



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

January 25, 2010

Ms. Leslie Spear Pearce  
City Attorney  
City of Plainview  
901 Broadway  
Plainview, Texas 79072

OR2010-01139

Dear Ms. Pearce:

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# 367905.

The City of Plainview (the "city") received a request for information relating to a former employee, including personnel, complaint, and investigation records. You state that some of the requested information has been released. You claim that other responsive information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.108, 552.111, 552.130, and 552.147 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the information you submitted. We also have considered the comments we received from the requestor.<sup>2</sup>

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<sup>1</sup>Although you also claim the attorney-client privilege under Texas Rule of Evidence 503 and the attorney work product privilege under Texas Rule of Civil Procedure 192.5, we note that the information for which you claim those provisions is not subject to section 552.022 of the Government Code. *See* Gov't Code § 552.022 (listing eighteen categories of information that must be released unless the information is confidential under other law or subject to Gov't Code § 552.022(a)(1) but excepted from disclosure under Gov't Code § 552.108); *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001) (Texas Rules of Evidence and Texas Rules of Civil Procedure are other law for purposes of Gov't Code § 552.022). Accordingly, this decision does not address rules 503 and 192.5.

<sup>2</sup>*See* Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

We first note that some of the information in Exhibits K and L was created subsequent to the city's receipt of this request for information. The Act does not require a governmental body to release information that did not exist when it received a request or create responsive information.<sup>3</sup> Thus, the submitted information that did not exist when the city received this request is not responsive to the request. This decision does not address the public availability of that information, which we have marked, and it need not be released in response to this request.

Next, we consider your claims for the responsive information in Exhibits H through K. Section 552.108 of the Government Code excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]" Gov't Code § 552.108(a)(1). A governmental body must reasonably explain how and why section 552.108 is applicable to the information at issue. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You explain that Exhibits H through K are related to a pending criminal investigation involving the former employee who is the subject of this request for information. You state that some of the information in Exhibit H has been released. You contend that the release of the remaining information in H and the responsive information in Exhibits I through K would interfere with the pending investigation. Based on your representations, we conclude that section 552.108(a)(1) is generally applicable to the remaining information in Exhibit H and the responsive information in Exhibits I through K. *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).

We note that section 552.108 does not except from disclosure "basic information about an arrested person, an arrest, or a crime." Gov't Code § 552.108(c). Section 552.108(c) refers to the basic front-page information held to be public in *Houston Chronicle*. *See* 531 S.W.2d at 186-88; Open Records Decision No. 127 (1976). Basic information includes an identification and description of the complainant and a detailed description of the offense. *See* ORD 127 at 3-4 (summarizing types of information deemed public by *Houston Chronicle*).

You seek to withhold the complainant's identity under section 552.101 of the Government Code in conjunction with the common-law informer's privilege. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses the informer's privilege, which Texas courts have long recognized. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969). The common-law informer's privilege protects

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<sup>3</sup>*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).

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. *See* Open Records Decision Nos. 515 at 3 (1998), 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." *See* 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 the informer's identity. *See* Open Records Decision No. 549 at 5 (1990).

In this instance, the former city employee to whom the submitted information pertains is the suspect in the pending criminal case. The former employee appears to know the identity of the complainant. The requestor is the former employee's attorney and, as such, would also have knowledge of the complainant's identity. We therefore conclude that the complainant's identity may not be withheld under section 552.101 in conjunction with the common-law informer's privilege. Instead, the city must release basic information under section 552.108(c), including an identification and description of the complainant and a detailed description of the offense, even if the information does not literally appear on the front page of an offense or arrest report. *See* ORD 127 at 3-4. The city may withhold the rest of the responsive information at issue in Exhibits H through K under section 552.108(a)(1) of the Government Code.<sup>4</sup>

Turning to your claims for Exhibit L, we begin with section 552.107 of the Government Code. Section 552.107(1) protects information that comes within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. *See* TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *See In re 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

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<sup>4</sup>As we are able to make this determination, we do not address your other claims for Exhibits H through K, except to note that section 552.103 of the Government Code does not generally except from disclosure the same basic information that must be released under section 552.108(c). *See* Open Records Decision No. 597 (1991).

