



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

December 6, 2002

Ms. Shelby Rogers
State Bar of Texas
P.O. Box 12487
Austin, Texas 78711-2487

OR2002-6953

Dear Ms. Rogers:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 173245.

The State Bar of Texas (the "State Bar") received a request for eight categories of information regarding internet use by State Bar employees and information concerning a specified employee and employee terminations. You state that you have provided a portion of the responsive information to the requestor. However, you claim that a portion of the requested information is excepted from disclosure under sections 552.101, 552.102, 552.107, and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that Exhibits 4A and 5 contain documents that are subject to section 552.022 of the Government Code. Section 552.022 makes certain information expressly public, and therefore not subject to discretionary exceptions to disclosure. Section 552.022 states in relevant part:

- (a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and are not excepted from required disclosure under this chapter unless they are expressly confidential under other law.

Gov't Code § 552.022. One such category of expressly public information under section 552.022 is "a settlement agreement to which a governmental body is a party." Gov't Code § 552.022(a)(18). Therefore, the submitted settlement agreements must be released to the requestor unless they are confidential under other law. *See id.* You argue that the responsive information in Exhibit 4A is excepted from disclosure under section 552.107 of the Government Code. However, section 552.107 is a discretionary exception and not "other law" for the purposes of section 552.022. *See Open Records Decision No. 630 at 4-5 (1994)* (governmental body may waive statutory predecessor to section 552.107). However, the

attorney-client privilege is also found in Rule 503 of the Texas Rules of Evidence. Recently, the Texas Supreme Court held 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 (Tex. 2001). Thus, we will determine whether the settlement agreement in Exhibit 4A is confidential under Rule 503 of the Texas Rules of Evidence. *See* Open Records Decision No. 676 (2002). Additionally, because you claim that all of the submitted information is confidential under sections 552.101, 552.102, and that the information in Exhibit 6 is confidential under 552.136 of the Government Code, we will address these assertions for the section 552.022 information and the non-section 552.022 information.

In regard to the section 552.022 information in Exhibit 4A, 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 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* Tex. R. Evid. 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 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); see also Tex. R. Evid. 511 (waiver of privilege by voluntary disclosure).

After reviewing your arguments and the settlement agreement in Exhibit 4A, we conclude that you have not demonstrated how the settlement agreement constitutes confidential communications pursuant to Rule 503. Therefore, the settlement agreement in Exhibit 4A may not be withheld pursuant to section Rule 503.

In regard to all of 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." Section 552.101 encompasses the doctrine of common-law privacy. Section 552.102 protects "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The protection of section 552.102 is the same as the protection provided by the common-law right to privacy under section 552.101. *Hubert v. Harte-Hanks Tex. Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.). Consequently, we will consider these two exceptions together.

For information to be protected from public disclosure under common-law privacy, the information must meet the criteria set out in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). Information may be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 at 1 (1992). The type of information considered intimate and 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. Additionally, prior decisions of this office have found that financial information relating only to an individual ordinarily satisfies the first requirement of the test for common-law privacy but that there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. See, e.g., Open Records Decision No. 600 (1992) (information revealing that employee participates in group insurance plan funded partly or wholly by governmental body is not excepted from disclosure). Having reviewed Exhibits 4A, 4B and 5, we have marked the information that is considered highly intimate or embarrassing and is not of legitimate concern to the public. This information is protected by common-law privacy and must be withheld under section 552.101. However, the remaining information in Exhibits 4A, 4B and 5 consists of information regarding the employment of the individuals in question and, thus, is of

legitimate concern to the public. *See* Open Records Decision Nos. 470 (1987) (public employee's job performance does not generally constitute his private affairs), 455 (1987) (public employee's job performances or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees). Therefore, the remainder of Exhibits 4A, 4B and 5 may not be withheld under section 552.101 in conjunction with the common-law right to privacy or section 552.102.

You also assert section 552.107 of the Government Code in regard to the non-section 552.022 information in Exhibit 4A. Section 552.107(1) protects information coming within the attorney-client privilege. In instances where an attorney represents a governmental entity, the attorney-client privilege protects only an attorney's legal advice and the client's confidences made to the attorney. *See* Open Records Decision No. 574 (1990). Accordingly, these two classes of information are the only information contained in the records at issue that may be withheld pursuant to the attorney-client privilege. Upon review of the submitted information, we conclude that the non-section 552.022 information in Exhibit 4A does not consist of an attorney's legal advice or the client's confidences made to the attorney and, thus, may not be withheld under section 552.107.

Additionally, section 552.117 of the Government Code excepts from disclosure the home addresses, telephone numbers, 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 in accordance with section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). The State Bar must withhold this type of information pursuant to section 552.117 only to the extent that the respective former employee elected to keep this information confidential prior to the State Bar's receipt of the current records request. We have marked the information subject to section 552.117.

Finally, you state that Exhibit 6 contains Internet Protocol (IP) address ranges. In Open Records Decision No. 581 (1990), this office determined that certain computer information, such as source codes, documentation information, and other computer programming, that has no significance other than its use as a *tool for the maintenance, manipulation, or protection of public property* is not the kind of information made public under section 552.021 of the Government Code. The requested information pertaining to IP addresses is the type of information that has no significance other than its use as a tool for the maintenance, manipulation, or protection of public property. As such, Exhibit 6 is not public information as defined by section 552.002, and, therefore, is not subject to the Public Information Act (the "Act").¹

¹As we are able to make this determination, we need not address your argument under section 552.136 of the Government Code.

In summary, we conclude that: 1) you must withhold the information we have marked that is protected by common-law privacy and must be withheld under section 552.101; 2) you must withhold the section 552.117 information in Exhibit 4B only to the extent that the respective former employee elected to keep this information confidential prior to the State Bar's receipt of the current records request; and 3) the information in Exhibit 6 is not subject to the Act. All remaining information must be released.

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. *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); *Texas Department of Public 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



W. Montgomery Meitler
Assistant Attorney General
Open Records Division

WMM/lmt

Ref: ID# 173245

Enc: Submitted documents

c: Mr. Mario E. Gutierrez
12405 Sun Terrace
El Paso, Texas 79938
(w/o enclosures)