



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 9, 2010

Ms. Cara Leahy White  
Counsel to the City of Southlake  
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6000 Western Place, Suite 200  
Fort Worth, Texas 76107-4654

OR2010-10159

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# 385998.

The City of Southlake (the "city"), which you represent, received a request for nineteen categories of information relating to the requestor, specified investigations, a specified address, a named consulting agency, several named individuals and employees, a "SWOT" survey," and certain video footage. You state some of the requested information has been released with redactions made under section 552.117 of the Government Code pursuant to section 552.024(c)(2) of the Government Code.<sup>1</sup> You also state you have redacted certain information pursuant to Open Records Decision No. 684 (2009).<sup>2</sup> You claim portions of the submitted information are excepted from disclosure under sections 552.101, 552.107, 552.108, 552.117, and 552.139 of the Government Code. We have considered the

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<sup>1</sup>Section 552.024(c)(2) of the Government Code allows a governmental body to redact the home address and telephone number, social security number, and family member information pertaining to employees who properly elected to keep their information confidential without the necessity of requesting a ruling from this office. *See* Gov't Code § 552.024(c)(2).

<sup>2</sup>This office recently issued Open Records Decision No. 684 (2009), a previous determination authorizing all governmental bodies to withhold ten categories of information without the necessity of requesting an attorney general decision.

exceptions you claim and reviewed the submitted information, portions of which are representative samples.<sup>3</sup>

Initially, we note a portion of the submitted information, which we have marked, is not responsive to the instant request because it was created after the date the request was received. The city need not release nonresponsive information in response to this request and this ruling will not address that information.

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 protected by other statutes, such as section 418.176 of the Texas Homeland Security Act, chapter 418 of the Government Code (the "HSA"). Section 418.176 of the Government Code provides, in pertinent part:

(a) Information is confidential if the information is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, responding to, or investigating an act of terrorism or related criminal activity and:

...

(3) consists of a list or compilation of pager or telephone numbers, including mobile and cellular telephone numbers, of the provider.

*Id.* § 418.176(a)(3). The fact that information may relate to a governmental body's security concerns or emergency management activities does not make the 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 assert the document you have marked consists of the contact information of emergency services providers throughout the state that was compiled by the Emergency Preparedness Department of the North Central Texas Council of Governments. You state this information is maintained for the purpose of responding to an act of terrorism or related criminal activity.

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<sup>3</sup>We assume the representative samples of records submitted to this office are 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.

Based upon your representations and our review, we find the information at issue contains telephone numbers that were collected, assembled, or maintained by or for a governmental entity for the purpose of responding to an act of terrorism or related criminal activity. *See id.* § 418.176(a)(3). Accordingly, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 418.176(a)(3) of the Government Code.<sup>4</sup> However, the remaining information at issue does not consist of pager or telephone numbers. Consequently, none of the remaining information may be withheld under section 552.101 on that basis.

Section 1703.306 of the Occupations Code provides in part:

(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[.]

Occ. Code § 1703.306. As you acknowledge, a portion of the submitted information is related to a polygraph examination in which the requestor was the examinee. We have marked information acquired from a polygraph examination that is confidential under section 552.101 in conjunction with section 1703.306. However, we note the city has the discretion to release the marked information to this requestor pursuant to section 1703.306(a)(1). *See* Open Records Decision No. 481 at 9 (1987) (statutory predecessor to Occ. Code § 1703.306 permitted, but did not require, examination results to be disclosed to polygraph examinees).

Section 552.101 of the Government Code encompasses section 58.007 of the Family Code, which makes confidential juvenile law enforcement records relating to conduct that occurred on or after September 1, 1997. The relevant language of section 58.007(c) reads as follows:

(c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

(1) if maintained on paper or microfilm, kept separate from adult files and records;

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<sup>4</sup>As our ruling is dispositive, we need not address your remaining arguments as they pertain to this information.

(2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and

(3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapters B, D, and E.

Fam. Code § 58.007(c). You assert a portion of the remaining information is excepted from disclosure under section 58.007 of the Family Code. We note, however, section 58.007 does not make information relating to traffic offenses confidential. *See id.* §§ 51.02(16) (defining traffic offense), 51.03(a) (delinquent conduct does not include traffic offense), 51.03(b) (conduct indicating need for supervision does not include traffic offense), 58.007(b) (section applies to records and files relating to child who is party to proceeding under title 3 of Family Code). Because the information at issue does not involve delinquent conduct or conduct indicating a need for supervision for purposes of the Family Code, we conclude that section 58.007 is not applicable to this information. Consequently, the city may not withhold any portion of the information at issue under section 552.101 in conjunction with section 58.007 of the Family Code.

