



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 2, 2004

Mr. J. David Dodd, III
Nichols, Jackson, Dillard, Hager & Smith, L.L.P.
1800 Lincoln Plaza
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Dallas, Texas 75201

OR2004-5423

Dear Mr. Dodd:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 204370.

The City of Allen Police Department (the "department"), which you represent, received a request for any information that pertained to the requestor's employment status, including all annual job performance evaluations and information related to the "Management Review" of the requestor's job performance. You claim that the requested information is excepted from disclosure under sections 552.101 and 552.111 of the Government Code. You also contend that the interagency memorandums are protected under the attorney work product and attorney client privileges. We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (allowing interested party to submit comments indicating why requested information should or should not be released).

Initially, we note that the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides 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 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' Code § 552.022(a)(1). The submitted information consists of a completed investigation and evaluation. Consequently, this information must be released unless it is confidential under other law or excepted from disclosure under section 552.108. Section 552.111 is a discretionary exception to disclosure that protects a governmental body's interests and is therefore not other law that makes information expressly confidential for purposes of section 552.022(a). *See* Open Records Decision No. 473 (1987) (section 552.111 may be waived); *see also* Open Records Decision No. 522 at 4 (1989) (discretionary exceptions generally). Therefore, the department may not withhold any portion of the submitted information under section 552.111.

The Texas Supreme Court has held, however, that the Texas Rules of Evidence and Texas Rules of Civil Procedure are "other law" within the meaning of section 552.022 of the Government Code. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). You state that the "Texas Public Information Act exceptions for interagency memorandums also protects Attorney work product and attorney client privileged communications." The attorney-client privilege is found at Texas Rule of Evidence 503, and the attorney work product privilege is found at Texas Rule of Civil Procedure 192.5. Therefore, we will consider whether any of the information for which you claim these privileges is confidential under rule 503 or 192.5.

Rule 503(b)(1) of the Texas Rules of Evidence 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. 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. *Id.* 503(a)(5). Thus, 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. *See* Open Records Decision No. 676 (2002). Upon a demonstration of all three factors, the entire communication is confidential under rule 503 provided the client has not waived the privilege or the communication does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero Energy Corp.*, 973 S.W.2d 453, 4527 (Tex. App.—Houston [14th Dist.] 1998, no pet.) (privilege attaches to complete communication, including factual information).

You state that “the correspondence from the attorney is protected by attorney client privilege.” Upon review of your arguments and the information at issue, we agree that the submitted memorandums from the attorney to the department chief constitute or reveal confidential communications made for the purpose of facilitating the rendition of professional legal services to the department. Accordingly, we have marked the information that the department may withhold under rule 503.¹

You also assert that the remaining submitted information contains “confidential information” that is excepted from disclosure pursuant to section 552.101 of the Government Code. Section 552.101 excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. *See* Gov’t Code § 552.101; *see also* Open Records Decision Nos. 611 at 1 (1992) (relating to common-law privacy), 600 at 4 (1992) (relating to constitutional privacy), 478 at 2 (1987) (relating to statutory confidentiality). You state that the officers that were interviewed were given an administrative warning and ordered to answer the questions. You assert that “interviews of police officers under administrative warnings are not free and voluntary. Therefore, the officers have an interest in keeping the interviews confidential.” However, you do not cite to any specific law, and we are not aware of any law, that makes any portion of the submitted information confidential under section 552.101. *See* Open Records Decision No. 478 at 2

¹ As we are able to make a determination under rule 503 for the memorandums at issue, we do not address your attorney work product claim under rule 192.5.

(1987) (statutory confidentiality requires express language making information confidential or stating that information shall not be released to public). Accordingly, we conclude that the department may not withhold any portion of the submitted information under section 552.101 of the Government Code.

We note that some of the remaining submitted information may be subject to section 552.117. Section 552.117(a)(1) of the Government Code excepts from public disclosure the present and former 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. Section 552.117(a)(2) protects the same information regarding a peace officer regardless of whether the officer made an election under section 552.024 or section 552.1175 of the Government Code.² Thus, to the extent the submitted information contains any of the listed information regarding a peace officer or an employee who elected to restrict access to this information under section 552.024 prior to the date the department received this request, the department must withhold such information. We note, however, that under section 552.023 of the Government Code a person or a person's authorized representative has a special right of access to records that contain information relating to the person that are protected from public disclosure by laws intended to protect that person's privacy interests. Therefore, the requestor has a special right of access to his section 552.117 information, and it must be released to him in this instance.

We note that the remaining submitted information also contains an e-mail address that is subject to section 552.137 of the Government Code, which 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 "Peace officer" is defined by article 2.12 of the Code of Criminal Procedure.

(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.

Gov't Code § 552.137. Section 552.137 excepts certain e-mail addresses of members of the public that are not within the scope of section 552.137(c), unless the relevant members of the public have affirmatively consented to the release of the e-mail addresses. We note, however, that section 552.137 does not apply to the work e-mail addresses of officers or employees of a governmental body, a website address, or the general e-mail address of a business. We determine that the e-mail address we have marked is within the scope of section 552.137(a). Unless the department has received affirmative consent to disclose the e-mail address, the department must withhold the marked e-mail address under section 552.137.

In summary, the department may withhold the information we have marked under rule 503 of the Texas Rules of Evidence. If the submitted information contains the home phone number, home address, social security number, and family member information of a peace officer or former or current employee who timely elected to keep this information confidential, the department must withhold this information under section 552.117. The department must withhold the marked e-mail address pursuant to section 552.137 unless the individual to whom a particular e-mail address belongs has affirmatively consented to its public disclosure. The remaining requested 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,



Debbie K. Lee
Assistant Attorney General
Open Records Division

DKL/sdk

Ref: ID# 204370

Enc. Submitted documents

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(w/o enclosures)