



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 2, 2003

Mr. Jonathan Steinberg
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Texas Water Development Board
P.O. Box 13231
Austin, Texas 78711-3231

OR2003-6980

Dear Mr. Steinberg:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 188623.

The Texas Water Development Board (the "board") received a written request from a board employee for the personnel files of two former board employees, as well as that of the requestor. You state the requestor's personnel file and other responsive information has been or will be released to her. You contend, however, that the remaining information coming within the scope of the request, a representative sample of which you submitted to this office, is excepted from required disclosure pursuant to sections 552.101, 552.102, 552.103, 552.107(1), 552.111, and 552.117 of the Government Code.¹ You have submitted the information you seek to withhold from the two former employees' personnel files as Sets A and B, respectively, divided into smaller subsets. We will discuss each of the sets you submitted to this office in turn.

You first contend that the documents you submitted to this office as Set A-1 are excepted from required public disclosure pursuant to section 552.101 of the Government Code in

¹In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision No. 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 that those records contain substantially different types of information than that submitted to this office.

conjunction with section 301.081 of the Labor Code. Section 552.101 of the Government Code protects “information considered to be confidential by law, either constitutional, *statutory*, or by judicial decision.” (Emphasis added.) Section 301.081 of the Labor Code provides:

- a) Each employing unit shall keep employment records containing information as prescribed by the commission and as necessary for the proper administration of this title. The records are open to inspection and may be copied by the commission or an authorized representative of the commission at any reasonable time and as often as necessary.
- b) The commission may require from an employing unit sworn or unsworn reports regarding persons employed by the employing unit as necessary for the effective administration of this title.
- c) Employment information thus obtained or otherwise secured may not be published and is not open to public inspection, other than to a public employee in the performance of public duties, except as the commission considers necessary for the proper administration of this title.

Labor Code § 301.081. In Open Records Decision No. 599 (1992), this office interpreted the predecessor of section 301.081(c) and concluded that it applied to information the Texas Workforce Commission (the “commission”) obtained from the records and reports that employers are required to file with the commission. You do not inform us, nor does it appear, that the documents contained in Set A-1 consist of records that employers are required to maintain for or file with the commission for the purpose of administering the state unemployment insurance program. *See* Labor Code § 301.081(a). We therefore conclude that the documents contained in Set A-1 are not made confidential under section 301.081, and thus may not be withheld on that basis. Consequently, these records must be released to the requestor in their entirety.

Set A-2 contains information that you contend is excepted from public disclosure pursuant to section 552.117(a)(1) of the Government Code. Section 552.117(a)(1) requires that the board withhold an employee’s home address, home telephone number, social security number, and information that reveals whether the employee has family members, but only if the employee timely elected to keep this information confidential in accordance with section 552.024 of the Government Code. Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for the information is received by the governmental body. *See* Open Records Decision No. 530 at 5 (1989). Therefore, in order to withhold section 552.117(a)(1) information from the public, a proper election must be made prior to the governmental body’s receipt of the request for information. In this instance, you have demonstrated that the employee has timely elected to keep his social security number and family information confidential. We

therefore conclude that the board must withhold such information wherever that information is found in the submitted documents. We have marked a representative sample of the types of information in Set A-2 that must be withheld pursuant to section 552.117(a)(1) wherever that information is found in the submitted documents. On the other hand, because this employee elected not to make his home address and telephone number confidential, that information must be released.

You next contend that the documents contained in Set A-3 contain information protected by common-law privacy. Section 552.101 also protects information coming within the common-law right of privacy. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common-law privacy protects information if it is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, *and* it is of no legitimate concern to the public. *Id.* at 683-85.

In *Industrial Foundation*, the Texas Supreme Court considered intimate and embarrassing information that relates 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. 540 S.W.2d at 683. This office has also determined that common-law privacy protects the following information: the kinds of prescription drugs a person is taking, Open Records Decision No. 455 (1987); the results of mandatory urine testing, *id.*; illnesses, operations, and physical handicaps of applicants, *id.*; the fact that a person attempted suicide, Open Records Decision No. 422 (1984); the names of parents of victims of sudden infant death syndrome, Attorney General Opinion JM-81; and information regarding drug overdoses, acute alcohol intoxication, obstetrical/gynecological illnesses, convulsions/seizures, or emotional/mental distress. Open Records Decision No. 343 (1982).

Upon review, we agree that the information submitted to this office under Set A-3 is highly intimate or embarrassing. The board therefore must withhold this information in its entirety pursuant to common-law privacy.

