



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 7, 2008

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

OR2008-10797

Dear Ms. Thomas:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 318397.

The Office of the Attorney General (the "OAG") received requests for information pertaining to a March 2008 complaint filed in the El Paso Medicaid Fraud Control Unit (the "MFCU").¹ The OAG states it will release some information and asserts the remainder is excepted from disclosure under sections 552.101, 552.107, and 552.108 of the Government Code. We have considered the OAG's claimed exceptions to disclosure and have reviewed the submitted sample of information.²

Section 552.108(a) excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime." Gov't Code § 552.108(a)(1). Generally, a governmental body claiming section

¹The OAG withdrew its request for a decision as to four of the requests because the requestors withdrew their requests for information by operation of law. *See* Gov't Code § 552.2615.

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.

552.108(a)(1) must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See* Gov't Code §§ 552.108(a)(1), .301(e)(1)(a); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977).

The OAG argues section 552.108(a)(1) is applicable because the information it marked relates to pending criminal investigations conducted by the MFCU. After review of the information, we conclude the OAG may withhold some of the information it marked and as we have marked under section 552.108(a)(1). *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases).

Section 552.108(b)(2) excepts from disclosure an internal record of a law enforcement agency that relates to an investigation that concluded in a result other than conviction or deferred adjudication. A governmental body claiming section 552.108(b)(2) must demonstrate that it is a law enforcement agency and the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication.

The OAG argues section 552.108(b)(2) is applicable to the portions it marked because the criminal investigations conducted by the MFCU resulted in conclusions other than conviction or deferred adjudication. The submitted Ombudsman's complaint file is an internal record of MFCU, a law enforcement unit, that relates to a personnel matter that arose from MFCU's Medicaid fraud investigations. Because the allegations against MFCU's investigators relate to criminal investigations, and are not solely personnel matters, we conclude the OAG may withhold some of the information it marked and as we have marked under section 552.108(a)(2).

Next, the OAG asserts the "work product privilege" under subsections 552.108(a)(4) and (b)(3). These subsections provide:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

...

(4) it is information that:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [required public disclosure] if:

...

(3) the internal record or notation:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

Gov't Code § 552.108(a)(4), (b)(3). A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why this exception is applicable to the information that the governmental body seeks to withhold. *See* Gov't Code § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986). Although the OAG asserts release of the "marked information" would reveal "the mental impressions and legal reasoning of the MFCU attorneys and MFCU employees," the OAG did not mark any information as excepted from disclosure under these subsections. Thus, the OAG may not withhold any information under these subsections. *See* Gov't Code § 552.301(e)(2) (agency must label specific information to indicate which exception applies). Lastly, the OAG labeled some information as excepted from disclosure under section "552.108." However, because the OAG did not identify which of the various subsections under section 552.108 applies to the information, we conclude the OAG failed to comply with section 552.301, and therefore, may not withhold these portions. We marked the information the OAG must release.

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).

The OAG states it marked internal communications between OAG attorneys and employees. After review of the information, we conclude the OAG may withhold some of the information it marked and as we have marked under section 552.107 as privileged attorney-client communications made in furtherance of the rendition of legal services. However, the rest of the information the OAG marked were not communications made in rendering legal services, and therefore, the OAG may not withhold the information under section 552.107.

Next, we consider the OAG’s common-law privacy argument for portions of the information it marked. Section 552.101 of the Government Code excepts “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses the doctrine of common-law 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). The types 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. 540 S.W.2d at 683. We have marked the information that the OAG must withhold under common-law privacy.

Section 552.101 also encompasses the informer’s privilege, which Texas courts have recognized. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969). It protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided that the subject of the information does not already know the informer’s identity. Open Records Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978). The informer’s privilege protects the identities of

individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 279 at 2 (1981) (citing Wigmore, Evidence, § 2374, at 767 (McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. See Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5 (1988). The privilege excepts the informer's statement only to the extent necessary to protect that informer's identity. Open Records Decision No. 549 at 5 (1990).

The OAG informs us the complainant alleged a violation of Medicaid laws, which carries criminal penalties, to the MFCU. Thus, we conclude the OAG may withhold the complainant's name under section 552.101 in conjunction with the informer's privilege.

Finally, we note some of the information may be excepted from disclosure under section 552.117(a)(1) of the Government Code. 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 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). Therefore, the OAG may only withhold information under section 552.117 on behalf of current or former employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. For those employees who timely elected to keep their personal information confidential, the OAG must withhold the employees' information we marked. The OAG may not withhold this information under section 552.117 for those employees who did not make a timely election to keep the information confidential.

In summary, pursuant to section 552.117(a)(1), the OAG must withhold the information we marked for those employees who timely elected to keep their personal information confidential. Also, the OAG must withhold the private information we marked. The OAG may withhold some of the information it marked and as we marked under subsections 552.108(a)(1) and 552.108(a)(2). Furthermore, pursuant to section 552.107, the OAG may withhold some of the information it marked and as we marked. Lastly, the OAG may withhold the name of the person who reported a violation of Medicaid laws under the informer's privilege. The OAG must release the remainder.

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).

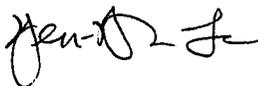
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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,



Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/sdk

Ref: ID# 318397

Enc: Marked documents

c: Mr. Bill J. Clarke
6090 Surety Drive, Suite 334
El Paso, Texas 79905
(w/o enclosures)

Ms. Marty Olivo
11593 Stockmeyer
El Paso, Texas 79936
(w/o enclosures)

Mr. George J. Jarvis
19011 Armington Drive
El Paso, Texas 79928
(w/o enclosures)

Mr. Steve Munoz
3705 Paisley Lane
Horizon City, Texas 79928
(w/o enclosures)

Ms. Sylvia R. Perez
1328 Bat Masterson
El Paso, Texas 79936
(w/o enclosures)

Ms. Lupe Macias
5728 Devon
El Paso, Texas 79924
(w/o enclosures)