



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 30, 2016

Ms. Theresa Cullen
Deputy City Attorney
City of El Paso
P.O. Box 1890
El Paso, Texas 79950-1890

OR2016-28717

Dear Ms. Cullen:

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# 640708 (ORR No. 16-1020-1111).

The City of El Paso (the "city") received a request for information pertaining to a named employee. The city states it is providing some of the requested information to the requestor, but claims the submitted information is either not subject to the Act or excepted from disclosure under sections 552.101 and 552.107 of the Government Code. We have considered the submitted arguments and reviewed the submitted information.

Section 552.0038(c) of the Government Code provides a governmental entity that maintains records of a participant in a retirement system's retirement program in cooperation with or on behalf of a retirement system is not required to accept or comply with a request for such information or to seek an opinion from the attorney general because the records are exempt from the provisions of the Act. *See Gov't Code § 552.0038(c)*. Therefore, to the extent Exhibit C consists of records of a participant in a retirement system's retirement program maintained in cooperation with or on behalf of a retirement system, the information is not subject to the Act, and the city is not required to release it in response to the request. However, to the extent Exhibit C does not consist of records of a participant in a retirement system's retirement program maintained in cooperation with or on behalf of a retirement system, we will consider the city's arguments against its disclosure.

Next, we note some of the information in Exhibit B may have been the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2010-16438 (2010). In Open Records Letter No. 2010-16438, we determined the city may withhold some information under Texas Rule of Evidence 503 and section 552.107 of the Government Code, but must release the remaining information at issue. Section 552.007 of the Government Code provides 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. *See id.* § 552.007; Open Records Decision Nos. 518 at 3 (1989), 400 at 2 (1983). Thus, pursuant to section 552.007, the city may not now withhold any information that was previously released, unless its release is expressly prohibited by law or the information is confidential by law. Section 552.107 of the Government Code is discretionary in nature; it serves only to protect a governmental body's interests. *See* Open Records Decision No. 676 at 12 (2002) (attorney-client privilege under section 552.107 subject to waiver); *see also* Open Records Decision No. 522 (1989) (discretionary exceptions in general). As such, section 552.107 does not expressly prohibit the release of the submitted information or make the information confidential. Accordingly, pursuant to section 552.007 to the extent the city previously released any of the information in Exhibit B, the city may not withhold such information under section 552.107. However, to the extent the city did not previously release the information at issue in Exhibit B, we will address the city's argument against its disclosure.

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 ORD 676 at 6-7. 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).

The city explains Exhibit B constitutes confidential communications between attorneys for and employees of the city that were made in furtherance of the rendition of professional legal services. The city also asserts the communications were intended to be confidential and their confidentiality has been maintained. Upon review, we find the city has demonstrated the applicability of the attorney-client privilege to the information at issue. Therefore, the city may withhold Exhibit B under section 552.107(1) of the Government Code, to the extent it did not previously release this information.

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[.]”¹ Gov’t Code § 552.102(a). The Texas Supreme Court has 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). The city must withhold the date of birth of the employee at issue in the submitted information under section 552.102(a) of the Government Code.²

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 the doctrine of 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 satisfied. *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 found personal financial information not relating to the financial transaction between an

¹The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body. *See Open Records Decision Nos. 481 at 2 (1987), 480 at 5 (1987).*

²As our ruling is dispositive, we do not address the other argument of the city to withhold this information.

individual and a governmental body is excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 600 (1992), 545 (1990). However, this office has also found the public has a legitimate interest in information relating to employees of governmental bodies and their employment qualifications and job performance. *See* Open Records Decision Nos. 470 at 4 (1987) (public has legitimate interest in job qualifications and performance of public employees), 405 at 2-3 (1983) (public has interest in manner in which public employee performs job). Upon review, we find some of the remaining information, which we have marked, satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, we conclude the remaining information is not confidential under common-law privacy, and the city may not withhold it under section 552.101 on that ground.

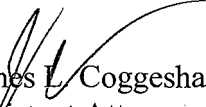
Section 552.117(a)(1) of the Government Code may be applicable to some of the submitted information. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). Whether 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, the city may only withhold information under section 552.117(a)(1) on behalf of current or former employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Such information may not be withheld for individuals who did not make a timely election. We have marked information that the city must withhold if section 552.117(a)(1) applies.

To conclude, the city may generally withhold Exhibit B under section 552.107(1) of the Government Code; however, to the extent the city previously released any of the information in Exhibit B, the city must provide such information to the requestor. To the extent Exhibit C consists of records of a participant in a retirement system's retirement program maintained in cooperation with or on behalf of a retirement system, the information is not subject to the Act, and the city is not required to release it in response to the request. To the extent Exhibit C does not consist of records of a participant in a retirement system's retirement program maintained in cooperation with or on behalf of a retirement system, the city must (1) withhold the date of birth of the employee at issue under section 552.102(a) of the Government Code; (2) withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy; (3) withhold the information we have marked under section 552.117(a)(1) of the Government Code if the employee at issue timely elected to withhold that information; and (4) 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,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/bw

Ref: ID# 640708

Enc. Submitted documents

c: Requestor
(w/o enclosures)