



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 10, 2003

Ms. Elizabeth Lutton
Assistant City Attorney
City of Arlington
P.O. Box 231
Arlington, Texas 76004-0231

OR2003-8107

Dear Ms. Lutton:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 190911.

The City of Arlington (the "city") received a request for specific e-mail messages, notes, and memoranda during a certain time period. You indicate that portions of the requested information will be released to the requestor, but argue that the remaining portions are excepted from disclosure under sections 552.101, 552.103, 552.104, 552.105, 552.107, 552.117, 552.131 and 552.136 of the Government Code.¹ We have considered the exceptions you claim and reviewed the information you submitted.

The city argues that certain e-mail addresses contained in the submitted information are excepted from disclosure. Section 552.137 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.

¹ Please note that section 552.136 of the Government Code relating to the confidentiality of certain e-mail addresses has been repealed as duplicative of section 552.137. See Act of May 21, 2003, 78th Leg., R.S., ch. 1276, 2003 Tex. Sess. Law Serv. 4218 (Vernon). Accordingly, we will address your claim with respect to section 552.136 under section 552.137.

(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 (Vernon) (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 certain e-mail addresses are excepted from disclosure under section 552.137(a). You do not indicate that the city has received affirmative consent for the release of e-mail addresses that are contained within the submitted information. Accordingly, we conclude that the city must withhold the e-mail addresses we have marked pursuant to section 552.137(a) of the Government Code.

The city also argues that section 552.117 excepts some of the submitted information. Section 552.117(a)(1) excepts from disclosure the home addresses and 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 under section 552.024.² 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). Therefore, the city may only withhold information under section 552.117(a)(1) on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. We have marked the information that is excepted from disclosure under section 552.117(a)(1) for those employees who timely elected under section 552.024. We note that the requestor has a special right of access to her own information under section 552.023; therefore, you must release this information to the requestor. *See* Gov't Code § 552.023 (person or person's authorized representative has special right of access to information relating to person and protected from public disclosure by laws intended to protect that person's privacy interests).

We next address the city's arguments under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information deemed confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. You assert that Exhibit 4 is confidential under section 418.716 of the Government Code. The Seventy-eighth Legislature recently added sections 418.176 through 418.182 to chapter 418 of the Government Code. These newly enacted provisions make certain information related to terrorism confidential. Sections 418.176, which became effective on June 22, 2003, provides in relevant part:

Sec. 418.176. CONFIDENTIALITY OF CERTAIN INFORMATION RELATING TO EMERGENCY RESPONSE PROVIDERS.

(a). Information is confidential if the information is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, responding to, or investigating an act of terrorism or related criminal activity and:

(1) relates to staffing requirements of an emergency response provider, including law enforcement agency, a fire-fighting agency, or an emergency services agency;

² In Senate Bill 1388, which became effective on June 20, 2003, the Seventy-eighth Legislature amended section 552.117 of the Government Code by adding "(a)" to the relevant language of this provision. *See* Act of May 30, 2003, 78th Leg., R.S., ch. 947, 2003 Tex. Sess. Law Serv. 2822 (Vernon) (to be codified as an amendment to Gov't Code § 552.117).

- (2) relates to a tactical plan of the provider; or
- (3) consists of a list or compilation of pager or telephone numbers, including mobile and cellular telephone numbers, of the provider.

Act of June 2, 2003, 78th Leg., R.S., ch. 1312, 2003 Tex. Sess. Law Serv. 4813 (Vernon) (to be codified at Gov't Code § 418.176). As with any exception to disclosure, a governmental body asserting section 552.101 must adequately explain how the responsive records fall within the provision's scope. See Gov't Code § 552.301 (stating, among other things, that governmental body bears burden of establishing applicability of claimed exception to disclosure). In this instance, you generally assert that the information in Exhibit 4 is protected under section 418.716. We note that Exhibit 4 consists solely of an e-mail from a citizen and e-mails routing the citizen's communication to various city officials. You do not explain, nor do the records reflect, how the information contained in Exhibit 4 falls within the scope of section 418.176. Thus, the city may not withhold Exhibit 4 under section 552.101.

Section 552.101 also encompasses the doctrine of common law privacy. Common law privacy 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. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). 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. 540 S.W.2d at 683.

