



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 2, 2008

Mr. David M. Swope
Assistant County Attorney
Harris County Attorney's Office
1019 Congress, 15th Floor
Houston, Texas 77002

OR2008-13534

Dear Mr. Swope:

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# 323600.

The Harris County Attorney's Office (the "county") received a request for information pertaining to the Ainsley Court Assisted Living a/k/a Eldridge Parkway Assisted Living, LP. You claim that some of the requested information is excepted from disclosure under sections 552.101, 552.107, 552.111, 552.130, and 552.136 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that you have redacted information from the submitted documents. Section 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. However, you do not assert, nor does our review of our records indicate, that you have been authorized to withhold the remaining information at issue without seeking a ruling from this office. *See Gov't Code* § 552.301(a); *Open Records Decision No. 673 (2000)*. Because we can discern the nature of the remaining information that has been redacted, being deprived of this information does not inhibit our

¹Although you raise Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5, we note that the proper exceptions to raise when asserting the attorney-client and attorney work product privileges for information not subject to section 552.022 of the Government Code are sections 552.107 and 552.111 of the Government Code. *See Open Records Decision Nos. 677 (2002), 676 at 6 (2002)*.

ability to make a ruling in this instance. Nevertheless, be advised that a failure to provide this office with requested information generally deprives us of the ability to determine whether information may be withheld and leaves this office with no alternative other than ordering that the redacted information be released. *See* Gov't Code §§ 552.301(e)(1)(D) (governmental body must provide this office with copy of "specific information requested"), 552.302.

You assert the submitted information is excepted under section 552.101 of the Government Code, which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes, including the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides in part the following:

(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.

Occ. Code § 159.002(b), (c). You assert that Exhibit B-4 is confidential under the MPA; however, after review of your arguments and the information at issue, we find you have not established that this information consists of the records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician. *See id.* § 159.002(b). Therefore, the county has not established that the MPA is applicable to Exhibit B-4, and it may not withhold the information on that ground.

Section 552.101 also encompasses the doctrine of common-law privacy, which 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). 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. *Id.* at 683. This office has found that some kinds of medical information or information indicating disabilities or specific illnesses and personal financial information not relating to the financial transaction between an individual and a governmental body are excepted from required public disclosure under common-law privacy. *See, e.g.*, Open Records Decision Nos. 600 (1992), 545 (1990), 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps).

Exhibit B-2 contains private financial information that the county must withhold under section 552.101 in conjunction with common-law privacy. The county must also withhold the private medical and financial information in Exhibits B and B-4, a representative sample of which we have marked in each exhibit, on the same ground. The remaining information is not intimate or embarrassing; therefore, the remaining information is not confidential under common-law privacy, and the county may not withhold it under section 552.101 on that ground.

You assert that Exhibit B-1 is excepted from disclosure under section 552.107 of the Government Code. Section 552.107(1) 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 Tex. 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 in a pending action and concerning a matter of common interest. TEX. R. EVID. 503(b)(1). 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.*, 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 explain that Exhibit B-1 contains confidential communications between county attorneys and the Texas Department of Aging and Disability Services that discuss “joint strategy and case handling” and that were made in furtherance of the rendition of

professional legal services. You also assert the communications were intended to be confidential and that their confidentiality has been maintained. After reviewing your arguments and the submitted information, we agree that Exhibit B-1 consists of privileged attorney-client communications that the county may withhold under section 552.107.² See TEX. R. EVID. 503(b)(1)(C) (client has privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for purpose of facilitating rendition of professional legal services to lawyer or representative of lawyer representing another party in pending action and *concerning a matter of common interest therein*) (emphasis added); TEX. R. DISCIPLINARY CONDUCT 1.05(c)(1) (lawyer may reveal confidential information when lawyer has been expressly authorized to do so in order to carry out representation); *In re Auclair*, 961 F.2d 65, 69 (5th Cir. 1992) (citing *Hodges, Grant & Kaufmann v. United States Government*, 768 F.2d 719, 721 (5th Cir. 1985)) (attorney-client privilege is not waived if privileged communication is shared with third person who has common legal interest with respect to subject matter of communication); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 76 (if two or more clients with common interest in litigated or nonlitigated matter and represented by separate lawyers agree to exchange information concerning the matter, communication of any such information that otherwise qualifies as privileged under sections 68-72 and that relates to the matter is privileged as against third persons, and any such client may invoke privilege unless it has been waived by client that made communication).

You assert that 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). We agree that the county must withhold the Texas motor vehicle record information highlighted in yellow in Exhibit B-2, as well as the information we have marked, under section 552.130.

You assert that some of the remaining information is excepted under section 552.136 of the Government Code. Section 552.136(b) provides that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." The county must withhold the bank account and routing numbers we have marked in Exhibit B-3 and the insurance policy numbers in Exhibit B-4, a representative sample of which we have marked, under section 552.136.

We note that some of the remaining information is excepted under section 552.137 of the Government Code.³ Section 552.137 excepts from disclosure "an e-mail address of a

²As our ruling is dispositive, we do not address your other arguments to withhold this information.

³The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body. See Open Records Decision Nos. 481 at 2 (1987), 480 at 5 (1987); see e.g., Open Records Decision No. 470 at 2 (1987) (because release of confidential information could impair rights of third parties and because improper release constitutes a misdemeanor, attorney general will raise predecessor statute of section 552.101

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* Gov’t Code § 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, the county must withhold the e-mail addresses we have marked under section 552.137.

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

To conclude, the county must withhold the following: the information we have marked in Exhibit B-2 under section 552.101 of the Government Code in conjunction with common-law privacy; the private medical and financial information in Exhibits B and B-4, a representative sample of which we have marked in each exhibit, under section 552.101 in conjunction with common-law privacy; the information marked under section 552.130 of the Government Code; the account numbers we have marked in Exhibit B-3 under section 552.136 of the Government Code; the insurance policy numbers in Exhibit B-4, a representative sample of which we have marked, under section 552.136; and the information we have marked under section 552.137 of the Government Code. The county may withhold Exhibit B-1 under section 552.107 of the Government Code. The county must release the remaining information, but any copyrighted information may only be released in accordance with copyright law.

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

on behalf of governmental bodies).

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,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/ma

Ref: ID# 323600

Enc. Submitted documents

c: Ms. Alice P. Newland
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(w/o enclosures)