



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

January 14, 2009

Mr. John M. Knight
Deputy City Attorney
City of Denton
215 East McKinney
Denton, Texas 76201

OR2009-00593

Dear Mr. Knight:

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# 332205 (ORR No. 08-250).

The City of Denton (the "city") received requests from three requestors for information relating to a request for proposals for delinquent tax collection services. You state that the city is releasing some of the information encompassed by the first request. You have submitted other information encompassed by the first request that the city seeks to withhold under sections 552.101, 552.107, and 552.111 of the Government Code. You take no position on the public availability of the rest of the submitted information. You believe, however, that the remaining information may implicate the proprietary interests of third parties.¹ You notified the interested parties of these requests for information and of their right to submit arguments to this office as to why the information should not be released.² We have considered the exceptions you claim and reviewed the submitted information. We assume that the city has released any other information that is responsive to the third request,

¹You inform us that the interested parties are Hayes, Berry, White & Vanzant; the Law Offices of Sawko & Burroughs; Linebarger Goggan Blair & Sampson; McCreary, Vesselka, Bragg & Allen; and Shipman Steppick.

²See Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances).

to the extent that such information existed when the city received that request. If not, then any such information must be released immediately.³ See Gov't Code §§ 552.221, .301, .302; Open Records Decision No. 664 (2000).

We first note that the city did not submit some of the information at issue to this office within the fifteen-business-day period prescribed by section 552.301 of the Government Code. See Gov't Code § 552.301(e)(1)(A)-(D). Therefore, that information is presumed to be public under section 552.302 of the Government Code and must be released, unless there is a compelling reason to withhold any of the information. See *id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App. — Austin 1990, no writ). This statutory presumption can generally be overcome when the information is confidential by law or third-party interests are at stake. See Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). Accordingly, we will determine whether the city must withhold any of the information that was not timely submitted on either of those grounds. We also will determine whether any of the other information at issue is excepted from disclosure on those grounds or under any of the exceptions the city claims.

An interested third party is allowed ten business days from the date of its receipt of the governmental body's notice under section 552.305 of the Government Code to submit its reasons, if any, as to why information relating to that party should not be released. See Gov't Code § 552.305(d)(2)(B). As of the date of this decision, this office has received no correspondence from any of the third parties that were notified. Thus, none of the third parties has demonstrated that any of the information at issue is proprietary for the purposes of the Act. Therefore, the city may not withhold any of the submitted information on that basis. See *id.* § 552.110(a)-(b); Open Records Decision Nos. 552 at 5 (1990), 661 at 5-6 (1999).

Next, we address the city's exceptions to disclosure. 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. This exception encompasses common-law privacy, which protects information that is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and of no legitimate public interest. See *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Financial information that relates only to an individual ordinarily satisfies the first element of the common-law privacy test, but the public has a legitimate interest in the essential facts about a financial transaction between an individual and a governmental body. See Open Records Decision Nos. 600 at 9-12 (1992) (identifying public and private portions of certain state personnel records), 545 at 4 (1990) (attorney

³We 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).

general has found kinds of financial information not excepted from public disclosure by common-law privacy to generally be those regarding receipt of governmental funds or debts owed to governmental entities), 523 at 4 (1989) (noting distinction under common-law privacy between confidential background financial information furnished to public body about individual and basic facts regarding particular financial transaction between individual and public body), 373 at 4 (1983) (determination of whether public's interest in obtaining personal financial information is sufficient to justify its disclosure must be made on case-by-case basis). We have marked personal financial information that the city must withhold under section 552.101 in conjunction with common-law privacy. Because common-law privacy protects the interests of individuals, not those of business and governmental entities, financial information relating to a business entity may not be withheld on privacy grounds under section 552.101. See Open Records Decision Nos. 620 (1993) (corporation has no right to privacy), 192 (1978) (right to privacy is designed primarily to protect human feelings and sensibilities, rather than property, business, or other pecuniary interests); see also *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (cited in *Rosen v. Matthews Constr. Co.*, 777 S.W.2d 434 (Tex. App.—Houston [14th Dist.] 1989), *rev'd on other grounds*, 796 S.W.2d 692 (Tex. 1990)) (corporation has no right to privacy).

Section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege.⁴ 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 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 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. See TEX. R. EVID. 503(b)(1)(A)-(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

⁴Although you also claim the attorney-client privilege under section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503, we note that section 552.101 does not encompass discovery privileges. See Open Records Decision No. 676 at 1-3 (2002).

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).

You seek to withhold the memoranda submitted as Exhibit C under section 552.107(1). You state that the information at issue is related to the rendition of professional legal services to the city. You also state that the information was not intended to be disclosed to third parties, and you do not indicate that the privilege has been waived. Based on your representations and our review of the information at issue, we conclude that the city may withhold Exhibit C under section 552.107(1).⁵

We note that the remaining information appears to include a Texas driver’s license number. Section 552.130 of the Government Code excepts from disclosure information relating to a motor vehicle operator’s or driver’s license or permit issued by an agency of this state.⁶ *See* Gov’t Code § 552.130(a)(1). The city must withhold the information that we have marked under section 552.130.

Lastly, we note that some of the submitted information appears to be protected by copyright. A governmental body must allow inspection of copyrighted information unless an exception to disclosure applies to the information. *See* Attorney General Opinion JM-672 (1987). An officer for public information also must comply with copyright law, however, and is not required to furnish copies of copyrighted information. *Id.* A member of the public who wishes to make copies of copyrighted information 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 at 8-9 (1990).

In summary: (1) the city must withhold the information that we have marked under section 552.101 of the Government Code in conjunction with common-law privacy and

⁵As we are able to make this determination, we need not address your claim under section 552.111 of the Government Code.

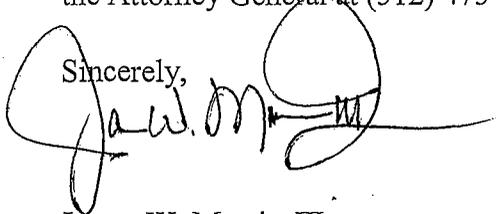
⁶Unlike other exceptions to disclosure under the Act, this office will raise section 552.130 on behalf of a governmental body, as this exception is mandatory and may not be waived. *See* Gov’t Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

section 552.130 of the Government Code; and (2) the city may withhold Exhibit C under section 552.107(1) of the Government Code. The rest of the submitted information must be released. Any information that is protected by copyright must be released in accordance with copyright law.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,

A handwritten signature in black ink, appearing to read "James W. Morris, III". The signature is written in a cursive style with a large, looping initial "J" and a long horizontal stroke extending to the right.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/cc

Ref: ID# 332205

Enc: Submitted documents

c: Requestor
(w/o enclosures)

Mr. Richard D. Hayes
Hayes, Berry, White & Vanzant
512 West Hickory Suite 100
Denton, Texas 76201
(w/o enclosures)

Mr. Stephen T. Meeks
Mr. Glenn O. Lewis
Linebarger Goggan Blair & Sampson
100 Throckmorton Suite 300
Fort Worth, Texas 76102
(w/o enclosures)

Mr. Gilbert T. Bragg
McCreary, Vesselka, Bragg & Allen
700 Jeffrey Way Suite 100
Round Rock, Texas 78665
(w/o enclosures)

Mr. Gregory J. Sawko
Law Offices of Sawko & Burroughs
1100 Dallas Drive Suite 100
Denton, Texas 76205
(w/o enclosures)

Ms. Sherry L. Shipman
Shipman Steppick
400 West Oak Street Suite 205
Denton, Texas 76201
(w/o enclosures)