



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 11, 2015

Mr. Nick Lealos
Assistant General Counsel
Texas Department of Public Safety
P.O. Box 4087
Austin, Texas 78773-0001

OR2015-26089

Dear Mr. Lealos:

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# 590384 (DPS PIR# 15-4856).

The Texas Department of Public Safety (the "department") received a request for information pertaining to a specified investigation and disciplinary records for a named trooper. You claim the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.108, and 552.111 of the Government Code and privileged under Rule 503 of the Texas Rules of Evidence.¹ We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

Initially, we note the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

¹Although you do not raise section 552.111 of the Government Code in your brief, we understand the department to assert this exception based on your markings.

²We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108; [and]

Gov't Code § 552.022(a)(1). The information at issue pertains to completed reports and investigations subject to section 552.022(a)(1) that must be released unless they are excepted from disclosure under section 552.108 of the Government Code or expressly made confidential under the Act or other law. *See id.* You raise section 552.107 of the Government Code and the deliberative process privilege encompassed by section 552.111 of the Government Code. However, these sections are discretionary exceptions and do not make information confidential under the Act. *See* Open Records Decision Nos. 676 at 10-11 (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 470 at 7 (1987) (governmental body may waive statutory predecessor to section 552.111 deliberative process). Therefore, the information at issue may not be withheld under section 552.107 or section 552.111 of the Government Code. The Texas Supreme Court has held, however, 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). Accordingly, we will address your assertion of the attorney-client privilege under Texas Rule of Evidence 503 for the information subject to section 552.022(a)(1). Additionally, because information subject to section 552.022(a)(1) may be withheld under section 552.108, we will address your argument under that exception. Furthermore, because sections 552.101 and 552.117³ of the Government Code make information confidential under the Act, we will address the applicability of these sections to 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. This section encompasses information other statutes make confidential. Section 411.00755 of the Government Code states, in pertinent part:

(b) The personnel records of a commissioned officer of the department may not be disclosed or otherwise made available to the public, except the department shall release in accordance with [the Act]:

(1) any letter, memorandum, or document relating to:

³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body. *See* Open Records Decision No. 481 (1987), 480 (1987), 470 (1987).

...

(B) misconduct by the officer, if the letter, memorandum, or document resulted in disciplinary action[.]

Id. § 411.00755(b). Section 411.00755 defines a personnel record, in part, as “any letter memorandum, or document maintained by the department that relates to a commissioned officer of the department[.]” *Id.* § 411.00755(a). For the purpose of section 411.00755, “disciplinary action” means discharge, suspension, or demotion. *Id.* §§ 411.0072(a)(1), .00755(a)(2) (“disciplinary action” defined in section 411.0072(a)(1)). In Open Records Letter No. 2010-12863 (2010), this office issued a previous determination to the department authorizing it to withhold, with the exception of the information listed in subsections 411.00755(b)(1)-(12), the personnel records of commissioned officers of the department under section 411.00755(b) of the Government Code, without the necessity of requesting an attorney general decision. *See* Open Records Decision No. 673 (2001) (previous determinations generally).

You argue the information you have marked should be withheld under section 411.00755 because it pertains to officers involved in the investigation who did not receive disciplinary action. We note the request specifically seeks information pertaining to the disciplinary records for the named trooper. As you acknowledge, the information at issue pertains to an administrative investigation of the named trooper, who is a commissioned officer of the department, which resulted in disciplinary action. Therefore, because the investigation at issue resulted in disciplinary action of the named trooper, no portion of the investigation may be withheld under section 411.00755(b)(1)(B) of the Government Code. Therefore, the department may not withhold any of the information at issue under section 552.101 of the Government Code in conjunction with section 411.00755 of the Government Code.

Section 552.101 of the Government Code also encompasses section 261.201 of the Family Code, which provides, in relevant part:

(a) [T]he following information is confidential, is not subject to public release under [the Act] and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a). Upon review, we find the information we have marked was used or developed in an investigation of alleged or suspected child abuse or neglect. *See id.* §§ 101.003(a) (defining “child” for purposes of this section as person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes), 261.001(1), (4) (defining “abuse” and “neglect” for purposes of chapter 261 of the Family Code). Accordingly, the information is within the scope of section 261.201 of the Family Code. You have not indicated the department has adopted a rule that governs the release of this type of information. Therefore, we assume no such regulation exists. Given that assumption, we conclude the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 261.201(a) of the Family Code.⁴

You claim section 552.101 of the Government Code in conjunction with section 58.007 of the Family Code for portions of the remaining information. Section 552.101 of the Government Code also encompasses section 58.007, which provides in part:

(c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

(1) if maintained on paper or microfilm, kept separate from adult files and records;

(2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and

(3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapters B, D, and E.

Id. § 58.007(c). Section 58.007(c) is applicable to records of juvenile delinquent conduct or conduct indicating a need for supervision that occurred on or after September 1, 1997. For purposes of section 58.007(c), “child” means a person who is ten years of age or older and under seventeen years of age at the time of the reported conduct. *See id.* § 51.02(2). We note section 58.007(c) is only applicable to law enforcement records and files of a child. Upon review, we find the remaining information you have marked is personnel information that does not constitute juvenile law enforcement records for purposes of section 58.007(c) of the

⁴As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

Family Code. As such, the remaining information you have marked may not be withheld under section 552.101 in conjunction with section 58.007(c).

