



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

October 8, 2004

Ms. Patricia A. Moore  
General Counsel  
State Bar of Texas  
P. O. Box 12487  
Austin, Texas 78711

OR2004-8551

Dear Ms. Moore:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 209834.

The State Bar of Texas (the "state bar") received a request for certain information concerning a named attorney from 1995 to the present, as well as (1) information related to the process and procedures concerning a request to expunge records in the possession of the Texas Supreme Court (the "supreme court") or the state bar and (2) communications or correspondence between supreme court and state bar representatives related to the expunction process. You state you have released some of the requested information, and that some information is not maintained by the state bar.<sup>1</sup> You claim that some of the submitted information is not subject to the Act, and some is excepted from disclosure under sections 552.101, 552.130, 552.136, 552.137, and 552.139 of the Government Code. We have considered your arguments and reviewed the submitted information. We have also considered comments submitted by the requestor. See Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

---

<sup>1</sup>We note the Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex.App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

You assert that the letter in Attachment 3 is maintained by the state bar as an agent of the judiciary and is therefore not subject to the Act. The Act applies to information that is “collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business by a governmental body.” Gov’t Code § 552.002(a)(1). However, a “governmental body” under the Act “does not include the judiciary.” *Id.* § 552.003(1)(B). Information that is “collected, assembled or maintained by . . . the judiciary” is not subject to the Act, but is “governed by rules adopted by the Supreme Court of Texas or by other applicable laws and rules.” *Id.* § 552.0035(a); *cf.* Open Records Decision No. 131 (1976) (applying statutory predecessor). In addition, information that is “collected, assembled, or maintained . . . for the judiciary” by a governmental body acting as an agent of the judiciary is not subject to the Act. Gov’t Code § 552.0035(a); *cf.* Attorney General Opinions DM-166 (1992), H-826 (1976); Open Records Decision Nos. 610 (1992), 572 (1990), 513 (1988), 274 (1981).

You state that the document at issue consists of the state bar’s letter to the Texas Supreme Court advising the court about this attorney and that it “was part of the Supreme Court’s deliberations.” Pursuant to section 552.303(c) of the Government Code, on September 24, 2004, this office asked the state bar for further explanation regarding the nature of this letter. In its response of September 27, 2004, the state bar informed us:

This letter was drafted [by a member of the state bar] in the capacity of the Deputy Clerk, as custodian of records for the Supreme Court, in response to a telephone request from the Supreme Court for its use in their deliberations regarding [the individual]’s request for expungement.

You have also provided us with documentation showing that, in denying the requestor’s attempt to acquire this document under Rule 12 of the Rules of Judicial Administration, the appellate body of the Administrative Judicial Regions concluded in its *Per Curiam* Rule 12 Decision, Appeal No. 04-003, September 17, 2004, that the letter was related to the court’s adjudicative function. *See generally* Tex. R. Jud. Admin. 12.

Having considered your representations and the submitted information, we conclude that the state bar created this record at the request of the supreme court for use in a judicial proceeding and that the bar maintains the letter on behalf and at the direction of the judiciary. Therefore, we conclude that the letter is a record of the judiciary under section 552.0035(a) of the Government Code, and thus not subject to release under the Act. *See* Gov’t Code § 552.0035(a); *cf.* Open Records Decisions Nos. 513 (1988) (records kept by district attorney who is acting as agent for grand jury are considered records in constructive possession of grand jury and therefore not subject to the Act), 411 (1984) (for purposes of the Act, grand jury is part of judiciary, and therefore not subject to the Act). *But see* Open Records Decision No. 513 at 4 (1988) (defining limits of judiciary exclusion).

You also assert that the information in Attachment 5 must be withheld under 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.” You assert that the supreme court has ordered the expungement of this information, which pertains to the attorney’s suspension. In support of this assertion, you cite a submitted document that you characterize as “the supreme court’s ruling.” The document at issue consists of a letter from the clerk of the supreme court to the attorney that states the following: “[Y]our recent administrative suspension . . . shall be expunged.” This letter does not constitute a court order or ruling making the records at issue confidential, nor does it prohibit the release of any of the information. Therefore, we have no basis for finding this information to be “confidential by law, either constitutional, statutory, or by judicial decision,” and it may not be withheld under section 552.101 on that ground.