Section 552.101 of the Government Code also encompasses the doctrine of common-law 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). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. The types of information considered intimate or 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. In addition, this office has found some kinds of medical information or information indicating disabilities or specific illnesses is protected by 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).

This office has also found personal financial information relating only to an individual ordinarily satisfies the first requirement of the test for common-law privacy, but there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See* Open Records Decision Nos. 600 (1992) (finding personal financial information to include designation of beneficiary of employee's retirement benefits and optional insurance coverage; choice of particular insurance carrier; direct deposit authorization; and 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). However, where a transaction is funded in part by a governmental body, it involves the employee in a transaction with the governmental body, and the basic facts about that transaction are not private under section 552.101. ORD 600 at 9 (basic facts of group insurance provided by governmental body not protected by common-law privacy). However, we note a person has a special right of access to private information concerning himself under section 552.023 of the Government Code. *See* Gov't Code § 552.023(a); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual or her authorized representative requests information concerning individual).

Upon review, we agree some of the information at issue is highly intimate or embarrassing and not of legitimate public concern. We have marked a representative sample of this information. Accordingly, apart from information pertaining to the requestor, the city must withhold the information we have indicated in the documents and on the submitted audio recording under section 552.101 of the Government Code in conjunction with the common-law right of privacy. We agree some of the remaining information at issue also contains information about city employees which may be considered intimate and embarrassing. However, because this information pertains to workers' compensation claims, we find there is a legitimate public interest in it. *See* Open Records Decision Nos. 545 at 4 (1990) (attorney 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), 423 at 2 (1984) (scope of public employee privacy is narrow). Furthermore, some of the remaining information relates to individuals who are not identified. Consequently, we find the remaining information at issue is either not highly intimate or embarrassing, or is of legitimate public interest. Accordingly, none of the remaining information may be withheld under section 552.101 in conjunction with common-law privacy.

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 Texas 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, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. 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. *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 assert a portion of the remaining information, which you have marked, consists of communications between and amongst city staff, city council members, and city attorneys that were made for the purpose of providing legal advice to the city. You have identified the parties involved in the communications. You assert these communications were made in confidence and have maintained their confidentiality. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the submitted information at issue, which the city may generally withhold under section 552.107 of the Government Code. However, we note some of the individual e-mails in the otherwise privileged e-mail chains consist of communications with non-privileged parties. Furthermore, we note some of the attachments to privileged e-mails have been seen by non-privileged parties. These non-privileged documents, to the extent they exist separate and apart from privileged communications, are responsive to the request. Accordingly, to the extent these non-privileged e-mails and e-mail attachments, which we have marked, exist separate and apart from the submitted e-mail chains, they may not be withheld under section 552.107.

Section 552.108 of the Government Code provides in part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if:

(1) release of the information would interfere with the detection, investigation or prosecution of crime; [or]

(2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication[.]

Gov't Code § 552.108(a)(1), (2). The protections offered by sections 552.108(a)(1) and 552.108(a)(2) of the Government Code are, generally, mutually exclusive. Section 552.108(a)(1) generally applies to information that pertains to particular criminal investigations or prosecutions, while section 552.108(a)(2) protects law enforcement records that pertain to criminal investigations and prosecutions that have concluded in final results other than criminal convictions or deferred adjudication. A governmental body claiming section 552.108(a)(1) must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). A governmental body that claims section 552.108(a)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. *See Gov't Code* §§ 552.108(a)(2), .301(e)(1)(A).

In this instance, you generally assert portions of the submitted information pertain to ongoing investigations and portions of the submitted information pertain to investigations which did not result in conviction or deferred adjudication. However, because you have failed to specify what portions of the remaining information are excepted from disclosure under section 552.108(a)(1) and which are excepted from disclosure under section 552.108(a)(2), this office is unable to determine whether these sections apply to any of the information at issue. Consequently, we find the city has failed to demonstrate the applicability of section 552.108(a)(1) or section 552.108(a)(2), and none of the remaining information may be withheld on this basis.

You raise section 552.117 of the Government Code for portions of the remaining information. Section 552.117(a)(2) excepts from disclosure the home address, home telephone number, 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 section 552.024 or 552.1175 of the Government Code. *Id.* § 552.117(a)(2). Section 552.117 also encompasses personal cellular telephone numbers, provided that the cellular telephone service is paid for by the employee with his or her own funds. *See Open Records Decision No. 506 at 5-6 (1988)* (section 552.117 not applicable to cellular mobile numbers paid for by governmental body and intended for official use). However, we note a post office box number is not a "home address" for purposes of section 552.117. *See 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). Section 552.117(a)(2) adopts the definition of peace officer found at article 2.12 of the Code of Criminal Procedure. However, we note section 552.117 protects personal privacy; therefore, the requestor has a right of access to the information concerning himself. Gov't Code § 552.023.

