



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 19, 2010

Ms. Jenny Gravley
Taylor, Olson, Adkins, Sralla, Elam, L.L.P.
6000 Western Place, Suite 200
Fort Worth, Texas 76107-4654

OR2010-10730

Dear Ms. Gravley:

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# 387099.

The City of Southlake (the "city") received two requests for: 1) complaints, requests for corrective action, disciplinary files, and internal affairs investigations pertaining to eleven named individuals; any information that mentions the requestor or the requestor's sons; any information regarding the requestor's son that was recorded by Lt. Ben Brown or any employee of the Department of Public Safety ("DPS") without the requestor's son's knowledge, or, if consent was given, the statement where consent is given; and all requests for open records for all DPS employees from April 28, 2007 until April 28, 2010; and 2) witness statements, employee statements, and Garrity warnings pertaining to eleven named individuals.¹ You indicate the city will release some of the requested information to the requestor. You claim portions of the requested information are excepted from disclosure under sections 552.101, 552.107, 552.117, and 552.1175 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

¹You state, and provide documentation showing, the city received clarification from the requestor regarding the second request. *See* Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used).

²We assume 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 those records contain substantially different types of information than that submitted to this office.

Initially, we note the requestor has specifically excluded from her request social security numbers, e-mail addresses, and personal information concerning marriages, family, and children. Thus, any such information is not responsive to the request. This decision does not address the public availability of the non-responsive information, and that information need not be released.³

Next, you acknowledge, and we agree, the city did not timely submit some of the information responsive to the first request, and arguments against disclosure of this information, within the statutory time period prescribed by section 552.301(e) of the Government Code. *See* Gov't Code § 552.301(e). Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption the requested information is public and must be released, unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); *see also* Open Records Decision No. 630 (1994). A compelling reason exists when third-party interests are at stake or when information is confidential by law. *See* Open Records Decision No. 150 (1977). Because section 552.101 of the Government Code can provide a compelling reason to withhold information, we will consider your argument under this exception. We will also address your arguments under sections 552.101 and 552.107 for the information that was timely submitted.

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. Section 552.101 encompasses information protected by other statutes, such as section 58.007 of the Family Code. Section 58.007 provides in pertinent part:

(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;
- (2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are

³Accordingly, we do not address your claims under sections 552.117 and 552.1175 for personal information falling within these categories in the submitted audio recording.

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). Section 58.007 makes confidential juvenile law enforcement records relating to delinquent conduct or conduct indicating a need for supervision that occurred on or after September 1, 1997. *See id.* § 51.03 (defining “delinquent conduct” and “conduct indicating a need for supervision” for purposes of title 3 of the Family Code). The summation report is an administrative document made for “quality control” purposes, not a juvenile law enforcement record; thus, section 58.007(c) is not applicable to this document. Similarly, the officer’s statement you seek to withhold under section 58.007 is part of an administrative investigation, not a juvenile law enforcement record. Accordingly, none of the information you seek to withhold under section 552.101 of the Government Code in conjunction with section 58.007 of the Family Code may be withheld under this section. As you raise no further exceptions to disclosure of this information, it must be released.

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 indicate the submitted polygraph report is excepted under section 1703.306. You state the requestor does not fall into any of the categories of individuals who are authorized to receive the polygraph information under section 1703.306(a). Upon review, we agree the city must withhold the polygraph report under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *See 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. *See id.* at 683. This office has also 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).

Some of the information in the submitted audio recording is highly intimate or embarrassing and not of legitimate public interest; however, this information pertains to the requestor. Section 552.023(a) provides 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.” *See* Gov’t Code § 552.023(a). Thus, the requestor has a right of access to information that would ordinarily be withheld to protect her common-law privacy interests. *See id.*; Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual or authorized representative asks governmental body to provide information concerning that individual).

The remaining information you seek to withhold under common-law privacy pertains to the on-the-job actions of the firefighters that resulted in the juveniles’ injuries and is, therefore, generally of legitimate public interest. We note, however, the names of the treating physicians are highly intimate or embarrassing and not of legitimate public interest. Therefore, these names, which we marked, must be withheld under section 552.101 in conjunction with common-law privacy.

We note the public generally has a legitimate interest in information that relates to public employment and an employee's actions as a public servant. See Open Records Decisions Nos. 562 at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs, but in fact touches on matters of legitimate public concern); 542 (1990); 470 at 4 (1987) (public has legitimate interest in job qualifications and performance of public employees); 444 at 5-6 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees); 423 at 2 (1984) (scope of public employee privacy is narrow). Because the remaining information you seek to withhold under common-law privacy pertains to the on-the-job actions of the firefighters that resulted in the juveniles' injuries, it is of legitimate public interest and may not be withheld under section 552.101 in conjunction with common-law privacy. As you raise no further exceptions to disclosure of this information, it must be released.

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 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 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 the clipped documents are e-mails and attachments between and among city employees and the city's attorneys and their representatives. You state some of the communications are solely between city employees, but that they contain legal advice provided by city attorneys. You indicate these e-mails and attachments were created for the purpose of facilitating the rendition of professional legal services to the city. You have identified the parties to these communications and assert the confidentiality of these communications has been maintained. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to most of the clipped e-mails and attachments. We note, however, that some non-privileged documents are attached to some of the privileged e-mails. These non-privileged documents are independently responsive to a portion of the request. Thus, to the extent these non-privileged documents exist separate and apart from the e-mails to which they are attached, they may not be withheld under section 552.107. We have marked the attachments that must be released if they exist separate and apart from the otherwise privileged e-mails. Therefore, with the exception of the attachments we marked, the clipped e-mails and attachments may be withheld under section 552.107.

In summary, the city must withhold the marked polygraph report under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code. The city must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. With the exception of the non-privileged attachments we marked, the city may withhold the clipped e-mails and attachments under section 552.107 of the Government Code. The remaining responsive 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,



Jessica Eales
Assistant Attorney General
Open Records Division

JCE/em

Ref: ID# 387099

Enc. Submitted documents

c: Requestor
(w/o enclosures)