



KEN PAXTON  
ATTORNEY GENERAL OF TEXAS

July 30, 2019

Mr. Scott Lemond  
General Counsel  
Harris County Housing Authority  
8933 Interchange  
Houston, Texas 77054

OR2019-20909

Dear Mr. Lemond:

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# 777762.

The Harris County Housing Authority (the "authority") received two requests from different requestors for information pertaining to tenant protection vouchers and a specified contract. You claim some of the submitted information is not subject to the Act. You also claim the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.132, 552.139, 552.147, and 552.148 of the Government Code.<sup>1</sup> Additionally, we understand the authority notified Marquis Group ("Marquis"); the Southwest Housing Compliance Corporation ("SHCC"); and the United States Department of Housing and Urban Development ("HUD") of the request for information and of their right to submit arguments to this office as to why the submitted information should not be released.<sup>2</sup> *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released); *id.* § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party

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<sup>1</sup>Although you do not cite section 552.107 of the Government Code in your brief, we understand you to raise this exception based upon the substance of your arguments.

<sup>2</sup>As of this date, we have not received comments from HUD explaining why the submitted information should not be released.

to raise and explain applicability of exception in the Act in certain circumstances). We have considered your arguments and reviewed the submitted information.

Initially, we note you have not submitted information responsive to the portion of the requests seeking the specified contract. To the extent any information responsive to this portion of the requests existed on the date the authority received the request, we assume the authority has released it. If the authority has not released any such information, it must do so at this time. *See* Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes no exceptions apply to requested information, it must release information as soon as possible).

Next, we note the first requestor asks questions in his request. The Act does not require a governmental body to answer factual questions, conduct legal research, or create new information in responding to a request. *See* Open Records Decision Nos. 563 at 8 (1990), 555 at 1-2 (1990). However, a governmental body must make a good-faith effort to relate a request to any responsive information that is within its possession or control. Open Records Decision Nos. 561 at 8-9 (1990), 555 at 102. We assume you have made a good-faith effort to do so.

Next, we note some of the information you submitted in response to the first request, which we marked and indicated, is not responsive to that request for information because it was created after the date the authority received the first request. Additionally, some of the information you submitted in response to the second request, which we indicated, is not responsive to that request because it was created after the date the authority received the second request. This ruling does not address the public availability of any information that is not responsive to the respective requests, and the authority is not required to release this information in response to the requests.<sup>3</sup>

Next, we note the second requestor seeks information not requested by the first requestor. Thus, the second request is broader than the first request. Accordingly, any responsive information beyond the scope of the first request is not responsive to that request, and the authority need not release information to the first requestor that is not responsive to his request for information.

Next, you assert the electronic password you indicated within the remaining information is not subject to the Act. The Act is applicable only to "public information." *See* Gov't Code § 552.021. Section 552.002 of the Act defines public information as information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

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<sup>3</sup>As we are able to make this determination, we need not address your arguments against disclosure of this information.

- (1) by a governmental body; or
- (2) for a governmental body and the governmental body owns the information or has a right of access to it.

*Id.* § 552.002. In Open Records Decision No. 581 (1990), this office determined certain computer information, such as source codes, documentation information, and other computer programming, that has no significance other than its use as a tool for the maintenance, manipulation, or protection of public property is not the kind of information made public under section 552.021 of the Government Code. You indicate the password at issue consists of information used solely as a tool for the maintenance, manipulation, or protection of public property and have no other significance. Based on the reasoning in that decision and our review of the information at issue, we determine the password at issue does not constitute public information under section 552.002. Accordingly, the password at issue is not subject to the Act, and the authority is not required to release this information in response to these requests.<sup>4</sup>

Next, we note an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See id.* § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from Marquis or SHCC explaining why the submitted information should not be released. Therefore, we have no basis to conclude either of these third parties has a protected proprietary interest in the submitted information. *See id.* § 552.110; 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, the authority may not withhold the responsive information on the basis of any proprietary interest Marquis or SHCC may have in it.

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

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<sup>4</sup>As we are able to make this determination, we need not address your remaining arguments against disclosure of this information.