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information if (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). 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 the identities of victims of sexual abuse are excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). Upon review, we find the information we have marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find the remaining information pertains to an unidentified individual whose privacy interests are, thus, protected, is not highly intimate or embarrassing information, or is of legitimate public interest. Therefore, none of the remaining information may be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

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

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 not intended to be disclosed to third persons other than those to whom disclosure is made to further the rendition of professional legal services to the client or reasonably necessary to transmit the communication. *Id.* 503(a)(5).

Accordingly, in order to withhold attorney-client privileged information from disclosure under Rule 503, a governmental body must 1) show that 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 that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. *See* Open Records Decision No. 676 (2002). Upon a demonstration of all three factors, the entire communication is confidential under Rule 503 provided the client has not waived the privilege or the communication does not fall within the purview of the exceptions to the privilege enumerated in Rule 503(d). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero Energy Corp.*, 973 S.W.2d 453, 457 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding) (privilege attaches to complete communication, including factual information).

You state the information you have marked consists of communications between department employees and attorneys for the department. You also state the communications were made for the purpose of rendering legal advice and the confidentiality of the communication has been maintained. Upon review, we find the department has demonstrated the applicability of the attorney-client privilege to the information at issue. Therefore, the department may withhold the information you have marked under Rule 503.

Section 552.108(b) of the Government Code excepts from disclosure “[a]n internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution . . . if (1) release of the internal record or notation would interfere with law enforcement or prosecution[.]” Gov’t Code § 552.108(b)(1). This section is intended to protect “information which, if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate the laws of this State.” *City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.). This office has concluded this provision protects certain kinds of information, the disclosure of which might compromise the security or operations of a law enforcement agency. *See, e.g.*, Open Records Decision Nos. 531 at 3-4 (1989) (detailed guidelines regarding police department’s use of force policy), 508 at 3-4 (1988) (information relating to future transfers of prisoners), 413 (1984) (sketch showing security measures for forthcoming execution). However, to claim this aspect of section 552.108 protection a

governmental body must meet its burden of explaining how and why release of the information at issue would interfere with law enforcement and crime prevention. Open Records Decision No. 562 at 10 (1990). Further, commonly known policies and techniques may not be withheld under section 552.108. *See, e.g.*, Open Records Decision Nos. 531 at 2-3 (former section 552.108 does not protect Penal Code provisions, common-law rules, and constitutional limitations on use of force), 252 at 3 (1980) (governmental body did not meet burden because it did not indicate why investigative procedures and techniques submitted were any different from those commonly known with law enforcement and crime prevention). To prevail on its claim that section 552.108(b)(1) exempts information from disclosure, a law-enforcement agency must do more than merely make a conclusory assertion that releasing the information would interfere with law enforcement. The determination of whether the release of particular records would interfere with law enforcement is made on a case-by-case basis. Open Records Decision No. 409 at 2 (1984).

The department explains revealing the operational details would provide wrong-doers, drug traffickers, terrorists, or criminals with invaluable information concerning department operations and drug trafficking enforcement. Upon review, we find the department has demonstrated release of the information it has marked would interfere with law enforcement. Thus, the department may withhold the information it has marked under section 552.108(b)(1) of the Government Code.

We note some of the remaining information is subject to section 552.117 of the Government Code. Section 552.117(a)(2) of the Government Code exempts from public disclosure the home address, home telephone number, emergency contact information, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with section 552.024 and 552.1175 of the Government Code.⁵ *See* Gov't Code § 552.117(a)(2). Accordingly, the department must withhold the information we have marked under section 552.117(a)(2) of the Government Code.

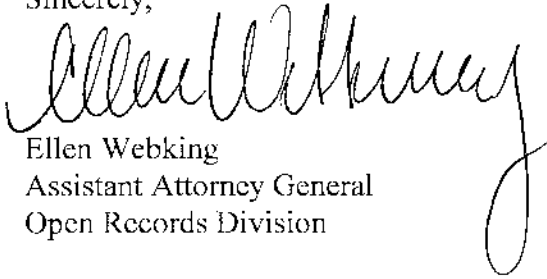
In summary, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. The department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The department may withhold the information you have marked under Rule 503. The department may withhold the information you have marked under section 552.108(b)(1) of the Government Code. The department must withhold the information we have marked under section 552.117(a)(2) of the Government Code. The department must release the remaining information.

⁵Section 552.117(a)(2) adopts the definition of peace officer found in article 2.12 of the Code of Criminal Procedure.

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, appearing to read "Ellen Webking". The signature is fluid and cursive, with a long, sweeping tail on the final letter.

Ellen Webking
Assistant Attorney General
Open Records Division

EW/akg

Ref: ID# 590384

Enc. Submitted documents

c: Requestor
(w/o enclosures)