



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 8, 2020

Mr. Mark Kratovil
Assistant Criminal District Attorney
Tarrant County
401 West Belknap
Fort Worth, Texas 76196

OR2020-22560

Dear Mr. Kratovil:

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# 843939.

The Tarrant County Elections Administrator (the "election's office") received a request for e-mail communications between named individuals and specified organizations for a specified period of time. You state you will release some of the requested information. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

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 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 the information the election's office indicated consists of e-mail addresses and 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 elections' office must withhold the information it indicated under section 552.101 of the Government Code in conjunction with section 32.076 of the Election Code.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). 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 Third 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.). Thus, the election's office must withhold the public citizens' dates of birth it indicated under section 552.101 of the Government Code in conjunction with common-law privacy.

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 election’s office claims some of the remaining information is protected by section 552.107(1) of the Government Code. The election’s office states the information at issue consists of communications involving election’s office attorneys and election’s office employees in their capacities as clients. The election’s office states the communications were made for the purpose of facilitating the rendition of professional legal services to the election’s office and that these communications have remained confidential. Based on these representations and our review, we find the election’s office has demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the election’s office may generally withhold the information it indicated under section 552.107(1) of the Government Code. We note, however, one of these e-mail strings include an e-mail received from a non-privileged party. Furthermore, if the e-mail received from the non-privileged party is removed from the e-mail string and stands alone, it is responsive to the request for information. Therefore, if this non-privileged e-mail, which we have marked, is maintained by the election’s office separate and apart from the otherwise privileged e-mail strings in which it appears, then the election’s office may not withhold this non-privileged e-mail under section 552.107(1) of the Government Code.

We note the remaining information contains e-mail addresses that are subject to section 552.137 of the Government Code.¹ 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). *See Gov’t Code* § 552.137(a)-(c). The e-mail addresses at issue are not excluded by subsection (c). Therefore, the election’s office must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure.

In summary, the elections’ office must withhold the information it indicated under section 552.101 of the Government Code in conjunction with section 32.076 of the Election Code. The election’s office must withhold the public citizens’ dates of birth it indicated under section 552.101 of the Government Code in conjunction with common-law privacy. The election’s office may generally withhold the information it indicated under section 552.107(1) of the Government Code; however, to the extent the non-privileged e-mail we

¹ 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).

marked is maintained by the elections' office separate and apart from the otherwise privileged e-mail string in which it appears, the elections' office may not withhold this non-privileged e-mail under section 552.107(1) of the Government Code. In that instance, the elections' office must withhold the personal e-mail addresses we marked under section 552.137 of the Government Code, unless the owners affirmatively consents to its public disclosure, and 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 <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,

Paige Lay
Assistant Attorney General
Open Records Division

PL/jm

Ref: ID# 843939

Enc. Submitted documents

c: Requestor
(w/o enclosures)