



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 1, 2010

Ms. Cara Leahy White
Taylor Olson Adkins Sralla Elam L.L.P.
For City of Southlake
6000 Western Place, Suite 200
Fort Worth, Texas 76107-4654

OR2010-01532

Dear Ms. White:

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# 368817.

The City of Southlake (the "city"), which you represent, received a request for various personnel and job performance records regarding eight named individuals; all evidence pertaining to a specified incident; police standard operating procedures for conducting criminal investigations; a specified contract; a specified city ordinance; specified e-mails; information regarding a named individual; and all information from a specified time period pertaining to the requestor, excluding any e-mails sent to or from the requestor. You state the city will provide some of the requested information to the requestor. You claim the submitted e-mails and attachments, personnel records, and letters are excepted from disclosure under sections 552.101, 552.107, 552.117, 552.130, 552.137, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, you inform us a portion of the submitted information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2009-09517 (2009). In that ruling, we concluded the city must withhold portions of the information at issue under section 552.101 of the Government Code in conjunction with section 418.812 of the Government Code and under section 552.136 of the Government Code. Because you state the law, facts, and circumstances on which the prior ruling was based have not changed, the city must continue to rely on that ruling as a previous

determination and withhold or release the previously ruled upon information in accordance with Open Records Letter No. 2009-09517. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

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 section encompasses information made confidential by other statutes, such as section 418.182 of the Texas Homeland Security Act (the “HSA”), chapter 418 of the Government Code. Section 418.182 provides:

- (a) Except as provided by Subsections (b) and (c), information, including access codes and passwords, in the possession of a governmental entity that relates to the specifications, operating procedures, or location of a security system used to protect public or private property from an act of terrorism or related criminal activity is confidential.

Id. § 418.182. The fact that information may be related to a governmental body’s security concerns does not make such 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).

You state a portion of the remaining information identifies the location of a city security system. Upon review, we determine the information you have marked relates to the location of a security system used to protect public or private property from an act of terrorism or related criminal activity. Accordingly, the city must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 418.182 of the Government Code.

Section 552.101 of the Government Code also encompasses section 1703.306 of the Occupations Code, which provides:

- (a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:

- (1) the examinee or any other person specifically designated in writing by the examinee;
- (2) the person that requested the examination;
- (3) a member, or the member's agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner's activities;
- (4) another polygraph examiner in private consultation; or
- (5) any other person required by due process of law.

(b) The [Polygraph Examiners] Board or any other governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information.

(c) A polygraph examiner to whom information acquired from a polygraph examination is disclosed under Subsection (a)(4) may not disclose the information except as provided by this section.

Occ. Code § 1703.306. You claim the polygraph examination results in the remaining information are excepted under section 1703.306. We agree this information is within the scope of section 1703.306. We note the information pertains to a polygraph examination of the requestor. Thus, the city has the discretion to release the requestor's polygraph examination information pursuant to section 1703.306(a)(1) of the Occupations Code. *See* Open Records Decision No. 481 at 9 (1987) (predecessor to section 1703.306 permitted, but did not require, polygraph examination results to be disclosed to examinees). Otherwise, the city must withhold the polygraph examination results under section 552.101 of the Government Code in conjunction with section 1703.306(a) of the Occupations Code.

Section 552.101 of the Government Code 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). To establish the applicability of common-law privacy, both prongs of this test must be demonstrated. *Id.* at 681-82. This office has found some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Common-law privacy does not, however, protect all medically-related information. *See* Open Records Decision No. 478 (1987). Individual determinations are required. *See* Open Records Decision No. 370 (1983). You claim some of the remaining information is protected by common-law

privacy because it identifies an employee's medical condition. Upon review, we agree the medical information that identifies the employee's specific medical condition, which we have marked, is highly intimate or embarrassing and is not of legitimate public concern. Accordingly, the information we have marked must be withheld under section 552.101 of the Government Code in conjunction with common-law privacy. You have failed to demonstrate how the remaining information you seek to withhold under common-law privacy identifies the employee's medical condition. Consequently, the remaining information at issue may not be withheld under section 552.101 of the Government Code in conjunction with common-law privacy. As you have claimed no other exceptions to disclosure for this information, it must be released.

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 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, lawyer representatives, and lawyers representing another party in a pending action concerning a matter of common interest therein. 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. *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 have marked the e-mails and attachments in the remaining information you claim are protected by the attorney-client privilege. You state the marked e-mails and attachments are communications between attorneys for the city and city officials, and between city officials discussing legal advice received from attorneys for the city. You also state these communications were made in furtherance of the rendition of professional legal services, the communications were made in confidence, and that confidentiality has been maintained. Based on your representations and our review of the information at issue, we find you have demonstrated the applicability of the attorney-client privilege to the marked e-mails and attachments. Thus, the city may withhold the marked e-mails and attachments under section 552.107 of the Government Code.

