



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

May 14, 2019

Mr. Ronny H. Wall  
Associate General Counsel  
Texas Tech University System  
P.O. Box 45031  
Lubbock, Texas 79409-5031

OR2019-12889

Dear Mr. Wall:

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# 765389.

The Texas Tech University System (the "system") received nine requests from the same requestor for telephone records related to nine named system officials during a specified time period. The system argues the submitted information does not consist of public information subject to the Act. In the alternative, the system claims the submitted information is excepted from disclosure under sections 552.103, 552.107, 552.117, and 552.136 of the Government Code. We have considered the submitted arguments and reviewed the submitted representative sample of information.<sup>1</sup> We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note the requestor excludes "personal phone calls" from the scope of the request. Accordingly, this type of information is not responsive to the request for information. This

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<sup>1</sup>We 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 those records contain substantially different types of information than that submitted to this office.

ruling does not address the public availability of any information that is not responsive to the request and the system is not required to release that information in response to the request.

Next, the system argues the remaining information is not subject to the Act. The Act applies to "public information," which is defined in section 552.002(a) of the Government Code 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; or
- (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.

Gov't Code § 552.002(a). Thus, virtually all of the information in a governmental body's physical possession constitutes public information and is subject to the Act. *See id.*; Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). The Act can also encompass information that a governmental body does not physically possess. Information that is written, produced, collected, assembled, or maintained by an individual officer or employee of a governmental body in the officer or employee's official capacity and in connection with the transaction of official business, is subject to disclosure under the Act if the information pertains to official business of the governmental body. Gov't Code § 552.002(a)(3); *see* Open Records Decision No. 462 at 4 (1987); *cf.* ORD 499. Information is "in connection with the transaction of official business" if it is "created by, transmitted to, received by, or maintained by an officer or employee of the governmental body in the officer's or employee's official capacity, or a person or entity performing official business or a government function on behalf of a governmental body, and pertains to official business of the governmental body." Gov't Code § 552.002(a-1). Moreover, section 552.001 of the Act provides it is the policy of this state that each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees. *See id.* § 552.001(a).

The system contends the remaining information is not subject to the Act because the information is maintained by an officer or employee of the system and relates to the officer's or employee's private cellular telephone. Upon review, we note the information at issue was created or is maintained by a person performing official business or a governmental function on behalf of the system and the information pertains to official business of the system. Accordingly, we find the remaining information was written, produced, collected, assembled, or maintained in connection with the transaction of the system's official business. Therefore, we conclude the remaining information is subject to the Act and the system must release it unless the system demonstrates the information falls within an exception to public disclosure under the Act. *See id.* §§ 552.006, .021, .301, .302.

Next, the system claims some of the remaining information, which the system marked Attachment C, is not responsive to the instant request. We note a governmental body must make a good faith effort to relate a request to information held by the governmental body. *See Open Records Decision No. 561 at 8 (1990)*. Upon review, we find Attachment C responsive to the request. We will therefore address the system's claimed exceptions to disclosure of this information as well as the remaining information.

Next, the system informs us some of the remaining information was the subject of a previous request for information from the same requestor. The system informs us the information is currently the subject of pending litigation (the "pending litigation") between the system and the requestor. *See Dolcefino Communications, L.L.C., d/b/a Dolcefino Consulting v. Texas Tech University*, Cause No. 2018528740 (99th Dist. Ct., Lubbock County, Tex.). We note the requestor states the information at issue is "no longer a part of the ongoing litigation between" the requestor and the system. Whether the information is currently the subject of pending litigation is a question of fact. This office cannot resolve questions of fact through the open records ruling process but, instead, must rely on the representations of the governmental body requesting our opinion. *See Open Records Decision Nos. 554 (1990), 552 (1990)*. Therefore, we rely on the system's representations in this matter. Accordingly, to the extent the remaining information is the subject of the pending litigation, we will allow the trial court to resolve the issue of whether that information must be released to the public. However, we will consider the system's arguments against disclosure of the remaining information that is not subject to the pending litigation.

Section 552.103 of the Government Code provides in relevant part as follows:

- (a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request for information and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a).

As noted above, the system has demonstrated it was a party to the pending litigation when the system received the instant request for information. *See Dolcefino Communications, L.L.C., d/b/a Dolcefino Consulting v. Texas Tech University*, Cause No. 2018528740 (99th Dist. Ct., Lubbock County, Tex.). However, upon review we find the system has failed to demonstrate the remaining information at issue pertains to the pending litigation for purposes of section 552.103 of the Government Code. Thus, we conclude the system has failed to demonstrate the applicability of section 552.103 to the information at issue and the system may not withhold the information on that basis.

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). 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).

The system states some of the remaining information, which it marked, documents communications between attorneys for the system and the named system officials in their capacities as clients. The system states these communications were made in furtherance of the rendition of professional legal services to the system. The system states these communications were intended to be, and have remained, confidential. Based on these representations and our review, we find the system has demonstrated the applicability of the attorney-client privilege to the information at issue. Accordingly, the system may withhold the information it marked 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. *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). The system indicates the officials whose information is at issue timely requested confidentiality under section 552.024. Further, the system indicates a governmental body does not pay for the cellular telephone service at issue. Accordingly, the system must withhold the information it marked under section 552.117(a)(1) of the Government Code.

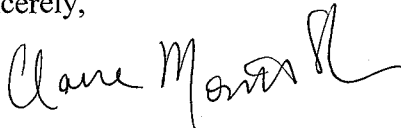
Section 552.136 of the Government Code provides, “Notwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” *Gov't Code* § 552.136(b); *see id.* § 552.136(a) (defining “access device”). Accordingly, the system must withhold the account numbers it marked under section 552.136 of the Government Code.

In summary, the submitted information that consists of "personal phone calls" is not responsive to the request for information and the system is not required to release that information in response to the request. To the extent the remaining information is the subject of pending litigation, we will allow the trial court to resolve the issue of whether that information must be released to the public. The system may withhold the information it marked under section 552.107(1) of the Government Code. The system must withhold the information it marked under section 552.117(a)(1) of the Government Code. The system must withhold the account numbers it marked under section 552.136 of the Government Code. The system 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](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/mo

Ref: ID# 765389

Enc. Submitted documents

c: Requestor  
(w/o enclosures)