



December 20, 2001

Mr. John M. Hill
Cowles & Thompson
901 Main Street, Suite 4000
Dallas, Texas 75202-3793

OR2001-6026

Dear Mr. Hill:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 156430.

The Town of Addison (the "town"), which you represent, received a request for information relating to an internal affairs investigation. You claim that the requested information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.107, and 552.108 of the Government Code. We have considered the exceptions you raise and have reviewed the information you submitted.

We first note that the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides in relevant part that

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under 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[.]

Gov't Code § 552.022(a)(1). As the submitted information pertains to a completed investigation, the town must release this information under section 552.022(a)(1), unless it is excepted from disclosure under section 552.108 or expressly confidential under other law. Sections 552.103 and 552.107 of the Government Code are discretionary exceptions to disclosure that protect the governmental body's interests and may be waived. As such, these exceptions are not other law that makes information confidential for the purposes of section 552.022. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76

(Tex. App.–Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive section 552.107(1)), 542 at 4 (1990) (litigation exception may be waived). Thus, the town may not withhold any of the submitted information under sections 552.103 or 552.107.

The Texas Supreme Court recently held, however, that “[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are ‘other law’ within the meaning of section 552.022.” *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). The attorney-client privilege also is found in rule 503 of the Texas Rules of Evidence. Thus, we will determine whether the information for which you claim the attorney-client privilege is confidential under rule 503. Rule 503(b)(1) provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client’s lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer’s representative;

(C) by the client or a representative of the client, or the client’s lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; 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 in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *See 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. Upon a demonstration of all three factors, the document containing privileged information is confidential under rule 503 provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ). We have marked the documents that the town may withhold under Texas Rule of Evidence 503.

With respect to the remaining information, you also raise section 552.108 of the Government Code. Section 552.108 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 . . . the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication[.]” Gov’t Code § 552.108(b)(2). A governmental body that raises section 552.108 must reasonably explain, if the information in question does not supply the explanation on its face, how and why section 552.108 is applicable to that information. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986).

In this instance, the information at issue concerns an administrative matter that only indirectly relates to law enforcement or prosecution. Although we are cognizant of the fact that this internal affairs investigation arose out of an arrest, the focus of this investigation was on the officers who made the arrest and the propriety of their conduct in doing so. Furthermore, the submitted documents reflect that these officers were given administrative warnings that statements obtained from them could not be used in any criminal proceeding. *See Garrity v. New Jersey*, 385 U.S. 493 (1967).¹ Thus, you have not demonstrated that the information in question relates to a criminal investigation, and therefore the town may not withhold the requested information under section 552.108. *See also Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. Civ. App.—El Paso 1992, writ denied) (statutory predecessor not applicable to internal investigation that does not result in a criminal investigation or prosecution); Open Records Decision No. 350 at 3-4 (1982).

You also raise section 552.102 of the Government Code. Section 552.102(a) protects “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]” The standard of privacy under section 552.102 is the same as the test under section 552.101 of the Government Code in conjunction with

¹The United States Supreme Court said in *Garrity* that “the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office.” 385 U.S. at 500.

the common-law right of privacy.² Information must be withheld from the public under section 552.101 in conjunction with common-law privacy when it is (1) highly intimate or embarrassing, such that release of the information would be highly objectionable to a person of ordinary sensibilities, and (2) of no legitimate public interest. See *Industrial Found. v. Texas Ind. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). Because of the greater legitimate public interest in matters involving governmental employees, privacy under section 552.102 is confined to information that reveals "intimate details of a highly personal nature." See *Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.--Austin 1983, writ ref'd n.r.e.); Open Records Decision Nos. 473 at 3 (1987), 444 at 3-4 (1986), 423 at 2 (1984). Thus, public employee privacy under section 552.102 is "very narrow." See Open Records Decision No. 400 at 5 (1983).

In this instance, we conclude that the public has a legitimate interest in most of the information for which you claim an exception under section 552.102. This information may not be withheld under this exception. See also Open Records Decision Nos. 444 at 3 (1986) (public has obvious interest in information concerning the qualifications and performance of governmental employees, particularly those involved in law enforcement), 423 at 2 (1984) (information may not be withheld under section 552.102 if it is of sufficient legitimate public interest, even if person of ordinary sensibilities would object to release on grounds that information is highly intimate or embarrassing), 418 at 2 (1984) (information concerning complaints filed by citizens and their resolution by the police department is of special interest to the public). The submitted documents also contain a small amount of information that ordinarily would be protected by common-law privacy under section 552.101. In this instance, however, the requestor identifies herself as an attorney for the individual to whom this information pertains. The requestor thus has a special right of access to private information that relates only to her client. See Gov't Code 552.023.³ Therefore, this information may not be withheld from the requestor under section 552.101 in conjunction with the common-law right of privacy.

²Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

³Section 552.023(a) provides that "[a] person or a person's authorized representative has a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect that person's privacy interests." See also Open Records Decision No. 481 at 4 (1987) (stating that privacy theories are not implicated when an individual asks a governmental body to provide him with information concerning himself).

The submitted documents also contain two social security numbers. The requestor also has a right of access to her client's social security number under section 552.023.⁴ The other social security number may be protected by section 552.101 in conjunction with 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), if the social security number was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 at 2-4 (1994). It is not apparent to this office that the town obtained or maintains this social security number pursuant to any provision of law enacted on or after October 1, 1990. You have cited no law, nor are we aware of any law, enacted on or after October 1, 1990, that authorizes the town to obtain or maintain a social security number. We therefore have no basis for concluding that this social security number was obtained or is maintained pursuant to such a law and is therefore confidential under section 405(c)(2)(C)(viii)(I) of the federal law. We caution you, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Therefore, prior to releasing this social security number, the town should ensure that it was not obtained and is not maintained pursuant to any provision of law enacted on or after October 1, 1990.

The submitted records also contain two Texas driver's license numbers. Section 552.130 of the Government Code excepts from disclosure "a motor vehicle operator's or driver's license or permit issued by an agency of this state[.]" Gov't Code § 552.130(a)(1). The town must withhold these Texas driver's license numbers under section 552.130(a)(1).

In summary, the town may withhold a small portion of the submitted information under Texas Rule of Evidence 503. One social security number may be excepted from disclosure under section 552.101 of the Government Code in conjunction with federal law. Two Texas driver's license numbers must be withheld under section 552.130. The town must release the remaining information.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days.

⁴We note that should the town receive another request for information relating to this individual from a person who would not have a right of access to it, the town should resubmit this same information and request another ruling.

Id. § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

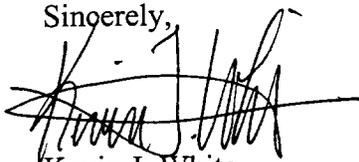
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Kevin J. White", written over a horizontal line.

Kevin J. White
Assistant Attorney General
Open Records Division

KJW/JWM/sdk

Ref: ID# 156430

Enc: Marked documents

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