



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 15, 2008

Ms. Zindia Thomas
Assistant Attorney General
Public Information Coordinator
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

OR2008-02184

Dear Ms. Thomas:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code, the Public Information Act (the "Act"). Your request was assigned ID# 304812.

The Office of the Attorney General (the "OAG") received a request for documents since May 15, 2007, concerning Request for Opinion No. RQ 0589GA; the names and dates of first hire of personnel who worked on the opinion as well as their resumes and employment applications; and sign-in sheets or registries for December 14, 2007, showing visitors to OAG offices. The OAG states it has released information that is not excepted from public disclosure and confidential information that is subject to release under section 552.008 of the Government Code. However, the OAG argues it need not comply with section 552.008 for information submitted as Exhibit B and asserts Exhibit B and portions of Exhibit C are excepted from disclosure under sections 552.101, 552.102, 552.107, 552.111, 552.117,

552.130, and 552.137 of the Government Code.¹ We have considered the OAG's arguments and have reviewed the submitted sample of information.²

The requestor, Representative Jim Dunnam, invokes section 552.008 in his request and states that his request is made for legislative purposes. Section 552.008(b) of the Government Code provides in part as follows:

[A] governmental body on request by an individual member, agency, or committee of the legislature shall provide public information, including confidential information, to the requesting individual member, agency, or committee of the legislature if the requesting member, agency or committee states that the public information is requested under [the Act] for legislative purposes.

Gov't Code § 552.008(b). Disclosure of information to a legislator does not waive or affect the confidentiality of the information or the right to assert exceptions in the future regarding that information. Section 552.008 prescribes specific procedures relating to the confidential treatment of the shared information. *Id.* The OAG states, pursuant to section 552.008, it has released confidential information to Representative Dunnam in his legislative capacity. However, the OAG objects to the application of section 552.008 to its "opinion drafts and internal communications that arise from the deliberative process of preparing Attorney General Opinions." The OAG contends extension of section 552.008 to such information violates the separation of powers doctrine and intrudes upon the Attorney General's duty under the Texas Constitution to render advisory opinions.

The powers of Texas government are divided into three distinct departments, and one department shall not exercise any powers assigned to either of the others unless expressly permitted to do so. Tex. Const. art. II, § 1. A violation of the separation of powers occurs when one branch of government unduly interferes or threatens to unduly interfere with another branch's effective exercise of its constitutionally assigned powers. *Armadillo Bail Bonds v. State*, 802 S.W.2d 237, 239 (Tex. Crim. App. 1990). The Attorney General is a member of the Executive Department of the State and shall give legal advice in writing to the Governor and other executive officers when requested by them. Tex. Const. art. IV, §§ 1,

¹The OAG states it will withhold social security numbers of living persons under section 552.147 of the Government Code. Section 552.147(b) authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

²We 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.

22; *see also* Gov't Code § 402.042. The Texas Constitution confers exclusive power to issue advisory opinions on the Attorney General; no constitutional provision confers such power on the legislature. Thus, our inquiry is whether the application of section 552.008 to permit a legislator access to the OAG's internal deliberations would unduly interfere with the Attorney General's effective exercise of his power to render a written advisory opinion.

In support of its assertion, the OAG argues permitting Representative Dunnam access to the information

would necessarily have a chilling effect on the free flow of ideas, frank communications, and robust deliberations necessary to generating an advisory opinion. It would also inhibit attorneys at the OAG from rendering candid advice and recommendations to the Attorney General on matters relating to advisory opinions. . . . Thus, the substance and quality of the Attorney General's opinion output would necessarily suffer.

We agree and find that applying section 552.008 to the OAG's internal deliberations concerning the issuance of an advisory opinion unduly interferes with the Attorney General's effective exercise of his constitutionally delegated power to give legal advice in writing. Accordingly, the OAG need not provide Exhibit B to Representative Dunnam pursuant to section 552.008. Instead, we will determine whether the OAG may withhold the information under its asserted exceptions.