We have marked a representative sample of the information that may be subject to section 552.117(a)(2). We are unable to determine from the information provided which, if any, of the individuals at issue are currently licensed peace officers. Thus, we must rule conditionally. To the extent the individuals at issue are currently licensed peace officers as defined by article 2.12, the city must withhold the information we have indicated, apart from information pertaining to the requestor, under section 552.117(a)(2); however, the city may only withhold a cellular telephone number if the cellular telephone service was paid for with the employee's own funds. To the extent the individuals at issue are not currently licensed peace officers, the city may not withhold the information at issue under section 552.117(a)(2).

If the individuals are not currently licensed peace officers, section 552.117(a)(1) may apply to the information at issue, as well as to information relating to other former or current employees. Section 552.117(a)(1) of the Government Code exempts from public 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 id.* § 552.117(a)(1). Whether a particular piece of 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). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former official or 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 the information. Accordingly, to the extent that the employees to whom this information pertains timely elected confidentiality under section 552.024, the city must withhold the information we have indicated, apart from information pertaining to the requestor, under section 552.117(a)(1). As previously noted, the city may only withhold a cellular telephone number if the cellular telephone service was paid for with the employee's own funds.<sup>5</sup>

We note portions of the remaining information are subject to section 552.136 of the Government Code.<sup>6</sup> Section 552.136 states "[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." Gov't Code § 552.136. This office has also concluded insurance policy numbers constitute access device numbers for purposes of section 552.136. *See id.* § 552.136(a) (defining "access device").

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<sup>5</sup>Regardless of the applicability of section 552.117, 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. *See* Gov't Code § 552.147(b).

<sup>6</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Accordingly, the city must withhold the information we have marked under section 552.136 of the Government Code.<sup>7</sup>

You assert portions of the remaining information are excepted from disclosure under section 552.139 of the Government Code. Section 552.139 provides that information is excepted from required public disclosure "if it is information that relates to computer network security, to restricted information under Section 2059.055, or to the design, operation, or defense of a computer network." *Id.* § 552.139(a). You state the information you have marked contains computer usernames and passwords used to access a computer network and wireless data card numbers which could be used to gain unauthorized access to city computers. Upon review, we agree the city must withhold the information we have marked under section 552.139 of the Government Code. However, the remaining information at issue does not relate to computer network security, to restricted information under section 2059.055, or to the design, operation, or defense of a computer network. Accordingly, none of the remaining information at issue may be withheld under section 552.139.

In summary, the city must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 418.176(a)(3) of the Government Code. The polygraph information we marked is confidential under section 1703.306 of the Occupations Code; however, the city has the discretion to release this information to the requestor pursuant to section 1703.306(a)(1). The city must withhold the information we indicated in the documents and audio recording, apart from information pertaining the requestor, under section 552.101 in conjunction with common-law privacy. The city may withhold the information you marked under section 552.107 of the Government Code; however, to the extent the non-privileged e-mails and e-mail attachments we marked exist separate and apart from the submitted e-mail chains, they may not be withheld under section 552.107. To the extent the individuals at issue are currently licensed peace officers, the city must withhold the information we indicated under section 552.117(a)(2) of the Government Code, apart from information pertaining to the requestor. If the individuals are not currently licensed peace officers, to the extent the employees timely elected confidentiality under section 552.024, the city must withhold the information we indicated under section 552.117(a)(1) of the Government Code, apart from information pertaining to the requestor. The city must also withhold the information we marked and indicated under section 552.117(a)(1) pertaining to all other current or former employees, to the extent those employees timely elected confidentiality. In either case, a cellular telephone number may only be withheld if the cellular telephone service was paid for with the employee's own funds. Finally, the city must withhold the information we marked under section 552.136 of

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<sup>7</sup>As noted above, Open Records Decision No. 684 (2009) is a previous determination authorizing all governmental bodies to withhold ten categories of information, including insurance policy numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

the Government Code and section 552.139 of the Government Code. The remaining responsive information must be released to this requestor.<sup>8</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,



Matt Entsminger  
Assistant Attorney General  
Open Records Division

MRE/tp

Ref: ID# 385998

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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<sup>8</sup>Should the city receive another request for these same records from a person who would not have a right of access to the requestor's private information, the city should resubmit these records and request another decision. See Gov't Code §§ 552.301(a), .302.