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 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 pet.). 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 contend that Exhibit L contains privileged attorney-client communications. You state, however, that these communications occurred after the city received a claim letter from the requestor. You also inform us that the claim letter was received subsequent to the city’s receipt of this request for information. Thus, you have not demonstrated that any of the responsive information in Exhibit L, which was in existence prior to the date of the receipt of the information request, was communicated by or to an attorney for the city on or before the date of the city’s receipt of this request for that information. See Open Records Decision No. 530 at 5 (1989) (public character of records ordinarily cannot be changed after request for information has been made). Accordingly, we find that none of the information in question constitutes or documents a privileged attorney-client communication. We therefore conclude that the city may not withhold any of the responsive information in Exhibit L under section 552.107(1) of the Government Code.

You also claim the attorney work-product privilege under section 552.111 of the Government Code. Section 552.111 excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” Gov’t Code § 552.111. This exception encompasses the attorney work product privilege found at rule 192.5 of the Texas Rules of Civil Procedure. See TEX. R. CIV. P. 192.5; *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines attorney work product as consisting of

- (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or

(2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX.R.CIV.P. 192.5. A governmental body that seeks to withhold information on the basis of the attorney work product privilege under section 552.111 bears the burden of demonstrating that the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. *See id.*; ORD 677 at 6-8. In order for this office to conclude that information was created or developed in anticipation of litigation, we must be satisfied that

(a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and (b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

*Nat'l Tank Co. v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204; ORD 677 at 7.

You contend that the information in Exhibit L was assembled in anticipation of litigation. You acknowledge, however, that the city's claim of anticipated litigation is based on the claim letter that the city received subsequent to its receipt of this request for information. We note that the information for which you claim the attorney work product privilege generally consists of routine city records. Having considered your arguments, we find that you have not demonstrated that any of the information in Exhibit L consists of material prepared, mental impressions developed, or communications made in anticipation of litigation or for trial. *See* TEX.R.CIV.P. 192.5. We therefore conclude that the city may not withhold any of the responsive information in Exhibit L on the basis of the attorney work product privilege under section 552.111 of the Government Code.

We note that some of the submitted information falls within the scope of the common-law right to privacy under section 552.101 of the Government Code. Section 552.101 also 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). Common-law privacy encompasses certain types of personal financial information. This office has determined that 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 state employees' personnel

records), 545 at 4 (1990) (“In general, we have found the kinds of financial information not excepted from public disclosure by common-law privacy to be those regarding the 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 in Exhibits F and L that is intimate or embarrassing and not a matter of legitimate interest. Therefore, the marked information must generally be withheld under section 552.101 of the Government Code in conjunction with common-law privacy. Nevertheless, some of the marked information identifies beneficiaries designated by the former city employee to whom the submitted information pertains. The beneficiaries have their own separate rights to the privacy of their status as beneficiaries. In this instance, however, the beneficiaries are the former employee’s spouse and son. Accordingly, the requestor, as the former employee’s attorney, may be an authorized representative of the beneficiaries. To the extent that the requestor is the beneficiaries’ authorized representative, he has a right of access to their identities, and the city must release that information. *See* Gov’t Code § 552.023; Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individuals request information concerning themselves).<sup>5</sup> To the extent that the requestor is not the beneficiaries’ authorized representative, their identities must be withheld. In either event, the city must withhold the rest of the marked personal financial information under section 552.101 in conjunction with common-law privacy.

Next, we address your claim under section 552.130 of the Government Code. This section excepts from disclosure information relating to a motor vehicle operator’s or driver’s license or permit or a motor vehicle title or registration issued by an agency of this state. *See* Gov’t Code § 552.130(a)(1)-(2). The city must withhold the Texas motor vehicle information we have marked in Exhibit L under section 552.130. We note that the submitted information also includes the former employee’s Texas driver’s license number. Because section 552.130 protects personal privacy, the requestor also has a right to the former employee’s Texas driver’s license number. *See* Gov’t Code § 552.023(a); ORD 481 at 4.<sup>6</sup>

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<sup>5</sup>Section 552.023 of the Government Code provides in part that “[a] person or a person’s authorized representative has a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect that person’s privacy interests.” Gov’t Code § 552.023(a).