Section 552.107(1) protects information that comes 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. *See* 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. *See* 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. *See 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, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *See* 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. *See 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).

The OAG explains the communications in Exhibit B are confidential communications among OAG attorneys and staff, and they are made in furtherance of the rendition of professional legal services. The OAG states the communications were intended to be confidential and that their confidentiality has been maintained. After reviewing the OAG’s arguments and the submitted information, we agree the communications in Exhibit B constitute privileged attorney-client communications that the OAG may withhold under section 552.107. Because section 552.107 is dispositive, we do not address the OAG’s other arguments for Exhibit B.

Section 552.117(a)(1) excepts from disclosure the home address, home telephone number, social security number, and family member information of a current or former employee of a governmental body who requests that this information be kept confidential under section 552.024. We note that an individual’s personal post office box number is not a “home address” and therefore may not be withheld under section 552.117.³ 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)*. The OAG explains all but one OAG employee timely elected to keep their information confidential. Therefore, the OAG must withhold the personal information of those employees who timely elected confidentiality, including personal cellular phone numbers and home fax numbers, under section 552.117(a)(1) because the OAG states it does not pay for the employee’s cellular phone service. *See Open Records Decision No. 506 at 5-6 (1988)* (section 552.117 not applicable to cellular phone numbers paid for by governmental body and intended for official use). We have marked the types of information the OAG must withhold under section 552.117(a)(1).

³*See Gov’t Code § 552.117; Open Records Decision No. 622 at 4 (1994) (legislative history makes clear that purpose of Gov’t Code § 552.117 is to protect public employees from being harassed at home) (citing House Committee on State Affairs, Bill Analysis, H.B. 1976, 69th Leg. (1985); Senate Committee on State Affairs, Bill Analysis, H.B. 1976, 69th Leg. (1985)) (emphasis added).*

Section 552.130 of the Government Code excepts from public disclosure information relating to a Texas driver's license; it does not apply to out-of-state motor vehicle record information. Thus, the OAG must withhold the Texas motor vehicle record information under section 552.130.

Section 552.137 of the Government Code requires a governmental body to 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. Gov't Code § 552.137(a), (b). Thus, because the OAG informs us the individuals at issue have not affirmatively consented to the release of their e-mail addresses, the OAG must withhold the private e-mail addresses pursuant to section 552.137.

Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101. See *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Accordingly, we will consider your section 552.101 and section 552.102 claims together.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. For information to be protected from public disclosure by the common law right of privacy under section 552.101, the information must meet the criteria set out in *Industrial Foundation*. In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. 540 S.W.2d at 685. After reviewing Exhibit C, we conclude it does not contain any private information because the information is either not highly intimate or embarrassing or there is a legitimate public interest in the information. Thus, the OAG may not withhold any of Exhibit C under common-law privacy.

Lastly, although the OAG takes no position as to the confidentiality of dates of birth, it believes it cannot release them until the conclusion of litigation on this matter. The litigation has concluded and the Austin Court of Appeals held that dates of birth are not private and are not excepted from disclosure under the Act. *Tex. Comptroller of Public Accounts v. Attorney Gen. of Tex.*, No. 03-07-00102-CV, 2008 WL 160173 (Tex. App.—Austin Jan. 17, 2008, no pet. h.). Thus, the OAG may not withhold the dates of birth.

In summary, the OAG need not provide Exhibit B to Representative Dunnam pursuant to section 552.008. Instead, the OAG may withhold Exhibit B pursuant to section 552.107. The OAG must withhold the following information in Exhibit C: 1) the information we marked under section 552.117(a)(1) of employees who timely elected confidentiality; 2) the Texas motor vehicle record information under section 552.130; and 3) the private e-mail addresses under section 552.137. The rest of Exhibit C is not confidential.

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 challenge 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 Office of the Attorney General 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. 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,



Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/sdk

Ref: ID# 304812

Enc: Marked documents

c: The Honorable Jim Dunnam
Texas House of Representatives
P.O. Box 2910
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(w/o enclosures)