



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 29, 2010

Ms. Julia Gannaway
Lynn Pham & Ross, L.L.P.
306 West Broadway Avenue
Forth Worth, Texas 76104

OR2010-04361

Dear Ms. Gannaway:

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# 374044.

The City of La Marque (the "city"), which you represent, received a request for the city manager's contract and all e-mails and correspondence from any city or personal computer or cell phone pertaining to city business by a named individual to all department heads and interim department heads including named individuals since January 31, 2009. You state you will release a portion of the requested information. You have redacted social security numbers pursuant to section 552.147 of the Government Code.¹ You claim that the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.117, 552.130, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

¹Section 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.

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.

Initially, we note that the submitted documents include a CR-3 accident form completed pursuant to chapter 550 of the Transportation Code. *See* Transp. Code § 550.064 (officer's accident report). Section 550.065(b) states that, except as provided by subsection (c) or (e), accident reports are privileged and confidential. *Id.* § 550.065. Section 550.065(c)(4) provides for the release of accident reports to a person who provides two of the following three pieces of information: (1) date of the accident; (2) name of any person involved in the accident; and (3) specific location of the accident. *Id.* § 550.065(c)(4). Under this provision, the Texas Department of Transportation or another governmental entity is required to release a copy of an accident report to a person who provides the agency with two or more pieces of information specified by the statute. *Id.* In this instance, the requestor has not provided the city with two of the three pieces of information. Therefore, you must withhold the accident report in Exhibit C, which we have marked, pursuant to section 550.065(b) of the Transportation Code.

Next, we note that Exhibit B contains an attorney fee bill which is subject to section 552.022(a)(16) of the Government Code. Section 552.022(a)(16) provides for required public disclosure of "information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege," unless the information is expressly confidential under "other law." Gov't Code § 552.022(a)(16). Although you seek to withhold Exhibit B under section 552.107 of the Government Code, that section is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See* Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.107 is not "other law" that makes information confidential for the purposes of section 552.022(a)(16), and the district may not withhold the fee bill in Exhibit B under that exception. The Texas Supreme Court has held, however, that the Texas Rules of Evidence are "other law" within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Accordingly, we will address your attorney-client privilege claim under rule 503 of the Texas Rules of Evidence for the fee bill in Exhibit B. We will also address your claimed exceptions for the information that is not subject to section 552.022.

Rule 503 of the Texas Rules of Evidence encompasses the attorney-client privilege and provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

- (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
- (B) between the lawyer and the lawyer's representative;

(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if 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). Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You state that the submitted attorney fee bill contains confidential communications between the city manager, police chief, and fire chief concerning attorneys' fees. You state that these communications were made for the purpose of facilitating the rendition of professional legal services to the city. Further, you state the submitted fee bill was intended to be, and has remained, confidential. Based on your representations and our review, we agree that the attorney fee bill in Exhibit B-3 contains information that reveals confidential communications between privileged parties. Accordingly, we have marked the information that is protected by the attorney-client privilege and may therefore be withheld pursuant to rule 503 of the Texas Rules of Evidence. We note, however, that you have failed to identify some of the parties to the communications in the submitted attorney fee bills. *See* ORD 676 at 8 (governmental body must inform this office of identities and capacities of individuals to whom each communication at issue has been made; this office cannot necessarily assume that communication was made only among categories of individuals identified in rule 503); *see generally* Open Records Decision No. 150 (1977) (predecessor to Act places burden on governmental body to establish why and how exception applies to requested information); *Strong v. State*, 773 S.W. 2d 543, 552 (Tex. Crim. App. 1989) (burden of establishing attorney-client privilege is on party asserting it). We further note that some of the remaining information does not document communications. Thus, you have failed to demonstrate that

the remaining information documents privileged attorney-client communications. Accordingly, none of the remaining information in Exhibit B-3 may be withheld under Texas Rule of Evidence 503.

We next turn to the information not subject to section 552.022, found in Exhibits B, C, D, E, F, and G. You raise section 552.107 of the Government Code for the remaining information in Exhibits B and G. Section 552.107(1) of the Government Code 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 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 state that the information you have marked in Exhibits B and G constitutes privileged attorney-client communications for the purpose of furthering professional legal services to the city. You further state that the communications contain legal advice and opinion. You have identified the parties to the communications. You state the communications were

intended to be confidential, and you indicate that the communications have maintained their confidentiality. Based on your representations and our review of the information at issue, we find that the city has established that the information you have marked consists of attorney-client privileged communications. Therefore, we conclude that the city may withhold the information you have marked in Exhibits B-1, B-2, B-4, B-5, and G under section 552.107(1) of the Government Code.³

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. Section 552.101 encompasses the common-law right of privacy, which protects information if it (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* include 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 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). In addition, this office has found that personal financial information not relating to a financial transaction between an individual and a governmental body is generally protected by common-law privacy. *See* Open Records Decision Nos. 600 (1992) (employee's designation of retirement beneficiary, choice of insurance carrier, election of optional coverages, direct deposit authorization, forms allowing employee to allocate pretax compensation to group insurance, health care or dependent care), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). Upon review, we find that the information we have marked is highly intimate or embarrassing and not of legitimate public concern. Therefore, the city must withhold the information we have marked under section 552.101 of the Government Code pursuant to common-law privacy. However, the remaining information you have marked is not intimate or embarrassing or is of legitimate public interest. Thus, the city may not withhold any of the remaining information you have marked under common-law privacy.