You contend that the memorandum you submitted to this office as Set A-4 is excepted from required public disclosure pursuant to section 552.107(1) of the Government Code. Section 552.107(1) 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 "for the purpose of facilitating 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 Texas 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 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 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.” *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, no writ). 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).

After reviewing your arguments and the memorandum you submitted to this office, we conclude that you have demonstrated the applicability of section 552.107(1) to this record. Accordingly, we conclude that the board may withhold the submitted record in its entirety pursuant to section 552.107(1) of the Government Code.

Set B-1 contains information that you also contend is excepted from public disclosure pursuant to section 552.117(a)(1). You have demonstrated that this former employee has timely elected to make confidential his home address, home telephone number, social security number, and information that reveals whether he has family members. We therefore conclude that the board must withhold pursuant to section 552.117(a)(1) all such information wherever that information is found in the submitted documents. We have marked a representative sample of this type of information in Set B-1 for your convenience.

You contend that all of the remaining information at issue, which you have submitted as Set B-2, is excepted from required public disclosure pursuant to section 552.103 of the Government Code. However, before we address the applicability of this exception, we first note that Set B-2 contains information specifically made public under section 552.022(a) of the Government Code. Section 552.022(a) provides in pertinent 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 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; [and]

....

(3) information in an account, voucher, or *contract* relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(1), (3) (emphasis added). The "Performance Plan and Appraisal" documents contained in Set B-2 are expressly made public under section 552.022(a)(1). Therefore, the board may withhold those records only if they are made confidential under other law or are excepted from public disclosure pursuant to section 552.108.² Additionally, Set B-2 contains employment contracts, titled "Information Technology Recruitment and Retention Agreement," which are made public under section 552.022(a)(3). Although you argue that these records are excepted under section 552.103 of the Government Code, this provision is a discretionary exception and therefore is not "other law" for purposes of section 552.022. *See, e.g.*, Open Records Decision Nos. 665 at 2 n.5 (2000) (governmental body may waive section 552.103). Consequently, the board may not withhold any of these types of records pursuant to section 552.103. Because you have not raised an applicable exception to required public disclosure, all of these types of information made public under section 552.022(a) must be released to the requestor. We have marked the documents that the board must release pursuant to section 552.022.

We now address the extent to which the remaining documents submitted under Set B-2 are excepted from public disclosure pursuant to section 552.103 of the Government Code. Section 552.103 provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

²We note that you do not contend that the requested records are excepted from public disclosure pursuant to section 552.108.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

To secure the protection of section 552.103(a), a governmental body must demonstrate that requested information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding that was pending or reasonably anticipated on the date the governmental body received the request. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); Open Records Decision No. 588 at 1 (1991).

You explain that the a board employee has filed a civil rights complaint against the board with the Texas Commission on Human Rights ("TCHR") under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5. You have provided this office with a copy of that complaint, which was filed prior to the board's receipt of the current records request. The TCHR operates as a federal deferral agency under section 706(c) of title VII, 42 U.S.C. § 2000e-5. The Equal Employment Opportunity Commission ("EEOC") defers jurisdiction to the TCHR over complaints alleging employment discrimination. *Id.* The filing of this complaint constitutes evidence that the likelihood of litigation against the board by the complainant/employee is more than mere conjecture. *Cf.* Open Records Decision No. 386 (1983) (complaints filed with EEOC). We therefore conclude that the board reasonably anticipated litigation regarding the subject matter of the submitted information in Set B-2 on the date it received the records request. We also conclude that you have demonstrated how the remaining submitted records in Set B-2 relate to the anticipated litigation for purposes of section 552.103. We therefore conclude that the board may withhold most of the remaining submitted information in Set B-2 pursuant to section 552.103 of the Government Code.³

We note, however, that the employee who filed the complaint with the TCHR has had prior access to many of the documents submitted under Set B-2. Absent special circumstances, once information has been obtained by all parties to the anticipated litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Consequently, to the extent the complaining employee has

³Because we resolve this aspect of your request under section 552.103, we need not address your other arguments regarding Set B-2.

seen or had access to these records, there would be no justification for now withholding such information from the requestor pursuant to section 552.103(a).⁴

We turn now to your other arguments regarding Set B-2-a for the information not excepted pursuant to section 552.103. You contend that sections 21.304 and 21.305 of the Labor Code make the information in Set B-2-a confidential. Section 21.304, which relates to public release of information obtained by the TCHR, provides as follows:

An officer or employee of *the [Texas] commission [on Human Rights]* may not disclose to the public information obtained by the commission under Section 21.204 except as necessary to the conduct of a proceeding under this chapter.

