



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 6, 2012

Mr. Habib H. Erkan, Jr.
For the City of Shavano Park
Denton, Navarro, Rocha & Bernal, P.C.
2517 North Main Avenue
San Antonio, Texas 78212

OR2012-17812

Dear Mr. Erkan:

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# 470247.

The City of Shavano Park (the "city"), which you represent, received a request for recordings that took place on two specified dates. You state the portions of the submitted recordings containing city council meetings have been released to the requestor. You claim the remaining information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information. We have also considered comments received 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 address the requestor's contention the city has voluntarily released the information at issue. Section 552.007 of the Government Code gives a governmental body the discretion to voluntarily release public information that is not confidential by law. *See id.* § 552.007(a). The requestor states the submitted information was released to two citizens of the city. We note, however, these two individuals are members of the city council. The purpose of the Act is to prescribe conditions under which members of the general public can obtain information from a governmental body. *See Attorney General Opinion JM-119 (1983)* (statutory predecessor). An official of a governmental body who, in an official capacity, requests information held by the governmental body does not act as a member of the public in doing so. Thus, exceptions to public disclosure under the Act do not control

the right of access of an official of a governmental body to information maintained by the governmental body. *See id.* at 3 (member of community college district board of trustees, acting in official capacity, has an inherent right of access to information maintained by district). Accordingly, to the extent the information at issue was previously released to the council members in their official capacities, the release of the information did not constitute a release to the general public under section 552.007. *See* Open Records Decision No. 666 at 4 (2000) (municipality's disclosure to a municipally-appointed citizen advisory board does not constitute a release to the public as contemplated under section 552.007 of the Government Code). However, if the information at issue was released to the council members, but not in their official capacities, the submitted information is subject to section 552.007. Section 552.007 states if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential by law. *See* Gov't Code § 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). You raise section 552.101, which makes information confidential under the Act. Thus, regardless of whether the information at issue was released to the two individuals not in their official capacities, we will consider your arguments under section 552.101 against disclosure of the information at issue.

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. You raise section 552.101 in conjunction with section 123.002(a)(2) of the Texas Civil Practice and Remedies Code. Section 123.002 provides in pertinent part:

(a) A party to a communication may sue a person who:

...

(2) uses or divulges information that he knows or reasonably should know was obtained by interception of the communication[.]

Civ. Prac. & Rem. Code § 123.002(a)(2). We note section 123.002(a)(2) provides a cause of action for a party to a communication against an individual who uses or divulges information obtained from intercepted communications. *See id.* However, section 123.002(a)(2) does not make information confidential for the purposes of section 552.101 of the Government Code. *See* Open Records Decision No. 478 at 2 (1987) (as general rule, statutory confidentiality requires express language making information confidential); *see also* Open Records Decision No. 658 at 4 (1998) (statutory confidentiality provision must be express, and confidentiality requirement will not be implied from statutory

structure). Therefore, the city may not withhold any portion of the information at issue under section 552.101 in conjunction with section 123.002(a)(2).

Section 552.101 also encompasses the doctrines of common-law and constitutional privacy. Common-law privacy protects information that (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). The type of information considered intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. This office has found personal financial information not relating to the financial transaction between an individual and a governmental body is excepted from required public disclosure under common-law privacy. See Open Records Decision Nos. 600 (1992) (personal financial choices concerning insurance are generally confidential), 545 (1990). This office has also found information pertaining to the work conduct and job performance of public employees is subject to a legitimate public interest, and, therefore, is generally not protected from disclosure under common-law privacy. See, e.g., Open Records Decision Nos. 470 at 4 (1987) (public has legitimate interest in job qualifications and performance of public employees), 455 (1987) (public employee's job performance or abilities generally not protected by privacy), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of governmental employees), 423 at 2 (1984) (scope of public employee privacy is narrow). Upon review, we find portions of one of the submitted audio recordings are highly intimate or embarrassing and not of legitimate public concern. Thus, the city must withhold the types of information we have indicated on the submitted recording under section 552.101 in conjunction with common-law privacy. However, we find the city has failed to demonstrate any of the remaining information at issue is highly intimate or embarrassing and not of legitimate public concern, and thus, none of the remaining information may be withheld under section 552.101 in conjunction with common-law privacy.

Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. See *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7. The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. ORD 455 at 4. The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* at 7. The scope of information protected is narrower than that under the common-law doctrine of privacy; constitutional privacy under section 552.101 is reserved for "the most intimate aspects of human affairs." *Id.* at 5 (quoting *Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985)). Upon review, we find you have failed to

demonstrate any portion of the remaining information at issue falls within the zones of privacy or implicates an individual's privacy interests for purposes of constitutional privacy. Therefore, the city may not withhold any portion of the remaining information under section 552.101 of the Government Code in conjunction with constitutional privacy.

We note portions of the remaining information at issue may be subject to section 552.117(a)(1) of the Government Code, which excepts from disclosure the home address and telephone number, social security number, emergency contact information, 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.¹ 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 only be withheld under section 552.117(a)(1) 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. Accordingly, if the individuals whose information is at issue timely requested confidentiality under section 552.024, the city must withhold the types of information we have indicated on one of the submitted recordings under section 552.117(a)(1) of the Government Code. However, if the individuals whose information is at issue did not make timely elections under section 552.024, the city may not withhold the types of information we have indicated under section 552.117(a)(1) of the Government Code.

In summary, they city must withhold the types of information we have indicated on one of the submitted recordings under section 552.101 in conjunction with common-law privacy. If the individuals whose information is at issue timely requested confidentiality under section 552.024, the city must withhold the types of information we have indicated on one of the submitted recordings under section 552.117(a)(1) of the Government Code. The remaining information must be released.

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.oag.state.tx.us/open/index_orl.php, 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

¹The 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).

information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,

A handwritten signature in cursive script, appearing to read "Kathleen J. Santos".

Kathleen J. Santos
Assistant Attorney General
Open Records Division

KJS/dls

Ref: ID# 470247

Enc. Submitted documents

c: Requestor
(w/o enclosures)