Section 552.101 also encompasses the Americans with Disabilities Act (the "ADA"), which provides for the confidentiality of certain medical records of employees and applicants. Specifically, the ADA provides that information about the medical conditions and medical histories of applicants or employees must be (1) collected and maintained on separate forms,

³As our ruling for this information is dispositive, we do not address your remaining argument against disclosure.

(2) kept in separate medical files, and (3) treated as a confidential medical record. In addition, an employer's medical examination or inquiry into the ability of an employee to perform job-related functions is to be treated as a confidential medical record. 29 C.F.R. § 1630.14(c); *see also* Open Records Decision No. 641 (1996). The Equal Employment Opportunity Commission determined medical information for the purposes of the ADA includes "specific information about an individual's disability and related functional limitations, as well as, general statements that an individual has a disability or that an ADA reasonable accommodation has been provided for a particular individual." *See* Letter from Ellen J. Vargyas, Legal Counsel, EEOC, to Barry Kearney, Associate General Counsel, National Labor Relations Board, 3 (Oct. 1, 1997). Federal regulations define "disability" for the purposes of the ADA as "(1) a physical or mental impairment that substantially limits one or more of the major life activities of the individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment." 29 C.F.R. § 1630.2(g). The regulations further provide that physical or mental impairment means: (1) any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or (2) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. *See id.* § 1630.2(h). Upon review, we find the city has failed to demonstrate the ADA is applicable to any portion of the remaining submitted information. Accordingly, the city may not withhold any of the submitted information under section 552.101 on that basis.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(1). We note that a post office box number is not a "home address" for purposes of section 552.117. *See id.*; Open Records Decision No. 622 at 4 (1994) (legislative history makes clear that purpose of section 552.117 is to protect public employees from being harassed *at home*) (citing House Committee on State Affairs, Bill Analysis, H.B. 1979, 69th Leg. (1985)) (emphasis added). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who did not timely request under section 552.024 that the information be kept confidential. Therefore, to the extent the employees made a timely request for confidentiality under section 552.024, you must withhold the remaining information we have marked in Exhibits D and E under section 552.117(a)(1) of the Government Code. If the employees did not

timely elect confidentiality for the marked information, the city may not withhold the marked information under section 552.117(a)(1) of the Government Code.

Section 552.130 excepts from public disclosure information that relates to a Texas motor vehicle operator's or driver's license or permit or Texas motor vehicle title or registration. Gov't Code § 552.130(a)(1), (2). Thus, the city must withhold the Texas motor vehicle record information you have marked in the remaining information, in addition to the information we have marked, under section 552.130 of the Government Code.

Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a 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 id.* § 552.137(a)-(c). You have marked e-mail addresses within the submitted information in Exhibit F that are subject to section 552.137(a). You state you have not received consent to release these e-mail addresses. Therefore, the city must withhold the e-mail addresses you have marked, in addition to the information we have marked, pursuant to section 552.137 of the Government Code.

In summary, (1) the city must withhold the accident report we have marked pursuant to section 550.065(b) of the Transportation Code; (2) the city may withhold the information we have marked in Exhibit B-3 under rule 503 of the Texas Rules of Evidence; (3) the city may withhold the information you have marked in Exhibits B-1, B-2, B-4, B-5, and G under section 552.107(1) of the Government Code; (4) the city must withhold the information we have marked under section 552.101 in conjunction with common-law privacy; (5) to the extent the employees timely requested confidentiality under section 552.024, the city must withhold the information we have marked under section 552.117(a)(1) of the Government Code; (6) the city must withhold the Texas motor vehicle record information you have marked, in addition to the information we have marked, under section 552.130 of the Government Code; and (7) the city must withhold the e-mail addresses you have marked, in addition to the e-mail addresses we have marked, under section 552.137 of the Government Code.⁴ 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.

⁴We 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, Texas license plate numbers, and the portion of a photograph that reveals a Texas license plate number 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.

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,



Andrea L. Caldwell
Assistant Attorney General
Open Records Division

ALC/eeg

Ref: ID# 374044

Enc. Submitted documents

c: Requestor
(w/o enclosures)