<sup>6</sup>We note that other Texas driver’s license and license plate numbers have been redacted from the responsive documents. The redaction of these types of information is now permitted by the previous determination issued in Open Records Decision 684 (2009), which authorizes all governmental bodies to withhold ten categories of information without the necessity of requesting an attorney general decision. In the future, however, the city must not redact requested information that it submits to this office in seeking an open records ruling unless the city has specific authorization to withhold such information without the necessity of

We note that section 552.136 of the Government Code is applicable to some of the submitted information.<sup>7</sup> Section 552.136(b) provides that “[n]otwithstanding any other provision of [the Act], 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.” *Id.* § 552.136(b); *see id.* § 552.136(a) (defining “access device”). The city must withhold the bank account and bank routing numbers we have marked in Exhibit F under section 552.136.

Lastly, section 552.147 of the Government Code provides that “[t]he social security number of a living person is excepted from” required public disclosure under the Act. *Id.* § 552.147(a). You state that the city has redacted social security numbers from the responsive documents pursuant to section 552.147(b), which 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. In this instance, however, the social security numbers in question are those of the former employee and his spouse. As the former employee’s attorney, the requestor has a right to his client’s social security number. The requestor also a right to the spouse’s social security number if he is her authorized representative. *See generally id.* § 552.023(b) (governmental body may not deny access to person to whom information relates, or that person’s representative, solely on grounds that information is considered confidential by privacy principles).

In summary: (1) the city may withhold the remaining information in Exhibit H and the responsive information in Exhibits I through K under section 552.108(a)(1) of the Government Code, except for the basic information that must be released under section 552.108(c); (2) the city must withhold the marked personal financial information in Exhibits F and L under section 552.101 of the Government Code in conjunction with common-law privacy, except to the extent that the requestor has a right of access under section 552.023 of the Government Code to the beneficiaries’ identities; (3) the Texas motor vehicle information we have marked in Exhibit L must be withheld under section 552.130 of the Government Code; and (4) the bank account and bank routing numbers we have

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asking this office for a decision. *See Gov't Code* §§ 552.301(e)(1)(D). Failure to comply with section 552.301 may result in the information being presumed public under section 552.302 of the Government Code. *See id.* § 552.302.

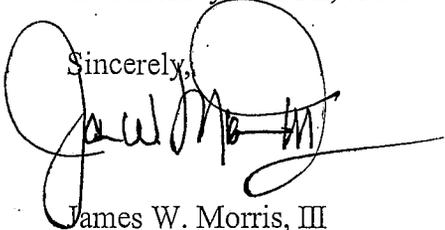
<sup>7</sup>Unlike other exceptions to disclosure under the Act, this office will raise section 552.136 on behalf of a governmental body, as this exception is mandatory and may not be waived. *See Gov't Code* §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

marked in Exhibit F must be withheld under section 552.136 of the Government Code.<sup>8</sup> The rest of the responsive information must be released.<sup>9</sup>

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](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, toll free, at (888) 672-6787.

Sincerely,



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

JWM/cc

Ref: ID# 367905

Enc: Submitted information

c: Requestor  
(w/o enclosures)

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<sup>8</sup>As noted previously, this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information without the necessity of requesting an attorney general decision, including a Texas license plate number under section 552.130 and a bank account number and bank routing number under section 552.136.

<sup>9</sup>We note that the submitted documents contain information that the city would ordinarily be required to withhold from the public on privacy grounds. The requestor has a right of access, however, to that information as an authorized representative of the former employee to whom the information pertains. Should the city receive another request for these same records from a person who would not have a right of access to the former employee's private information, the city should resubmit these records and request another decision. See Gov't Code §§ 552.301, .302.