



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 4, 2004

Mr. John T. Patterson  
Assistant City Attorney  
City of Waco  
P.O. Box 2570  
Waco, Texas 76702

OR2004-9427

Dear Mr. Patterson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 212546.

The City of Waco (the "city") received a request for:

- 1) A copy of any and all documents which reflect the names and race/ethnicity of any and all persons who have been allowed to work in a "light duty" or limited duty position within the Waco Police Department during the period beginning January 1, 2000 to August 20, 2004.
- 2) A copy of any and all current policies and rules of the City of Waco or the Waco Police Department pertaining to light duty positions in the Waco Police Department.
- 3) A copy of any and all memoranda, including any e-mail messages sent or received [by the Waco Police Department] which pertain to light duty positions within the Waco Police Department. Any such messages sent or received during the time period of July 1, 2004 and August 20, 2004 are being requested.

You inform us that the city asked the requestor to clarify the scope of his e-mail request, and you have submitted a copy of the requestor's written response. *See* Gov't Code 552.222 (providing that a governmental body may ask to clarify the request if what information is requested is unclear to the governmental body); *see also* Open Records Decision No. 663 (1999) (discussing requests for clarification). You state that the city will release some of the

responsive information. You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.107, 552.108, 552.111, 552.117, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted sample of information.<sup>1</sup>

First, you claim Exhibit 6 contains some medical records, access to which is governed by the Medical Practice Act (the "MPA"), chapter 159 of the Occupations Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 159.002 of the MPA provides:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Medical records must be released upon the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). We have marked the information subject to the MPA.

Section 552.101 also encompasses the common-law right of 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).

This office has found that some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and

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<sup>1</sup>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 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.

job-related stress), 545 (1990) (information concerning the intimate relations between individuals and their family members), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). We have marked the medical information in Exhibits 5 and 6 that is excepted from disclosure under section 552.101 and common-law privacy.

The city contends that some of the information in Exhibit 7 is confidential under section 552.101 in conjunction with Title I of the Americans with Disabilities Act of 1990 (the "ADA"), 42 U.S.C. §§ 12101 *et seq.* The ADA provides that information about the medical conditions and medical histories of applicants or employees must be (1) collected and maintained on separate forms, (2) kept in separate medical files, and (3) treated as a confidential medical record. Information obtained in the course of a "fitness for duty examination," conducted to determine whether an employee is still able to perform the essential functions of his or her job, also is to be treated as a confidential medical record. *See* 42 U.S.C. §§ 12101 *et seq.*; 29 C.F.R. § 1630.14(c); Open Records Decision No. 641 (1996). Furthermore, the federal Equal Employment Opportunity Commission (the "EEOC") has determined that medical information for the purposes of the ADA includes "specific information about an individual's disability and related functional limitations, as well as general statements that an individual has a disability or that an ADA reasonable accommodation has been provided for a particular individual." *See* Letter from Ellen J. Vargyas, Legal Counsel, EEOC, to Barry Kearney, Associate General Counsel, National Labor Relations Board, 3 (Oct. 1, 1997). We have marked information that the city must withhold in Exhibit 7 under section 552.101 in conjunction with the ADA.

Next, you claim that the information in Exhibit 9 is excepted from disclosure under section 552.101 in conjunction with section 143.089 of the Local Government Code which contemplates two different types of personnel files: one that the civil service director is required to maintain as part of the officer's civil service file, and one that the police department may maintain for its own internal use. Local Gov't Code § 143.089(a), (g). Section 143.089 provides in pertinent part:

(a) The director [of the fire fighters' or police officers' civil service] or the director's designee shall maintain a personnel file on each fire fighter and police officer. The personnel file must contain any letter, memorandum, or document relating to:

....

(2) any misconduct by the fire fighter or police officer if the letter, memorandum, or document is from the employing department and if the misconduct resulted in disciplinary action by the employing department in accordance with this chapter[.]

....

(g) A fire or police department may maintain a personnel file on a fire fighter or police officer employed by the department for the department's use, but the department may not release any information contained in the department file to any agency or person requesting information relating to a fire fighter or police officer. The department shall refer to the director or the director's designee a person or agency that requests information that is maintained in the fire fighter's or police officer's personnel file.

Thus, section 143.089 of the Local Government Code provides for the creation of two personnel files for police officers and fire fighters: one that must be maintained by the city's civil service director or his designee and another that may be maintained by the city's fire and police departments. Information contained in personnel files maintained by the civil service director in accordance with chapter 143, including all records from the employing police department relating to misconduct by police officers that resulted in disciplinary action, must be released to the public unless the information comes within one of the Public Information Act's exceptions to required public disclosure. However, information contained in a personnel file held by the police department is confidential pursuant to section 143.089(g) and may not be disclosed under the Act.

We understand that the City of Waco is a civil service city under chapter 143 of the Local Government Code. You indicate that the information in Exhibit 9 is maintained by the city's police department in its personnel files and was obtained in connection with the employment of the police officers. Based on your statements and our review of the submitted information, we agree that Exhibit 9 is confidential under section 143.089(g) of the Local Government Code. As our ruling on this issue is dispositive, we need not address your other Exhibit 9 argument.

Next, the city claims that some of the information in Exhibit 8 is excepted from disclosure under section 552.107 of the Government Code. 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. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

Based on your arguments and our review of the information that you claim is protected from disclosure under the attorney-client privilege, we agree that this information reflects confidential communications exchanged between privileged parties in furtherance of the rendition of legal services to a client. Accordingly, we conclude that the city may withhold the information it has marked in Exhibit 8 pursuant to section 552.107(1) of the Government Code.<sup>2</sup>

Next, you claim that portions of the e-mails in Exhibit 10 are excepted from disclosure under section 552.111 of the Government Code. Section 552.111 excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.). An agency’s policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. ORD 615 at 5-6. Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 160; ORD 615 at 4-5.

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<sup>2</sup>You state that the highlighted portion of Attachment C to Exhibit 8 is not responsive to the request. This decision does not address the public availability of the non-responsive information, and that information need not be released.

You state that the information you seek to withhold under section 552.111 contains “advice, opinions, conclusions and/or recommendations” reflecting the policymaking processes of the city. We agree. Accordingly, the information we have marked in Exhibit 10 is protected from public disclosure under section 552.111.

You claim that some of the information in Exhibit 3 is exempt from disclosure under section 552.117 of the Government Code. Section 552.117(a)(2) provides that information that relates to the home address, home telephone number, social security number, or family member information of a peace officer as defined in article 2.12 of the Texas Code of Criminal Procedure must be withheld regardless of whether the officer complied with section 552.024 of the Government Code. Thus, the city must withhold the home address, home telephone numbers, social security numbers, and family member information the city has marked under section 552.117(a)(2).

Finally, the city states that some of the information in Exhibit 3 is exempt from disclosure under section 552.130. Section 552.130 provides in relevant part:

(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]
- (2) a motor vehicle title or registration issued by an agency of this state[.]

We have marked the information that must be withheld under section 552.130.

In summary, the city must withhold 1) the marked information under the MPA; 2) the marked medical information under section 552.101 and common-law privacy; 3) the marked information under section 552.101 and the ADA; 4) Exhibit 9 under section 552.101 and 143.089 of the Local Government Code; 5) the marked information under section 552.107(1); the marked information under section 552.111; 6) the home address, home telephone numbers, social security numbers, and family member information under section 552.117(a)(2); and 7) the marked section 552.130 information.

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,

Tamara L. Harswick  
Assistant Attorney General  
Open Records Division

TLH/sdk

Ref: ID# 212546

Enc. Submitted documents

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