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). 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 we indicated, consists of communications involving an attorney for the authority, authority staff, and other privileged parties that were made for the purpose of providing legal services to the authority. We understand the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to some of the information at issue. Thus, with the exception of the information we marked for release, the authority may generally withhold the information we indicated under section 552.107(1) of the Government Code.<sup>5</sup> We note, however, some of the otherwise privileged e-mail strings include e-mails and attachments involving individuals you have not demonstrated to be privileged parties. Furthermore, if the non-privileged e-mails and attachments are removed from the e-mail strings in which they appear and stand alone, they are responsive to the request for information. Therefore, if these non-privileged e-mails and attachments, which we marked, are maintained by the authority separate and apart from the otherwise privileged e-mail strings in which they appear, then the authority may not withhold these non-privileged e-mails and attachments under section 552.107(1) of the Government Code. We note the information we marked for release consists of communications with non-privileged parties.

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<sup>5</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

Accordingly, we conclude you have failed to establish the information at issue constitutes privileged communications for the purposes of section 552.107(1), and the authority may not withhold the information on that basis.

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. This section encompasses information other statutes make confidential. You claim some of the remaining information is protected by the Privacy Act of 1974, section 552a of title 5 of the United States Code (“Federal Privacy Act”). The Federal Privacy Act applies to an “agency,” which is defined as “any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency[.]” See 5 U.S.C. §§ 552(f)(1)(formerly 5 U.S.C. § 552(e)), 552a(a)(1) (referring to 5 U.S.C. § 552(e) for definition of “agency”). Section 552a(b) of the Federal Privacy Act provides, “[n]o agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains[.]” 5 U.S.C. § 552a(b). In this instance, you inform us the information at issue was created by the Southwest Housing Compliance Corporation as authorized by the U.S. Department of Housing and Urban Development, and is maintained by the authority. However, our office and the courts have stated the Federal Privacy Act applies only to federal agencies, and not to state or local agencies. See *St. Michael’s Convalescent Hosp. v. State of California*, 643 F.2d 1369, 1373 (9th Cir. 1981) (definition of agency under Privacy Act does not encompass state agencies or bodies); *Shields v. Shetler*, 682 F. Supp. 1172, 1176 (D. Colo. 1988) (Privacy Act does not apply to state agencies or bodies); Attorney General Opinion MW-95 at 2 (1979) (neither FOIA nor federal Privacy Act applies to records held by state or local governmental bodies in Texas). The courts have also opined that neither the receipt of federal funds nor limited oversight by a federal entity convert state or local governmental bodies into agencies covered by the Privacy Act. See *St. Michael’s Convalescent Hosp.*, 643 F.2d at 1373-74; see also *United States v. Orleans*, 425 U.S. 807, 816 (1976) (federal regulations and contract provisions do not convert acts of local and state governmental bodies into federal governmental acts.). Upon review of your arguments, we find you have failed to demonstrate the Federal Privacy Act applies to the information at issue, and you may not withhold any of this information under section 552.101 of the Government Code on that basis.

As noted above, section 552.101 of the Government Code encompasses information other statutes make confidential. A federal regulation enacted pursuant to statutory authority can provide statutory confidentiality for purposes of section 552.101 of the Government Code. See Open Records Decision No. 599 at 4 (1992). You raise section 552.101 in conjunction with 5.2007(c) of title 24 of the Code of Federal Regulations, which pertains to the protection of certain crime victims who are applicants or beneficiaries of assistance under a program administered by a United States Department of Housing and Urban Development

("HUD") program covered by the Violence Against Women Act ("VAWA"), which is codified under section 13925 through section 14043e of title 42 of the United States Code. See 24 C.F.R. § 5.2001. Section 5.2007 of title 24 of the Code of Federal Regulations states, in part:

(c) Confidentiality. Any information submitted to a covered housing provider under this section, including the fact that an individual is a victim of domestic violence, dating violence, sexual assault, or stalking (confidential information), shall be maintained in strict confidence by the covered housing provider.

...

(2) The covered housing provider shall not enter confidential information described in paragraph (c) of this section into any shared database or disclose such information to any other entity or individual, except to the extent that the disclosure is:

(i) Requested or consented to in writing by the individual in a time-limited release

(ii) Required for use in an eviction proceeding or hearing regarding termination of assistance from the covered program; or

(iii) Otherwise required by applicable law.

*Id.* § 5.2007(c)(2). Upon review, we find you have failed to demonstrate the applicability of 5.2007(c) of title 24 of the Code of Federal Regulations to any of the information at issue. Accordingly, the authority may not withhold of the remaining responsive information under section 552.101 of the Government Code on that basis.

