



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

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OR2008-08564

Dear Mr. Schell and Ms. Smith:

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# 312263.

Dallas County (the "county") received five requests from two different requestors for incoming and outgoing e-mails to and from named county employees, information related to specified county personnel matters, personnel files, and grievance hearing rules. You state that you have released a portion of the requested information to the requestors. You state that you do not maintain information responsive to portions of the requests received on March 21, 24, and 25.¹ You also explain that some of the information responsive to the April 9 request has been destroyed in accordance with the county's record retention policy. You claim that portions of the submitted information are excepted from disclosure under sections 552.101, 552.102, 552.103, 552.107, 552.111, 552.117², 552.139, and 552.147 of

¹We note that the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

²Although you also assert section 552.1175, the proper exception in this instance is section 552.117 of the Government Code because section 552.117 applies to information the county maintains as the employer of the employee at issue.

the Government Code.³ We have considered the exceptions you claim and reviewed the submitted representative sample of information.⁴ We have also received comments from the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, Category 4 of the March 25 request seeks information pertaining to each employee written up by a named county supervisor. You state that in order to respond to this request you have to search "the personnel files of all employees in the [county] juvenile department who may have been under the direct supervision" of a named supervisor, and thus, you refuse to fully respond to category 4 of the March 25 request. However, we note that the administrative inconvenience of providing public records to a requestor in response to an open records request does not constitute sufficient grounds for denying such a request. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 687 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). We therefore find that the county may not refuse to comply with any portion of this request on the basis that doing so would be burdensome. Accordingly, you must comply with this request and release or withhold all information responsive to this category of the request in accordance with this ruling.

We next note that some of the submitted information constitutes information that is subject to section 552.022 of the Government Code. Section 552.022(a) enumerates categories of information that are not excepted from required disclosure under the Act unless they are expressly confidential under other law. *See* Gov't Code §§ 552.022(a)(1) (stating that a completed report or evaluation is public information unless excepted from disclosure under section 552.108 of the Government Code or made confidential under other law). We have marked performance evaluations and completed reports that fall under section 552.022(a)(1). This marked information is subject to required disclosure under the Act unless other law expressly makes it confidential. You claim that this information is excepted from disclosure under section 552.103 of the Government Code. Section 552.103 is a discretionary exception to disclosure that protects the governmental body's interests and does not make information confidential. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103). Therefore, you may not withhold any of the information that is subject to

³Although you raise Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5, we note that, in this instance, the proper exceptions to raise when asserting the attorney-client and attorney work product privileges for information not subject to section 552.022 are sections 552.107 and 552.111. *See* Open Records Decision Nos. 677 (2002), 676 at 6 (2002). Additionally, we note that section 552.101 of the Government Code does not encompass the attorney-client and attorney work product privileges. *See* ORD 676 at 1-3 (Gov't Code § 552.101 does not encompass discovery privileges).

⁴We 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.

section 552.022 under section 552.103. As you raise no other exception to disclosure of this specific information, it must be released to the requestor.

You state that the remaining submitted information is excepted from disclosure under section 552.103 of the Government Code. Section 552.103 provides in part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body receives the request for information, and (2) the information at issue is related to that litigation. *Thomas v. Cornyn*, 71 S.W.3d 473, 487 (Tex. App.—Austin 2002, no pet.); *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. See Open Records Decision No. 452 at 4 (1986). To establish that litigation is reasonably anticipated, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *Id.* This office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission ("EEOC"), see Open Records Decision No. 336 (1982); and threatened to sue on several occasions and hired an attorney, see Open Records Decision No. 288 (1981). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. See Open Records Decision No. 331 (1982).

In this instance you claim that the county anticipated litigation pertaining to the information at issue. You assert that the requestor's spouse has filed a discrimination complaint with the EEOC pertaining to the information at issue. However, the EEOC claim at issue was not filed until after the county received the fourth request for information, and the fifth request only seeks information that was previously requested in the first four requests. Thus, although you have demonstrated that the county anticipated litigation prior to receipt of the fifth request, the information responsive to this request is also responsive to the earlier requests. Accordingly, you may not withhold any portion of the submitted information based on the EEOC claim.

