



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 22, 2015

Ms. Stacie White
Counsel for the City of Southlake
Taylor Olson Adkins Sralla Elam L.L.P.
6000 Western Place, Suite 200
Fort Worth Texas, 76107

OR2015-07751

Dear Ms. White:

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# 560703.

The City of Southlake (the "city"), which you represent, received a request for several categories of information pertaining to the promotion of city fire department employees as well as internal affairs investigations and performance evaluations involving seven named city employees. You state you will provide some of the requested information to the requestor. You state you will redact some information subject to section 552.117(a)(2) of the Government Code in accordance with Open Records Decision No. 670 (2001) and certain information under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).¹ You claim some of the submitted information is excepted from

¹Open Records Decision No. 670 authorizes all governmental bodies to withhold the current and former home addresses and telephone numbers, personal cellular telephone and pager numbers, social security numbers, and family member information of peace officers under section 552.117(a)(2) of the Government Code without the necessity of requesting an attorney general decision. ORD 670 at 6. Open Records Decision No. 684 serves as a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including personal e-mail addresses under section 552.137 of the Government Code without the necessity of requesting an attorney general decision. *See* ORD 684.

disclosure under sections 552.101, 552.102, 552.107, and 552.130 of the Government Code.² 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 information made confidential by other statutes, such as section 1703.306 of the Occupations Code, which provides:

(a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:

- (1) the examinee or any other person specifically designated in writing by the examinee;
- (2) the person that requested the examination;
- (3) a member, or the member’s agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner’s activities;
- (4) another polygraph examiner in private consultation; or
- (5) any other person required by due process of law.

(b) The [Texas Department of Licensing and Regulation] or any other governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information.

Occ. Code § 1703.306(a), (b). The submitted information contains information acquired from a polygraph examination. The requestor does not fall within any of the categories of individuals who have a right of access to the submitted polygraph information under section 1703.306(a). Accordingly, the city must withhold the polygraph information, which we have marked, under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code.

²Although you raise sections 552.108, 552.111, 552.119, and 552.152 of the Government Code in your brief, you make no arguments to support these exceptions. Therefore, we assume you have withdrawn your claim sections 552.108, 552.111, 552.119, and 552.152 apply to the submitted information. See Gov’t Code §§ 552.301, .302.

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. 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)(A), (B), (C), (D), (E). 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).

You state the information you have marked consists of communications between city employees and a city attorney. You state these communications were made in furtherance of the rendition of professional legal services to the city. We understand the communications have been kept confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information we have marked. Accordingly, the city may withhold the information we have marked under section 552.107(1) of the Government Code. However, we find you have not demonstrated how the remaining information constitutes privileged communications made for the purpose of facilitating the rendition of professional legal services to the city. Therefore, the city may not withhold any of the remaining information on the basis of section 552.107(1) of the Government Code.

Section 552.101 of the Government Code also encompasses common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. 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 demonstrated. *See 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). Upon review, we find the information we have marked and indicated satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Thus, the information we have marked and indicated must be withheld under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find you have not demonstrated how any of the remaining information is highly intimate or embarrassing and not of legitimate public concern. Thus, the remaining information may not be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.102(a) of the Government Code excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]” Gov’t Code § 552.102(a). The Texas Supreme Court held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). Upon review, the city must withhold the employee date of birth we have marked under section 552.102(a) of the Government Code.

We note some of the submitted information may be excepted from disclosure under section 552.117 of the Government Code.³ Section 552.117(a)(2) of the Government Code excepts from public disclosure the home addresses, home telephone numbers, emergency contact information, social security number, and family member information of a peace officer, as defined by article 2.12 of the Code of Criminal Procedure, regardless of whether the peace officer complies with section 552.024 of the Government Code or section 552.1175 of the Government Code. Gov’t Code § 552.117(a)(2). We note section 552.117(a)(2) protects a peace officer’s personal cellular telephone or pager number only if the officer pays for the cellular telephone or pager service with his or her personal funds. *See* Open Records Decision Nos. 670 at 6 (2001) (Gov’t Code § 552.117(a)(2) excepts from disclosure peace officer’s cell phone or pager number if officer pays for cell phone or pager service), 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). We note

³The 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).

the information at issue pertains to named city police department officers. It is unclear whether the named individuals are currently licensed peace officers as defined by article 2.12 of the Code of Criminal Procedure. Thus, if the named individuals are currently licensed peace officers as defined by article 2.12, the city must withhold the information we have marked pertaining to these officers under section 552.117(a)(2) of the Government Code; the city may only withhold the named individuals' cellular telephone numbers if they pay for the cellular telephone service with their own funds. If, however, the named individuals are not currently licensed peace officers, their personal information may not be withheld under section 552.117(a)(2) of the Government Code.

In the event the individuals at issue are no longer licensed peace officers, then the information we have marked may be subject to section 552.117(a)(1) of the Government Code. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. *Id.* § 552.117(a)(1). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, a governmental body must withhold information under section 552.117(a)(1) on behalf of current or former officials or employees only if these individuals made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. To the extent the employees timely elected to keep such information confidential under section 552.024, the city must withhold the information we have marked under section 552.117(a)(1) of the Government Code. If the employees did not make a timely election under section 552.024, the city may not withhold the information we have marked under section 552.117(a)(1) of the Government Code.

Section 552.130 provides information relating to a motor vehicle operator's license, driver's license, motor vehicle title or registration, or personal identification document issued by an agency of this state or another state or country is excepted from public release. Gov't Code § 552.130. Accordingly, the city must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code.

In summary, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code. The city may withhold the information we have marked under section 552.107(1) of the Government Code. The city must withhold the information we have marked and indicated under section 552.101 of the Government Code in conjunction with common-law privacy. The city must withhold the date of birth we have marked under section 552.102 of the Government Code. The city must withhold the information we have marked under section 552.117(a)(2) of the Government Code if the named individuals are currently licensed peace officers as defined by article 2.12; the city may only withhold the named

individuals' cellular telephone numbers if they pay for the cellular telephone service with their own funds. If the named individuals are no longer peace officers as defined by article 2.12 and timely requested confidentiality under section 552.024 of the Government Code, the city must withhold the information we have marked under section 552.117(a)(1) of the Government Code, but may only withhold the named individuals' cellular telephone numbers if they pay for the cellular telephone service with their own funds. The city must withhold the information we have marked under section 552.130 of the Government Code. The city 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, 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,

A handwritten signature in black ink that reads "Abigail T. Adams". The signature is written in a cursive, flowing style.

Abigail T. Adams
Assistant Attorney General
Open Records Division

ATA/akg

Ref: ID# 560703

Enc. Submitted documents

c: Requestor
(w/o enclosures)