



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 7, 2004

Mr. Jeffrey L. Moore
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OR2004-3772

Dear Mr. Moore:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 201125.

The City of Highland Village (the "city"), which you represent, received a request for "all e-mails received by council members Fred Busche, Dianne Costa between April 15, 2003 and February 19, 2004 that mention FM2499, Paul Lebon, or the Stop 2499 Coalition." You claim that some of the requested information is excepted from disclosure under sections 552.101, 552.107, 552.117, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted sample of information.¹

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." The informer's privilege, incorporated into the Public Information Act (the "Act") by section 552.101, has long been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). It protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law- enforcement

¹We 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 Nos. 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.

authority, provided that the subject of the information does not already know the informer's identity. Open Records Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978). The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 279 at 2 (1981) (citing Wigmore, Evidence, § 2374, at 767 (McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. See Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5 (1988).

You state that the information contained in Exhibit F includes identifying information of an individual who provided information to the city's police department regarding allegations of harassment and stalking, found at sections 42.07 and 42.072 of the Penal Code. You state that violations of these statutes constitute a Class B misdemeanor and a third degree felony. See Penal Code § 42.07(b), (c). Therefore, we conclude that you may withhold the informer's identifying information we have marked in Exhibit F under section 552.101 of the Government Code in conjunction with the informer's privilege.

Section 552.101 also encompasses the doctrines of common-law and constitutional privacy. Information is protected from disclosure under the common-law right to privacy if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. See *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). 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. See *id.* at 683.

The constitutional right to privacy encompasses two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. See Open Records Decision No. 455 at 4 (1987). The first type of constitutional privacy protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. See *id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. See *id.* The scope of information protected by constitutional privacy is narrower than that under the doctrine of common-law privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)).

This office has found that the following types of information are excepted from required public disclosure under constitutional or common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, see Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987)

(prescription drugs, illnesses, operations, and physical handicaps), personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990), information concerning the intimate relations between individuals and their family members, *see* Open Records Decision No. 470 (1987), and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982).

In this instance, you argue that the names, home addresses, and telephone numbers of members of the public are confidential under common-law and constitutional privacy. However, such names, home addresses, and telephone numbers are not the type of information considered highly intimate or embarrassing for purposes of common-law privacy. *See* Open Records Decision Nos. 480 at 7 (1987), 455 at 7, 8 (1987), 169 at 6 (1977). We further conclude that these names, home addresses, and telephone numbers do not fall within the zones of privacy or implicate an individual's privacy interests for purposes of constitutional privacy. Therefore, you may not withhold any of the names, home addresses, and telephone numbers of members of the public you have marked under section 552.101 and common-law or constitutional privacy. Additionally, we note that this office has frequently stated that a mere expectation of privacy on the part of the individual who provides information to a governmental body does not permit that information to be withheld under section 552.101. *See* Open Records Decision Nos. 479 at 1 (1987) (information is not confidential simply because party that submitted information anticipated or requested confidentiality), 180 at 2 (1977) (information is not excepted from disclosure solely because individual furnished it with expectation that access to it would be restricted), 169 at 6 (special circumstances required to protect information must be more than mere desire for privacy or generalized fear of harassment or retribution).

Next, 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 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).

You claim that the information submitted as Exhibit E constitutes privileged attorney-client communications. After reviewing your arguments and Exhibit E, we find that the city has demonstrated that this information constitutes privileged attorney-client communications made in furtherance of the rendition of professional legal services to the client. Accordingly, the city may withhold this information under section 552.107 of the Government Code.

Next, you argue that portions of the submitted information are excepted from disclosure under section 552.117 of the Government Code. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and information that reveals whether the individual has family members of current or former officials or employees of a governmental body who timely request that this information be kept confidential pursuant to 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 it is received by a governmental body. *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 a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was received. The city may not withhold this information under section 552.117(a)(1) for an employee who did not make a timely election to keep the information confidential. Thus, if the individual whose information you have marked made a timely election to keep that information confidential pursuant to section 552.024, the city must withhold that information pursuant to section 552.117(a)(1).

Finally, you argue that the e-mail addresses you have marked are excepted under section 552.137 of the Government Code. This section excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). Gov’t Code

§ 552.137(a)-(c). We note that section 552.137 does not apply to a government employee's work e-mail address, because such an address is not that of the employee as a "member of the public" but is instead the address of the individual as a government employee. We also note that section 552.137 does not apply to a business's general e-mail address or website address. You state that none of the individuals whose e-mail addresses you have marked has consented to the release of such address. You also state that the requestor's e-mail address has not been marked as he has a special right of access to his own e-mail address pursuant to section 552.023 of the Government Code. *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). Accordingly, we agree that the city must withhold most of the e-mail addresses you have marked pursuant to section 552.137 of the Government Code. We have marked some additional e-mail addresses that must also be withheld pursuant to section 552.137 unless the individual to whom the e-mail address belongs has consented to its release, as well as e-mail addresses that you have marked, but which must be released, as they do not constitute e-mail addresses of a "member of the public." Gov't Code § 552.137.

In summary, we conclude: (1) the city may withhold the information we have marked in Exhibit F under section 552.101 in conjunction with the informer's privilege, (2) the city may withhold Exhibit E under section 552.107 of the Government Code, (3) the city must withhold the section 552.117 information, provided the employee whose information at issue timely elected, pursuant to section 552.024, to keep this information confidential, and (4) the city must withhold the e-mail addresses of members of the public. 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,



Sarah I. Swanson
Assistant Attorney General
Open Records Division

SIS/krl

Ref: ID# 201125

Enc. Submitted documents

c: Mr. Paul LeBon
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(w/o enclosures)