This office has also concluded that litigation is reasonably anticipated when multiple threats of litigation are made and an attorney is hired. Open Records Decision No. 288 (1981). However, you have only demonstrated that litigation was threatened and an attorney was hired after the county received the fourth request for information. Since we have already determined that information responsive to the fifth request was fully encompassed by the four earlier requests, you may not withhold any portion of the submitted information based on the threatened litigation. Because you have not provided arguments establishing that you reasonably anticipated litigation prior to receipt of any of the first four requests, we conclude that you may not withhold any of the submitted information under section 552.103 of the Government Code.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information that other statutes make confidential. You raise section 552.101 in conjunction with the federal Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C. §§ 1320d-1320d-8. At the direction of Congress, the Secretary of Health and Human Services ("HHS") promulgated regulations setting privacy standards for medical records, which HHS issued as the Federal Standards for Privacy of Individually Identifiable Health Information. *See* Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d-2 (Supp. IV 1998) (historical & statutory note); Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. Pts. 160, 164 ("Privacy Rule"); *see also* Attorney General Opinion JC-0508 at 2 (2002). These standards govern the releasability of protected health information by a covered entity. *See* 45 C.F.R. pts. 160, 164. Under these standards, a covered entity may not use or disclose protected health information, except as provided by parts 160 and 164 of the Code of Federal Regulations. *See id.* § 164.502(a). This office has addressed the interplay of the Privacy Rule and the Act. In Open Records Decision No. 681 (2004), we noted that section 164.512 of title 45 of the Code of Federal Regulations provides that a covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law. *See* 45 C.F.R. § 164.512(a)(1). We further noted that the Act "is a mandate in Texas law that compels Texas governmental bodies to disclose information to the public." *See* ORD 681 at 8; *see also* Gov't Code §§ 552.002, .003, .021. We therefore held that the disclosures under the Act come within section 164.512(a). Consequently, the Privacy Rule does not make information confidential for the purpose of section 552.101 of

the Government Code. See *Abbott v. Tex. Dep't of Mental Health & Mental Retardation*, 212 S.W.3d 648 (Tex. App. —Austin 2006, no pet.); ORD 681 at 9; see also Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Thus, because the Privacy Rule does not make information that is subject to disclosure under the Act confidential, the county may withhold protected health information from the public only if the information is confidential under other law or an exception in subchapter C of the Act applies.

Medical records are governed by the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code, which is also encompassed by section 552.101. See Occ. Code § 151.001. Section 159.002 of the MPA provides, in part:

(a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.

(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.

Id. § 159.002(a)-(c). A portion of the submitted information consists of medical records. 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. *Id.* §§ 159.004, .005. Medical records pertaining to a deceased patient may only be released upon the signed consent of the deceased's personal representative. See *id.* § 159.005(a)(5). Any subsequent release of medical records must be consistent with the purposes for which the governmental body obtained the records. See *id.* § 159.002(c); Open Records Decision No. 565 at 7 (1990). We have marked the portion of the submitted information that constitutes medical records. This information may only be released in accordance with the MPA.

You also raise section 552.101 in conjunction with the federal Family and Medical Leave Act (the "FMLA"). See 29 U.S.C. § 2801 *et seq.* Section 825.500 of chapter V of title 29 of the Code of Federal Regulations identifies the record-keeping requirements for employers that are subject to the FMLA. Subsection (g) of section 825.500 provides that:

[r]ecords and documents relating to medical certifications, recertifications or medical histories of employees or employees' family members, created for purposes of FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files, and if ADA is also applicable, such records shall be maintained in conformance with ADA confidentiality requirements[], except that:

- (1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations;
- (2) First aid and safety personnel may be informed (when appropriate) if the employee's physical or medical condition might require emergency treatment; and
- (3) Government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.

29 C.F.R. § 825.500(g). You generally assert that a portion of the submitted information falls within the scope of section 825.500(g). Based our review of the information at issue, we conclude that the information we have marked is confidential and must be withheld under section 552.101 in conjunction with the FMLA.

Next you generally assert that the submitted information may consist of records that are made confidential under Title I of the Americans with Disabilities Act (the "ADA"). Section 552.101 encompasses 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. In addition, an employer's medical examination or inquiry into the ability of an employee to perform job-related functions is to be treated as confidential medical records. 29 C.F.R. § 1630.14(c); *see also* Open Records Decision No. 641 (1996). The 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).

Federal regulations define "disability" for purposes of the ADA as "(1) a physical or mental impairment that substantially limits one or more of the major life activities of the individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment." 29 C.F.R. § 1630.2(g). The regulations further provide that:

physical or mental impairment means: (1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or (2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

29 C.F.R. § 1630.2(h). However, the county failed to identify any specific information that is confidential under the ADA or submit any arguments explaining how the ADA is applicable to the information at issue. Accordingly, the county may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with the ADA.

