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OR2020-18979

Dear Mr. Onk:

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# 835758.

La Salle County (the "county"), which you represent, received a request for the county's entire file for a particular roadway project. You claim some of the submitted information is excepted from disclosure under sections 552.101 and 552.107 of the Government Code.¹ You also state you notified third parties of the request for information and of the right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 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 to raise and explain applicability of exception in the Act in certain circumstances). We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note the submitted information contains the agenda of a public meeting. The agendas of a governmental body's public meetings are specifically made public under provisions of the Open Meetings Act, chapter 551 of the Government Code. *See* Gov't Code §§ 551.041 (governmental body shall give written notice of date, hour, place, and

¹ We note we asked the county to provide additional information pursuant to section 552.303 of the Government Code. *See* Gov't Code § 552.303(c)–(d) (if attorney general determines that information in addition that required by section 552.301 is necessary to render decision, written notice of that fact shall be given to governmental body and requestor, and governmental body shall submit necessary additional information to attorney general not later than seventh calendar day after date of receipt of notice). We have received and considered the correspondence sent by the county pursuant to that request.

subject of each meeting), .043 (notice of meeting of governmental body must be posted in place readily accessible to general public for at least 72 hours before scheduled time of meeting). Although the county raises section 552.107 of the Government Code for this information, the exceptions to disclosure found in the Act do not apply to information that other statutes make public. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Accordingly, the county must release the submitted agenda from the public meeting pursuant to section 551.022 of the Government Code.

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* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from any third parties explaining why the submitted information should not be released. Therefore, we have no basis to conclude any third party has a protected proprietary interest in the remaining information. *See, e.g., id.* § 552.110 (requiring the provision of specific factual evidence demonstrating the applicability of the exception). Accordingly, the county may not withhold any of the remaining information on the basis of any proprietary interest a third party may have in the information.

Next, we note the remaining information includes a contract that is subject to section 552.022(a)(3) of the Government Code. Section 552.022(a)(3) provides for the required public disclosure of "information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body," unless it is made confidential under the Act or other law. *Id.* § 552.022(a)(3). You seek to withhold the information at issue under section 552.107 of the Government Code. However, this section is discretionary in nature and does not make information confidential under the Act. *See* Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the information at issue may not be withheld under section 552.107 of the Government Code. However, the Texas Supreme Court has held the Texas Rules of Evidence are "other law" within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will consider your assertion of the attorney-client privilege under Texas Rule of Evidence 503 for the information subject to section 552.022. We will also address your arguments for the information not subject to section 552.022.

Texas Rule of Evidence 503(b)(1) provides as follows:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to facilitate the rendition of professional legal services to the client:

(A) between the client or the client's representative and the client's lawyer or the lawyer's representative;

(B) between the client's lawyer and the lawyer's representative;

(C) by the client, the client's representative, the client's lawyer, or the lawyer's representative to a lawyer representing another party in a pending action or that lawyer's representative, if the communications concern a matter of common interest in the pending action;

(D) between the client's representatives or between the client and the client's representative; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if it is not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5).

Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must (1) show the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show the communication is confidential by explaining it was not intended to be disclosed to third persons and it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, orig. proceeding).

You state the information subject to section 552.022(a)(3) is attached to a privileged attorney-client communication. However, we note the contract at issue is attached to an e-mail received from a non-privileged party. Thus, we find you have failed to demonstrate the information at issue consists of privileged attorney-client communications, and the county may not withhold the information subject to section 552.022 under rule 503 of the Texas Rules of Evidence.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *See Gov't Code* § 552.107(1). The elements of the privilege under section 552.107(1) are the same as those discussed above for rule 503. 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. ORD 676 at 6-7. 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*, 922 S.W.2d at 923.

You state the remaining information in Exhibit 4 that is not subject to section 552.022(a)(3) consists of communications between county attorneys, privileged third parties, and county

employees in their capacity as clients. You state these communications were made in order to provide legal advice and counsel to these employees. You assert these communications have not been disclosed to non-privileged parties and have remained confidential. Based upon your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to portions of the information at issue. Accordingly, except for the information we have marked and indicated for release, the county may generally withhold the remaining information in Exhibit 4 under section 552.107(1) of the Government Code.² We note, however, some of the information at issue consists of communications between the county and third parties regarding contract negotiations. Thus, the parties' interests were adverse at the time of the communications. Therefore, we find the information we have marked and indicated for release was shared with parties you have not shown to be privileged. Accordingly, we conclude the county may not withhold the information we have marked and indicated for release under section 552.107 of the Government Code. We also note some of the otherwise privileged e-mail strings include e-mails received from or sent to non-privileged parties. Furthermore, if the e-mails received from or sent to non-privileged parties are removed from the otherwise privileged 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, a representative sample of which we have marked and indicated, are maintained by the county separate and apart from the otherwise privileged e-mail strings in which they appear, then the county may not withhold these non-privileged e-mails under section 552.107(1).

Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses information protected by other statutes. As part of the Texas Homeland Security Act (the "HSA"), sections 418.176 through 418.182 were added to chapter 418 of the Government Code. These provisions make confidential certain information related to terrorism. Section 418.181 of the Government Code provides as follows:

Those documents or portions of documents in the possession of a governmental entity are confidential if they identify the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism.

Id. § 418.181. The fact that information may relate to a governmental body's security concerns does not make the information *per se* confidential under the HSA. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). Furthermore, the mere recitation by a governmental body of a statute's key terms is not sufficient to demonstrate the applicability of a claimed provision. As with any exception to disclosure, a governmental body asserting one of the confidentiality provisions of the HSA must adequately explain how the responsive records fall within the scope of the claimed provision. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

² As our ruling is dispositive, we need not address the remaining argument against disclosure of this information.

To the extent the information is maintained by the county separate and apart from the otherwise privileged e-mail strings in which they appear, you assert some of that information and some of the remaining information relates to the county's existing and proposed roadway system. You assert, and we agree, the county's roadway system is critical infrastructure for purposes of section 418.181 of the Government Code. *See generally id.* § 421.001(2) (defining "critical infrastructure" to include "all public or private assets, systems, and functions vital to the security, governance, public health and safety, economy, or morale of the state or the nation"). You state release of this information would reveal technical details of the county's roadway system. We understand release of this information would expose the county's roadway system to possible acts of terrorism or other criminal activity. Based upon these representations and our review, we find the county has demonstrated release of some of the information at issue, which we have marked and indicated, would identify the technical details of particular vulnerabilities of the county to an act of terrorism. Accordingly, the county must withhold the information we have marked and indicated under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code. However, we find the county has failed to establish any portion of the remaining information reveals the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism. *See Open Records Decision Nos. 542* (stating that governmental body has burden of establishing that exception applies to requested information), 532 (1989), 515 (1988), 252 (1980). Thus, we find the county has not demonstrated the applicability of section 418.181 to the remaining information, and the county may not withhold it under section 552.101 of the Government Code on this 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. 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 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). We note, however, the right to privacy is a personal right that lapses at death and the common-law right to privacy does not encompass information that relates only to a deceased individual. *Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 491 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.); *see also Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145, 147 (N.D. Tex. 1979) ("action for invasion of privacy can be maintained only by a living individual whose privacy is invaded" (quoting RESTATEMENT (SECOND) OF TORTS § 652I (1977))); Attorney General Opinions JM-229 (1984) ("the right of privacy lapses upon death"), H-917 (1976) ("We are . . . of the opinion that the Texas courts would follow the almost uniform rule of other jurisdictions that the right of privacy lapses upon death."); Open Records Decision No. 272 (1981) ("the right of privacy is

personal and lapses upon death”). Accordingly, information pertaining to a deceased individual may not be withheld on common-law privacy grounds. We also note common-law privacy protects the interests of individuals, not those of corporate and other business entities. See Open Records Decision Nos. 620 (1993) (corporation has no right to privacy), 192 (1978) (right to privacy is designed primarily to protect human feelings and sensibilities, rather than property, business, or other pecuniary interests); see also *Rosen v. Matthews Constr. Co.*, 777 S.W.2d 434 (Tex. App.—Houston [14th Dist.] 1989) (corporation has no right to privacy (citing *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950))), *rev’d on other grounds*, 796 S.W.2d 692 (Tex. 1990).

Upon review, we find some of the remaining information satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the county must generally withhold the information, a representative sample of which we have marked, under section 552.101 of the Government Code in conjunction with common-law privacy. However, it is not clear whether the financial information we have marked relates to the financial obligations of identifiable living individuals. To the extent the marked information relates to a personal financial obligation of an identifiable living individual, it must be withheld under section 552.101 in conjunction with common-law privacy. To the extent the marked information relates only to the financial interests of a corporate or business entity, or a deceased or unidentified individual, it may not be withheld on that basis under section 552.101.

We note some of the remaining information may be subject to copyright law. 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 must release the submitted agenda from the public meeting pursuant to section 551.022 of the Government Code. Except for the information we have marked and indicated for release, the county may generally withhold the remaining information in Exhibit 4 under section 552.107(1) of the Government Code. However, if the non-privileged e mails, a representative sample of which we have marked and indicated, are maintained by the county separate and apart from the otherwise privileged e mail strings in which they appear, then the county may not withhold these non-privileged e mails under section 552.107(1). The county must withhold the information we have marked and indicated under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code. To the extent it relates to a personal financial obligation of an identifiable living individual, the county must withhold the information, a representative sample of which we have marked, under section 552.101 of the Government Code in conjunction with common-law privacy. The county must release the remaining information; however, any information protected by copyright may only be released 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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

Erin Groff
Assistant Attorney General
Open Records Division

EMG/mo

Ref: ID# 835758

Enc. Submitted documents

c: Requestor
(w/o enclosures)