the information at issue pertains to children who are not ten years of age or older and under seventeen years of age, the department may not withhold it under section 552.101 of the Government Code in conjunction with section 58.007(b) of the Family Code.

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

You state some of the remaining information, which you marked, consists of communications between department attorneys or attorneys in the Dallas County District Attorney’s Office and department employees that were made for the purpose of providing legal services to the department. You state the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find you have established the information at issue consists of privileged attorney-client communications. Therefore, the department may withhold the information you marked under section 552.107(1) of the Government Code.⁵

Section 552.102(a) of the Government Code excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” Gov’t Code § 552.102(a). We understand you to assert the privacy analysis under section 552.102(a) is the same as the common-law privacy test under section 552.101 of the Government Code. Section 552.101 of the Government Code encompasses common-law privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). In *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref’d n.r.e.), the court of appeals ruled the privacy test under section 552.102(a) is the same as the *Industrial*

⁵As our ruling is dispositive, we need not consider your remaining argument against disclosure of this information.

Foundation privacy test. However, the Texas Supreme Court has expressly disagreed with *Hubert's* interpretation of section 552.102(a) and held the privacy standard under section 552.102(a) differs from the *Industrial Foundation* test under section 552.101. *See Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). The supreme court also considered the applicability of section 552.102(a) and held it excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *See id.* at 348. Upon review, we find none of the remaining information is subject to section 552.102(a) of the Government Code, and the department may not withhold any of the remaining information on that basis.

As previously noted, section 552.101 of the Government Code encompasses common-law privacy, which is subject to the two-part test discussed above. *Indus. Found.*, 540 S.W.2d at 685. Under the common-law right of privacy, an individual has a right to be free from the publicizing of private affairs in which the public has no legitimate concern. *Id.* at 682. The court of appeals has concluded public citizens' dates of birth are protected by common-law privacy pursuant to section 552.101. *Paxton v. City of Dallas*, No. 03-13-00546-CV, 2015 WL 3394061, at *3 (Tex. App.—Austin May 22, 2015, pet. denied) (mem. op.). Accordingly, the department must withhold all public citizens' dates of birth in the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy.

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.⁶ *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. 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. Therefore, to the extent the employee whose information is at issue timely requested confidentiality under section 552.024 of the Government Code, the department must withhold the information we marked under section 552.117(a)(1) of the Government Code. Conversely, to the extent the employee at issue did not timely request confidentiality under section 552.024, the department may not withhold the marked information under section 552.117(a)(1).

⁶The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision No. 481 (1987), 480 (1987), 470 (1987).

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). See Gov’t Code § 552.137(a)-(c). The e-mail address at issue is not excluded by subsection (c). Upon review, we find the department must withhold the e-mail address we marked under section 552.137 of the Government Code, unless its owner affirmatively consents to its public disclosure.

In summary, the department must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 58.005 of the Family Code. With the exception of the information we marked to release, to the extent the remaining information you marked pertains to children who are ten years of age or older and under seventeen years of age, it must be withheld under section 552.101 of the Government Code in conjunction with section 58.005(a) of the Family Code. The department may withhold the information you marked under section 552.107(1) of the Government Code. The department must withhold all public citizens’ dates of birth under section 552.101 of the Government Code in conjunction with common-law privacy. To the extent the employee whose information is at issue timely requested confidentiality under section 552.024 of the Government Code, department must withhold the information we marked under section 552.117(a)(1) of the Government Code. The department must withhold the e-mail address we marked under section 552.137 of the Government Code, unless its owner affirmatively consents to its public disclosure or subsection (c) applies. The department 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, 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,



Kaelan A. Henze
Assistant Attorney General
Open Records Division

KAH/gw

Ref: ID# 693036

Enc. Submitted documents

c: Requestor
(w/o enclosures)