We note that the submitted information contains a W-4 form. Section 552.101 also encompassed section 6103(a) of title 26 of the United States Code provides that tax return information is confidential. *See* 26 U.S.C. § 6103(a)(2), (b)(2)(A), (p)(8); *see also* Open Records Decision No. 600 (1992); Attorney General Op. MW-372 (1981). Accordingly, the county must withhold from disclosure the W-4 form that we have marked pursuant to section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code.

We also note that the submitted information contains an Employment Eligibility Verification, Form I-9. Form I-9 is governed by title 8, section 1324a of the United States Code, which is also encompassed by section 552.101. This section provides that an I-9 form “may not be used for purposes other than for enforcement of this chapter” and for enforcement of other federal statutes governing crime and criminal investigations. *See* 8 U.S.C. § 1324a(b)(5); *see also* 8 C.F.R. § 274a.2(b)(4). Release of this document in this instance would be “for purposes other than for enforcement” of the referenced federal statutes. Accordingly, we conclude that the marked Form I-9 is confidential and may only be released in compliance with the federal laws and regulations governing the employment verification system.

The remaining information also contains an L-2 Declaration of Medical Condition required by the Texas Commission on Law Enforcement Officer Standards and Education (“TCLEOSE”) that is subject to section 1701.306 of the Occupations Code, which is encompassed by section 552.101 of the Government Code. Chapter 1701 of the Occupations Code is applicable to TCLEOSE. Specifically, section 1701.306 provides as follows:

(a) The commission may not issue a license to a person as an officer or county jailer unless the person is examined by:

(1) a licensed psychologist or by a psychiatrist who declares in writing that the person is in satisfactory psychological and emotional health to serve as the type of officer for which a license is sought; and

(2) a licensed physician who declares in writing that the person does not show any trace of drug dependency or illegal drug use after a physical examination, blood test, or other medical test.

(b) An agency hiring a person for whom a license as an officer or county jailer is sought shall select the examining physician and the examining psychologist or psychiatrist. The agency shall prepare a report of each declaration required by Subsection (a) and shall maintain a copy of the report on file in a format readily accessible to the commission. A declaration is not public information.

Occ. Code § 1701.306(a), (b). Therefore, the county must withhold the submitted L-2 declaration we have marked under section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code.

Section 552.101 also encompasses sections 560.001, 560.002, and 560.003 of the Government Code, which govern the public availability of fingerprints. Section 560.003 provides that “[a] biometric identifier in the possession of a governmental body is exempt from disclosure under [the Act].” *Id.* § 560.003; *see id.* § 560.001(1) (“biometric identifier” includes fingerprints). Thus, the county must withhold the fingerprints that we have marked under section 552.101 in conjunction with section 560.003. However, we note that in this instance, some of the fingerprints are those of a deceased individual. Sections 560.001, 560.002, and 560.003 are intended to protect an individual’s privacy. *See id.* § 560.002(1)(A) (governmental body may not sell, lease, or otherwise disclose individual’s biometric identifier to another person unless individual consents to disclosure). The right to privacy is personal and lapses at death. *See Moore v. Charles B. Pierce Film Enters. Inc.*, 589 S.W.2d 489 (Tex. Civ. App.—Texarkana 1979, writ ref’d n.r.e.); Attorney General Opinions JM-229 (1984); H-917 (1976); Open Records Decision No. 272 (1981). Therefore, the county may not withhold the fingerprints of the deceased individual under section 552.101 of the Government Code, and this information must be released.

Section 552.101 also encompasses chapter 550 of the Transportation Code. The submitted information contains a ST-3 accident report form that was completed pursuant to chapter 550 of the Transportation Code. *See* Transp. Code § 550.064 (officer’s accident report). Section 550.065(b) states that except as provided by subsection (c), accident reports are privileged and confidential. Section 550.065(c)(4) provides for the release of accident reports to a person who provides two of the following three pieces of information: (1) date of the accident; (2) name of any person involved in the accident; and (3) specific location of the accident. *Id.* § 550.065(c)(4). Under this provision, the Texas Department of Transportation or another governmental entity is required to release a copy of an accident report to a person who provides the agency with two or more pieces of information specified by the statute. *Id.* The requestors have not provided the county with two of the three pieces of information; thus, the county must withhold the ST-3 accident report we have marked under section 550.065(b) of the Transportation Code.