You claim some of the remaining information is excepted under section 552.117 of the Government Code. Section 552.117(a)(2) excepts from public disclosure the home addresses, home telephone numbers, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with sections 552.024 and 552.1175 of the Government Code.¹ Gov't Code § 552.117(a)(2). You have marked the home addresses and social security number of a peace officer, and we have marked the officer's home telephone numbers. This information must be withheld under section 552.117(a)(2) of the Government Code.²

Section 552.117(a)(1) of the Government Code excepts from disclosure the current and former 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 this information be kept confidential under section 552.024 of the Government Code. *Id.* § 552.117(a)(1). Additionally, section 552.117 encompasses personal cellular telephone numbers, provided the cellular telephone service is paid for by the employee with his or her own funds. *See* Open Records Decision No. 670 at 6 (2001) (extending section 552.117(a)(1) exception to personal cellular telephone number and personal pager number of employee who elects to withhold home telephone number in accordance with section 552.024). 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). The city may only withhold information under section 552.117(a)(1) on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. You state, and provide documentation showing, the employees whose information is at issue timely chose to not allow public access to their home addresses, home telephone numbers, social security numbers, and family member information. You have marked home addresses, a home telephone number, and a cellular telephone number that you claim are protected

¹"Peace officer" is defined by Article 2.12 of the Texas Code of Criminal Procedure.

²As our ruling for this information is dispositive, we need not address your remaining argument for a portion of this information.

under section 552.117. Additionally, we have marked the cellular telephone number of one of the employees at issue. Upon review, we agree the city must withhold the marked personal information pursuant to section 552.117(a)(1) of the Government Code. However, if the employees at issue do not pay for the cellular telephone service for the marked cellular telephone numbers, the marked cellular telephone numbers may not be withheld under section 552.117(a)(1) of the Government Code.

You seek to withhold Texas driver's license numbers, which you have marked, in the remaining information. Section 552.130 of the Government Code provides information relating to a motor vehicle operator's or driver's license, title, or registration issued by a Texas agency is excepted from public release. Gov't Code § 552.130(a)(1), (2). Thus, the city must withhold the marked driver's license numbers, as well as the driver's license class we have marked, under section 552.130 of the Government Code.

You claim some of the e-mail addresses in the remaining information are confidential under section 552.137 of the Government Code. This section provides "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]," unless the owner of the e-mail address has affirmatively consented to its public disclosure. *Id.* § 552.137(a)-(c). The types of e-mail addresses listed in section 552.137(c) may not be withheld under this exception. *See id.* § 552.137(c). Likewise, section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees.

You have marked the e-mail addresses you seek to withhold. We note, however, that some of those e-mail addresses are maintained by governmental bodies for their employees. Thus, those e-mail addresses, which we have marked for release, may not be withheld under section 552.137 of the Government Code. *See id.* § 552.137(c)(1). You state the owners of the remaining e-mail addresses at issue have not consented to the release of their information. Accordingly, the city must withhold the remaining marked e-mail addresses under section 552.137 of the Government Code.

In summary, the city must continue to rely on Open Records Letter No. 2009-09517 as a previous determination and withhold or release the previously ruled upon information in accordance with that ruling. The city has the discretion to release the requestor's polygraph examination information pursuant to section 552.101 of the Government Code in conjunction with section 1703.306(a)(1) of the Occupations Code. The city may withhold the e-mails and attachments you have marked under section 552.107 of the Government Code. The city must withhold the marked security system location information under section 552.101 of the Government Code in conjunction with section 418.182 of the Government Code; the marked information under section 552.101 of the Government Code in conjunction with common-law privacy; the marked addresses, telephone numbers, and social security number under section 552.117(a)(2) of the Government Code; the marked addresses and telephone numbers under section 552.117(a)(1) of the Government Code, however, the marked cellular

telephone numbers may only be withheld if the city does not pay for the cellular service; the marked driver's license information under section 552.130 of the Government Code; and, with the exception of the e-mail addresses we have indicated, the marked e-mail addresses under section 552.137 of the Government Code.³ The remaining information must be released.

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

Sincerely,



Ana Carolina Vieira
Assistant Attorney General
Open Records Division

ACV/dls

Ref: ID# 368817

Enc. Submitted documents

c: Requestor
(w/o enclosures)

³We note 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, including Texas driver's license numbers under section 552.130 of the Government Code and e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.