The remaining information contains the social security number of an applicant to the state bar. Section 58.001 of the Occupations Code provides that the “social security number of an applicant for or holder of a license, certificate of registration, or other legal authorization issued by a licensing agency to practice in a specific occupation or profession that is provided to the licensing agency is confidential and not subject to disclosure under Chapter 552, Government Code.”<sup>2</sup> Occ. Code § 58.001. We understand that the state bar obtained the social security number in the process of licensing the attorney. Based on this understanding, we find that the social security number we have marked is confidential under section 58.001 of the Occupations Code, and must be withheld from disclosure under section 552.101 of the Government Code.<sup>3</sup>

You assert that some of the remaining information is confidential under various sections of the Texas Telemarketing and Disclosure and Privacy Act (the “telemarketing act”), chapter 44 of the Business and Commerce Code. Although the state bar raises sections 44.001-44.003, 44.005-44.006, 44.101-44.102, and 44.151 of the telemarketing act, you did not submit any arguments to this office explaining the applicability of those sections to the information at issue. *See Gov’t Code*, § 552.301(e)(1)(A); Open Records Decision Nos. 542 (1990) (governmental body has burden of establishing that exception applies to requested information), 532 (1989), 515 (1988). You have not directed our attention to any provision of the telemarketing act that expressly makes the submitted information confidential or provides that the information shall not be released to the public. *See* Open Records Decision Nos. 658 at 4 (1998), 478 at 2 (1987) (statutory confidentiality requires express language making certain information confidential or stating that information shall not be released to the public). Likewise, we are unable to locate any such language in these

---

<sup>2</sup>There are currently two different sections of the Occupations Code denominated as section 58.001. The section relating to “[t]he social security number of an applicant for or holder of a license, certificate of registration, or other legal authorization issued by a licensing agency to practice in a specific occupation or profession” was renumbered from section 56.001 to section 58.001 in 2003. *See* Act of May 20, 2003, 78th Leg., R.S., ch. 1275, § 2(112), 2003 Tex. Gen. Laws 4140, 4146.

<sup>3</sup>Because we are able to resolve this issue under section 58.001, we do not address your other arguments for exception regarding this information.

sections. Thus, you have failed to demonstrate that any of the remaining information is expressly made confidential under sections 44.001-44.003, 44.005-44.006, 44.101-44.102, and 44.151 of the telemarketing act, and the state bar may not withhold any of that information under section 552.101 on that basis.

You also assert that some of the submitted information must be withheld pursuant to chapter 730 of the Transportation Code. Section 730.004 of the Transportation Code provides as follows:

Notwithstanding any other provisions of law to the contrary, including chapter 552, Government Code, except as provided by Sections 730.005 - 730.008, an agency may not disclose personal information about any person obtained by the agency in connection with a motor vehicle record.

For purposes of chapter 730, section 730.003 defines the following:

(1) "Agency" includes any agency or political subdivision of this state, or an authorized agent or contractor of an agency of this state, that compiles or maintains motor vehicle records.

...

(4) "Motor vehicle record" means a record that pertains to a motor vehicle operator's or driver's license or permit, motor vehicle registration, motor vehicle title, or identification document issued by an agency of this state or a local agency authorized to issue an identification document. The term does not include:

(A) a record that pertains to a motor carrier; or

(B) an accident report prepared under Chapter 550 or 601.

Transp. Code § 730.003(1), (4). Section 730.004 only applies to an "agency" that compiles or maintains motor vehicle records. *See id.* § 730.003(1). You have not demonstrated, nor do we find, that the state bar compiles or maintains motor vehicle records. Because the state bar is not an "agency" for purposes of section 730.003, section 730.004 does not apply to the state bar. Accordingly, none of the requested information may be withheld under section 552.101 in conjunction with section 730.004 of the Transportation Code. *See Open Records Decision No. 478 at 2 (1987)* (language of confidentiality statute controls scope of protection).

Section 552.101 also encompasses common law and constitutional 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).<sup>4</sup> To demonstrate the applicability of common law privacy, both prongs of this test must be demonstrated. *Id.* at 681-82. In this respect, common law privacy under the Act differs from the privacy right protected under the exemptions of the federal Freedom of Information Act (“FOIA”) that prohibit the disclosure of information that “could reasonably be expected to constitute an unwarranted invasion of personal privacy.” *See* 5 U.S.C. §§ 552(b)(6), (7)(C). To determine whether the FOIA exemptions prohibit disclosure, federal courts must balance the individual’s privacy interest against the public interest in disclosure. *See, e.g., U.S. Dep’t of Defense v. Fed. Labor Relations Auth.*, 510 U.S. 487, 495 (1994); *Sherman v. U.S. Dep’t of the Army*, 244 F.3d 357, 366 (5th Cir. 2001) (individual researching service awards of soldiers failed to articulate clearly compelling public interest in disclosure of soldiers’ social security numbers); *Halloran v. Veterans Admin.*, 874 F.2d 315, 319 (5th Cir. 1989). In applying common law privacy under Texas law, however, the courts have rejected the balancing of interests test. *See Indus. Found.*, 540 S.W.2d at 681-82 (under policy determination that Texas legislature made in enacting predecessor to section 552.101, court is not free to balance public’s interest in disclosure against harm to person’s privacy); *Ross v. Midwest Communications, Inc.*, 870 F.2d 271, 272 (5th Cir. 1989) (court rejected “open-ended balancing of interests” and instead applied *Industrial Foundation* test). As the Third Court of Appeals has noted, the requirement of showing both elements of the *Industrial Foundation* test properly “balances” the individual’s privacy and the articulated purpose of the Act. *Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 550 (Tex. App.—Austin 1983, writ ref’d n.r.e) (under the Act, “the proper way to evaluate a claimed invasion of privacy is to apply the state tort law dealing with that injury”).