Section 552.101 of the Government Code also encompasses chapter 418 of the Government Code, the Homeland Security Act ("HSA"). The HSA makes specified categories of information confidential, including risk assessments, investigations of terrorism, vulnerabilities of critical infrastructure, and some types of information related to security systems. Gov't Code §§ 418.177-.182. However, the fact that information may relate to a governmental body's security concerns or emergency management activities does not make the information per se confidential under the HSA. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). Furthermore, the mere recitation by a governmental body of a statute's key terms is not sufficient to demonstrate the applicability of a claimed provision. As with any exception to disclosure, a governmental body asserting one of the confidentiality provisions of the HSA must adequately explain how the responsive records fall within the scope of the claimed provision. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies). However, beyond a general statement that the HSA is applicable to a portion of the submitted information, you have made no arguments explaining how any portion of the e-mails you seek to withhold fall within any provision of the HSA. Accordingly, you have failed to demonstrate the applicability of the HSA to the information at issue, and no portion of it may be withheld on this basis.

Section 552.101 also encompasses criminal history record information ("CHRI") generated by the National Crime Information Center or by the Texas Crime Information Center is confidential. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI that the Texas Department of Public Safety ("DPS") maintains, except that the DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov't Code § 411.083. Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090 - .127. Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. *See* Gov't Code § 411.082(2)(B) (term CHRI does not include driving record information). Accordingly, the county must withhold the CHRI that we have marked under section 552.101 of the Government Code in conjunction with federal law and chapter 411 of the Government Code.

Next, you generally assert that a portion of the submitted information is excepted from disclosure under common-law privacy and section 552.102. Section 552.101 encompasses information protected by common-law privacy. Section 552.102(a) of the Government Code excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 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(a) is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Bd.*, 540 S.W.2d 668 (Tex. 1976) for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101. Accordingly, we address the county's section 552.102(a) claim in conjunction with its common-law privacy claim under section 552.101 of the Government Code.

Common-law privacy protects information that (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. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be demonstrated. *Id.* at 681-82. 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. *Id.* at 683. We have marked certain information that is intimate and embarrassing and of no legitimate public interest. Thus, you must withhold this marked information under common-law privacy.

This office has also found that personal financial information not relating to a financial transaction between an individual and a governmental body is generally excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 600 (1992) (finding personal financial information to include designation of beneficiary of employee's retirement benefits and optional insurance coverage; choice of particular insurance carrier; direct deposit authorization; and forms allowing employee to allocate pretax compensation to group insurance, health care, or dependent care), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). We have marked option salary deduction information that constitutes personal financial information. Further, in this instance we find that there is not a legitimate public interest in the release of this information. Accordingly, you must withhold the marked optional salary deduction information under common-law privacy.

In addition, we find that a compilation of an individual's criminal history record information is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *Cf. U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (when considering prong regarding individual's privacy interest, court recognized distinction between public records found in courthouse files and local police stations and compiled summary of information and noted that individual has significant privacy interest in compilation of one's criminal history). Furthermore, we find that a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. Thus, you must withhold the criminal history information that we have marked pertaining private citizens. However, we also note that the records contain the criminal

history information of applicants for peace officer positions. This office has found that the public has a legitimate interest in information relating to employees of governmental bodies and their employment qualifications and job performance. See Open Records Decision Nos. 562 at 10 (1990), 542 at 5 (1990); see also Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow). Thus, we conclude that there is a legitimate public interest in the portion of the criminal history information that pertains to applicants for peace officer positions and we conclude that you must release this information.

Section 552.107 of the Government Code protects information coming within the attorney-client privilege. Gov't Code § 552.107. 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 state that a portion of the submitted information consists of communications between county employees and attorneys pertaining to the rendition of legal services to the county.

Further, you indicate that the communications were intended to be and have remained confidential. Based on your representations and our review, we conclude that you may withhold Attachment W under section 552.107 of the Government Code.⁵

Section 552.117(a)(2) excepts from disclosure the home address, home telephone number, social security number, and the family member information of a peace officer as defined by article 2.12 of the Code of Criminal Procedure regardless of whether the officer requested confidentiality under section 552.024 or 552.1175 of the Government Code. In this instance, although some of the employees at issue are peace officers, we are unable to determine from the information provided whether all of the employees at issue are licensed peace officers. Thus, we must rule conditionally. Accordingly, if the employees at issue are licensed peace officers, then the county must withhold the information we have marked under section 552.117(a)(2). We note the submitted information contains a post office box number that we have not marked because a post office box number is not a "home address" for purposes of section 552.117, and you must release the post office box number.