This office has also 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 Open Records Decision Nos. 600 (1992), 545 (1990), 373 (1983). For example, a public employee's allocation of his salary to a voluntary investment program or to optional insurance coverage that is offered by his employer is a personal investment decision and information about it is excepted from disclosure under the common law right of privacy. See Open Records Decision No. 600 (finding personal financial information to include designation of beneficiary of employee's retirement benefits and optional insurance coverage; choice of particular insurance carrier; direct deposit authorization; and forms allowing employee to allocate pretax compensation to group insurance, health care, or dependent care). In addition, information related to an individual's mortgage payments, assets, bills, and credit history is excepted from disclosure under the common law right to privacy. See Open Records Decision Nos. 545, 523 (1989). However, information revealing that an employee participates in a group insurance plan funded partly

or wholly by the governmental body is not excepted from disclosure. *See* Open Records Decision No. 600 at 10. Portions of the submitted information constitute personal financial information protected by the common law right of privacy. We have marked the personal financial information that is excepted from disclosure under common law privacy pursuant to section 552.101 of the Government Code.

You raise section 552.103 regarding information contained in Exhibit 6. Section 552.103 provides:

(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.

....

(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.

The city has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The city must meet both prongs of this test for information to be excepted under 552.103(a).

In this case, the submitted information includes Exhibit 5, a copy of a petition filed with the court concerning pending litigation to which the city is a party. Therefore, we find that litigation was pending at the time of the request for information. Gov't Code § 552.103(c). After considering your arguments and examining the submitted information, we find Exhibit 6 relates to the pending litigation. *See* Open Records Decision Nos. 551 at 5 (1990) (attorney general will determine whether governmental body has reasonably established that information at issue is related to litigation), 511 at 2 (1988) (information "relates" to litigation under predecessor to if its release would impair governmental body's litigation interests). Therefore, the city may withhold the marked information from disclosure under section 552.103 of the Government Code.

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Additionally, 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 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 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 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. *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You claim section 552.107 for certain information contained in Exhibit 7. Consequently, we are only reviewing the information you have indicated you believe to be excepted under

section 552.107. The information for which you claim section 552.107 is contained in several e-mails. You have not identified the parties to the e-mail communications. Furthermore, in some instances, it is not apparent from the e-mails themselves that the e-mails constitute confidential communications between privileged parties made for the purpose of facilitating the rendition of legal services. Consequently, portions of only one e-mail are excepted from disclosure under section 552.107. We have marked this e-mail accordingly.

You also assert that section 552.105 excepts certain information contained in Exhibit 8 of the submitted information. Section 552.105 excepts from disclosure information relating to:

- (1) the location of real or personal property for a public purpose prior to public announcement of the project; or
- (2) appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property.

Section 552.105 was designed to protect a governmental body's planning and negotiating position with respect to particular transactions. Open Records Decision No. 564 at 2 (1990). This exception protects information relating to the location, appraisals, and purchase price of property only until the transaction is either completed or aborted. Open Records Decision Nos. 357 at 3 (1982), 310 at 2 (1982). You seek to withhold certain information related to the purchase price of real property for a public purpose. You indicate that the transaction has not been completed. Therefore, we find section 552.105 applicable to the information at issue. The city may withhold the marked information in Exhibit 8 under section 552.105 of the Government Code. Because we are able to reach this determination, we decline to address your argument under section 552.104 of the Government Code.

Finally, we consider whether section 552.131(b) applies to the information in Exhibit 9. Section 552.131(b) excepts from disclosure information about a financial or other incentive being offered to the business prospect by the governmental body "[u]nless and until an agreement is made with the business prospect." You argue the e-mails in Exhibit 9 contain "discussions on several corporations which are considering sites in Arlington," including "possible economic incentives." However, you have not demonstrated, and it is not apparent from the e-mails themselves, how the information you seek to withhold constitutes financial or other incentives. Therefore, we find that the city has failed to meet its burden under section 552.131(b). The city may not withhold any information in Exhibit 9 under section 552.131(b) of the Government Code.

In summary, the city must withhold the marked e-mail addresses under section 552.137 of the Government Code. The city must also withhold information excepted under section 552.117 for those individuals who timely elected under section 552.024 of the Government Code. Certain personal financial information is confidential pursuant to section 552.101.

The city may withhold information excepted under sections 552.103 and 552.105. The city may also withhold the information we have marked as excepted under section 552.107 of the Government Code. The remaining 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,

A handwritten signature in black ink, appearing to read "Heather R. Rutland". The signature is fluid and cursive, with the first name being the most prominent.

Heather R. Rutland
Assistant Attorney General
Open Records Division

HRR/sdk

Ref: ID# 190911

Enc: Submitted documents

c: Ms. Wilma Smith
5405 Calvary Post Drive
Arlington, Texas 76017
(w/o enclosures)