Section 552.132(b) of the Government Code provides the following:

The following information held by the crime victim's compensation division of the attorney general's office is confidential:

(1) the name, social security number, address, or telephone number of a crime victim or claimant; or

(2) any other information the disclosure of which would identify or tend to identify the crime victim or claimant.

Gov't Code § 552.132(b). You argue portions of the remaining information are confidential under section 552.132. Upon review, we find the information at issue is held by the authority, not the crime victim's compensation division of the attorney general's office. Therefore, section 552.132(b) is not applicable to this information. Thus, the authority may not withhold any of the remaining responsive information under section 552.132(b) of the Government Code.

Section 552.139 of the Government Code provides, in relevant 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.

*Id.* § 552.139(a). 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). Upon review, we find you have failed to demonstrate the applicability of section 552.139 of the Government Code to any of the remaining responsive information, and the authority may not withhold it on that basis.

Section 552.148 of the Government Code provides the following:

(a) In this section, "minor" means a person younger than 18 years of age.

(b) The following information maintained by a municipality for purposes related to the participation by a minor in a recreational program or activity is excepted from [required disclosure]:

- (1) the name, age, home address, home telephone number, or social security number of the minor;
- (2) a photograph of the minor; and
- (3) the name of the minor's parent or legal guardian.

*Id.* § 552.148. Section 552.148 specifically applies to information maintained by a municipality “for purposes related to the participation by a minor in a recreational program or activity[.]” *Id.* § 552.148(b). Because the information at issue is not related to participation in a recreational program or activity, section 552.148 of the Government Code does not apply, and the authority may not withhold any of the remaining responsive information on that basis.

Section 552.101 of the Government Code also encompasses common-law privacy. Common-law privacy 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. *Industrial Found. v. Texas 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 established. *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). This office has also found personal financial information not relating to a financial transaction between an individual and a governmental body is generally highly intimate or embarrassing. *See* Open Records Decision Nos. 600 (1992) (personal financial information includes choice of a particular insurance carrier), 523 (1989) (common-law privacy protects credit reports, financial statements, and other personal financial information), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy). The court of appeals has concluded public citizens' dates of birth are protected by common-law privacy pursuant to section 552.101. *See 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.).

Upon review, we conclude portions of the remaining responsive information, which we marked, meet the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the authority must withhold the information we marked and all public citizens' dates of birth under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find no portion of the remaining information at issue is highly intimate or embarrassing and of no legitimate public concern, and the authority may not withhold any of the remaining responsive information under section 552.101 of the Government Code on the basis of common-law privacy.

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).<sup>6</sup> 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). Upon review, we find the authority must withhold the e-mail addresses in the remaining responsive information under section 552.137 of the Government Code, unless their owners of the e-mail addresses affirmatively consent to their public disclosure or subsection (c) applies.

Section 552.147 of the Government Code excepts from disclosure the social security number of a living person. *Id.* § 552.147. Accordingly, the authority may withhold the social security numbers within the remaining information under section 552.147 of the Government Code.

In summary, this ruling does not address the public availability of the information that is not responsive to the instant requests, and the authority is not required to release this information in response to the requests. The electronic password you indicated is not subject to the Act, and the authority is not required to release this information in response to the requests. With the exception of the information we marked for release, the authority may generally withhold the information we indicated under section 552.107(1) of the Government Code; however, the authority may not withhold the marked non-privileged e-mails and attachments if they are maintained separate and apart from the otherwise privileged e-mail strings in which they appear. The authority must withhold the information we marked and all public citizens’ dates of birth under section 552.101 of the Government Code in conjunction with common-law privacy. The authority must withhold the e-mail addresses in the remaining responsive information under section 552.137 of the Government Code, unless their owners of the e-mail addresses affirmatively consent to their public disclosure or subsection (c) applies. The authority may withhold the social security numbers within the remaining information under section 552.147 of the Government Code. The authority must release the remaining responsive information.

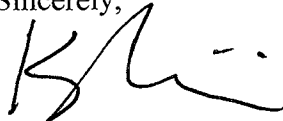
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

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<sup>6</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. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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,



Kieran Hillis  
Assistant Attorney General  
Open Records Division

KH/jxd

Ref: ID# 777762

Enc. Submitted documents

c: 4 Requestors  
(w/o enclosures)