Labor Code § 21.304 (emphasis added). Section 21.305 of the Labor Code is entitled "Access to Commission Records" and provides:

(a) The commission shall adopt rules allowing a party to a complaint filed under Section 21.201 reasonable access to commission records relating to the complaint.

(b) Unless the complaint is resolved through a voluntary settlement or conciliation, on the written request of a party the executive director shall allow the party access to the commission records:

(1) after the final action of the commission; or

(2) if a civil action relating to the complaint is filed in federal court alleging a violation of federal law.

Labor Code § 21.305. Section 21.304's prohibition on the release of information does not, however, apply to the board. *Cf.* Open Records Decision No. 155 (1977) (information not confidential when held by city as employer charged with discrimination). Consequently, while section 21.304 makes confidential certain information if it is in the possession of the TCHR, this confidentiality does not extend to the same information if it is in the possession of the board. *See* Open Records Decision No 478 at 2 (1987) (language of confidentiality statute controls scope of protection), 465 at 4-5 (1987) (statute explicitly required confidentiality). Thus, none of the information in Set B-2-a may be withheld pursuant to section 552.101 in conjunction with sections 21.304 or 21.305 of the Labor Code.

⁴We also note that the applicability of section 552.103(a) ends when the litigation, or the likelihood thereof, has concluded. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).

We next note that some of the information contained in Set B-2 not protected by section 552.103 may be excepted from public disclosure under section 552.117(a)(1). The board must withhold all section 552.117(a)(1) information only if the employee to whom this information pertains has timely elected to have this information withheld from the public in accordance with section 552.024 of the Government Code.

The information not protected under section 552.103 contained in Set B-2 also contains information the board is required to withhold pursuant to section 552.130 of the Government Code. Section 552.130(a)(1) of the Government Code requires the board to withhold "information [that] relates to . . . a motor vehicle operator's or driver's license or permit issued by an agency of this state." Accordingly, the board must withhold all Texas driver's license information pursuant to section 552.130(a)(1) of the Government Code.

Finally, we note that a document not protected by section 552.103 in Set B-2 contains a private e-mail address. Section 552.137 of the Government Code provides:

(a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

(c) Subsection (a) does not apply to an e-mail address:

(1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;

(2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract; or

(4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.

(d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Act of June 2, 2003, 78th Leg., R.S., ch. 1089, 2003 Tex. Sess. Law Serv. 3124, § 1 (2003) (to be codified as amendment to Gov't Code § 552.137). Section 552.137 requires a governmental body to withhold certain e-mail addresses of members of the public that are provided for the purpose of communicating electronically with the governmental body, unless the members of the public with whom the e-mail addresses are associated have affirmatively consented to their release. Section 552.137 does not apply to a government employee's work e-mail address or a business's general e-mail address or web address. E-mail addresses that are encompassed by subsection 552.137(c) are also not excepted from disclosure under section 552.137. Based on our review of the submitted information, we find that the e-mail address contained in Set B-2 is excepted from disclosure under section 552.137(a). Accordingly, we conclude that the board must withhold the e-mail address that we have marked pursuant to section 552.137(a) of the Government Code unless the board has received affirmative consent for the release of the e-mail address.

In summary, the board may withhold pursuant to section 552.103 the information you submitted to this office as Set B-2, except for the information that is made public under section 552.022 or the information to which the employee that filed the TCHR complaint has had prior access. The board must withhold the documents contained in Set A-3 pursuant to common-law privacy. The board may withhold the legal memorandum submitted under Set A-4 pursuant to section 552.107(1). The board must withhold pursuant to section 552.117(a)(1) board employees' home addresses, home telephone numbers, social security numbers, and family member information, but only to the extent the respective employees timely elected to keep this information confidential in accordance with section 552.024 of the Government Code. The board must withhold the information we have marked as coming under the protection of section 552.130(a)(1). The board must also withhold pursuant to section 552.137 the private e-mail address that we have marked unless the board has received affirmative consent for the release of the e-mail address. The remaining submitted information must be released to the requestor.

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 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. 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,



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Assistant Attorney General
Open Records Division

RJB/RWP/seg

Ref: ID# 188623

Enc: Submitted documents

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