Constitutional privacy consists of 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. Open Records Decision No. 455 at 4 (1987). The first type protects an individual’s autonomy within “zones of privacy” which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *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. *Id.* The scope of information protected is narrower than that under the common law doctrine of privacy; the information must concern the “most intimate aspects of human affairs.” *Id.* at 5; *see Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985).

The type of information considered intimate and embarrassing by the 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

---

<sup>4</sup>We note that you raise common law privacy for Texas driver’s license numbers; however, the legislature adopted section 552.130 of the Government Code specifically to address this information. Therefore, we will address them in the context of that exception.

disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. 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).

After review of your arguments and the information at issue, we find that the information you seek to withhold is not highly intimate or embarrassing and that it is of legitimate concern to the public. Therefore, this information is not confidential under common law privacy, and the state bar may not withhold it under section 552.101 of the Government Code on that ground. *See generally* Open Records Decision Nos. 554 at 3 (1990) (disclosure of person's home address and telephone number is not invasion of privacy), 455 at 7 (1987) (home addresses and telephone numbers do not generally qualify as "intimate aspects of human affairs"). In addition, we conclude that release of the information would not impede either an individual's right to make certain kinds of decisions independently or an individual's interest in avoiding disclosure of personal matters. Therefore, this information is not confidential under constitutional privacy, and the state bar may not withhold it under section 552.101 of the Government Code on that ground.

The remaining information contains Texas driver's license numbers. Section 552.130 of the Government Code provides in relevant part the following:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]

Gov't Code § 552.130(a)(1). The state bar must withhold the Texas driver's license numbers that we have marked under section 552.130.

In addition, you assert that the bank account information and "internal unique identifier numbers" in the remaining information are excepted under section 552.136 of the Government Code. Section 552.136 states that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136. Therefore, you must withhold the bank account information we have marked under section 552.136. However, we find you have not established that the identifier

numbers are “access device numbers” for purposes of section 552.136; therefore, the state bar may not withhold that information under section 552.136.

You also assert some of the remaining information is excepted under section 552.137 of the Government Code. Section 552.137 provides the following:

- (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.

Under section 552.137, a governmental body must withhold the e-mail address of a member of the general public, unless the individual to whom the e-mail address belongs has affirmatively consented to its public disclosure. *See id.* § 552.137(b). You do not inform us that any member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. Therefore, the state bar must withhold the e-mail addresses of members of the public that we have marked under section 552.137.

You also assert that the “internal unique identifier numbers” are excepted under section 552.139 of the Government Code. Section 552.139 provides as follows:

(a) Information is excepted from the requirements of Section 552.021 if it is information that relates to computer network security or to the design, operation, or defense of a computer network.

(b) The following information is confidential:

(1) a computer network vulnerability report; and

(2) any other assessment of the extent to which data processing operations, a computer, or a computer program, network, system, or software of a governmental body or of a contractor of a governmental body is vulnerable to unauthorized access or harm, including an assessment of the extent to which the governmental body's or contractor's electronically stored information is vulnerable to alteration, damage, or erasure.

After review of your arguments, we conclude you have not established that these numbers (1) relate to computer network security or to the design, operation, or defense of a computer network for purposes of section 552.139, (2) consist of a computer network vulnerability report, or (3) consist of an assessment of the extent to which data processing operations, a computer, or a computer program, network, system, or software of a governmental body or of a contractor of a governmental body is vulnerable to unauthorized access or harm. Therefore, the state bar may not withhold this information under section 552.139.

Finally, we note that some of the information at issue may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

To conclude, (1) the letter in Attachment 3 is not subject to the Act, (2) the marked social security numbers are confidential under section 58.001 and must be withheld under section 552.101, (3) the marked Texas driver's license numbers must be withheld under section 552.130, (4) the marked bank account information must be withheld under section 552.136, and (5) the marked e-mail addresses are excepted from release under section 552.137. The remaining information must be released, but the information that is copyrighted may be released only in compliance with copyright law.

You also request that this office issue a previous determination allowing the state bar to withhold the following information related to an attorney unless the attorney expressly consents to its release: home addresses, home telephone numbers, social security numbers,

birth dates, driver's license numbers, e-mail addresses, bank account information, and internal unique identifier numbers. We decline to issue such a previous determination at this time. Therefore, this letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us. 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,

  
James L. Coggeshall  
Assistant Attorney General  
Open Records Division

JLC/krl

Ref: ID# 209834

Enc. Submitted documents

c: Mr. Miles T. Bradshaw  
Feldman & Rogers, L.L.P.  
5718 Westheimer, Suite 1200  
Houston, Texas 77057  
(w/o enclosures)