We also note that a portion of the information pertains to a former county peace officer that is deceased. Because the protection afforded by section 552.117 includes "current or former" officials or employees, the protection generally does not lapse at death. However, because the protection of social security numbers under section 552.117 is intended to solely protect the privacy of the employee, it lapses at death. *See Moore v. Charles B. Pierce Film Enters. Inc.*, 589 S.W.2d 489 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.); *see also* Attorney General Opinions JM-229 (1984); H-917 (1976). Accordingly, with the exception of his social security number, which must be released, you must withhold the deceased individual's home address and telephone number, and any information that reveals whether this employee has family members under section 552.117(a)(2).

If the employees at issue are not peace officers, then section 552.117(a)(1) may apply to their personal information. Section 552.117(a)(1) excepts from disclosure the 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 of the Government Code. Whether information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See Open Records Decision No. 530 at 5 (1989)*. Thus, pursuant to section 552.117(a)(1), if any of the employees at issue are not peace officers, then the county must only withhold the personal information of those individuals who elected, prior to the county's receipt of the requests for information, to keep such information confidential. Such information may not be withheld for individuals who did not make a timely election. Again, we have marked the personal information that must be withheld if section 552.117 applies.

⁵Because our determination on this issue is dispositive, we need not address your remaining arguments against disclosure of this information under the work product privilege.

Some of the remaining information is excepted under section 552.130 of the Government Code, which provides that information relating to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by a Texas agency is excepted from public release. Gov't Code § 552.130(a)(1), (2). The county must withhold the Texas motor vehicle record information we have marked under section 552.130.

Some of the remaining information is also excepted under section 552.137 of the Government Code, which 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). *See id.* § 552.137(a)-(c). 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. The e-mail addresses at issue do not appear to be of a type specifically excluded by section 552.137(c). You do not inform us that a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. Therefore, unless the county receives consent to release, the county must withhold the e-mail addresses we have marked under section 552.137.

You also assert that some of the submitted information is subject to section 552.139 of the Government Code. Section 552.139(a) provides the following:

- (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.

Gov't Code § 552.139(a). However, you have not provided arguments explaining how section 552.139 is applicable to any specific portion of the information at issue. Thus, you have failed to demonstrate that any portion of the submitted information, which consists only of general administrative information related to the county computer system, relates to computer network security or to the design, operation, or defense of a computer network. Accordingly, none of the submitted information may be withheld under section 552.139.

Finally, section 552.147 of the Government Code states that "[t]he social security number of a living person is excepted from" required public disclosure under the Act. *Id.* § 552.147. Upon review, we agree that the county may withhold any remaining social security numbers of living persons under section 552.147 of the Government Code.⁶

In summary, the county must withhold the information we have marked under section 552.101: information subject to the FMLA, the W-4 form subject to federal law, the

⁶Section 552.147(b) of the Government Code 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. Gov't Code § 552.147(b).

I-9 form subject to federal laws and regulations governing the employment verification system, the L-2 declaration subject to section 1701.306 of the Occupations Code, the fingerprint information subject to 560.003 of the Government Code, information subject to the MPA, the ST-3 accident report subject to section 550.065(b) of the Transportation Code, the CHRI subject to federal law and chapter 411 of the Government Code, the information subject to common-law privacy. You may withhold the information in Attachment W under section 552.107. If the employees at issue are licensed peace officers, then the county must withhold the information we have marked under section 552.117(a)(2). If any of the employees at issue are not peace officers, then the county must only withhold the personal information that pertains to a current or former employee of the county who elected, prior to the county's receipt of the requests for information, to keep such information confidential. Such information may not be withheld for individuals who did not make a timely election. The county must withhold the Texas motor vehicle record information we have marked under section 552.130. Unless the county receives consent to release, the county must withhold the e-mail addresses we have marked under section 552.137. The county may withhold any remaining social security numbers of living persons under section 552.147. The remaining information must be released.

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). If the governmental body does not file suit over 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,



Justin D. Gordon
Assistant Attorney General
Open Records Division

JDG/eeg

Ref: ID# 312263

Enc. Submitted documents

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