ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 26, 2010

Ms. Debra A. Drayovitch
Drayovitch, P.C.
Attorney for City of Corinth
620 West Hickory Street
Denton, Texas 76201

OR2010-11168

Dear Ms. Drayovitch:

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# 388247.

The City of Corinth (the "city"), which you represent, received a request for records pertaining to the investigation of a named city employee. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.107, 552.108, and 552.117 of the Government Code.[1] We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a)(1) provides for the required public disclosure of "a completed report, audit, evaluation, or investigation made of, or, or by a governmental body, except as provided by Section 552.108." Gov't Code § 552.022(a)(1). The submitted information constitutes a completed investigation; thus, it is subject to section 552.022(a)(1). Therefore, the city may only withhold this information if it is subject to section 552.108 or confidential

[1]Although you also raise section 552.111 of the Government Code, you have not submitted any arguments regarding the applicability of this exception nor have you identified any information you seek to withhold under this exception. Therefore, this decision does not address section 552.111. *See* Gov't Code §§ 552.301(e)(1)(A) (governmental body must submit written comments stating why claimed exceptions apply to information at issue), .302.

under "other law." Sections 552.103 and 552.107 of the Government Code are discretionary exceptions under the Act and do not constitute "other law" for purposes of section 552.022. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 552 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Consequently, no portion of the submitted information may be withheld under either section 552.103 or section 552.107. However, information subject to section 552.022(a)(1) may be withheld pursuant to section 552.108 of the Government Code. Accordingly, we will consider your arguments under section 552.108, as well as under sections 552.101, 552.102, and 552.117 of the Government Code, which are "other law" for the purpose of section 552.022 of the Government Code. Further, the attorney-client privilege is also found in Rule 503 of the Texas Rules of Evidence. The Texas Supreme Court held "[t]he Texas Rules of Civil Procedure and 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 (Tex. 2001); *see also* Open Records Decision No. 676 (2002). Accordingly, we will consider your assertion of this privilege under Rule 503. Additionally, we note portions of the information are subject to section 552.136 of the Government Code, which also constitutes "other law" for purposes of section 552.022.[2] Accordingly, we address the applicability of section 552.136 to the submitted information.

Next, we address your claim under sections 552.101 and 552.102 of the Government Code in conjunction with common-law privacy for Exhibits C, E, and the separately submitted supplemental information. 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 section encompasses information protected by common-law privacy. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." *Id.* § 552.102(a). As you acknowledge, in *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976) for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101. Accordingly, we address your section 552.102 claim in conjunction with your common-law privacy claim under section 552.101.

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[2]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).

Common-law privacy 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.*, 540 S.W.2d at 685. To demonstrate the applicability of common-law privacy, both prongs of this test must be demonstrated. *Id.* at 681-82. We note the public generally has a legitimate interest in information that relates to public employment and public employees. *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 (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). Upon review, we find you have failed to demonstrate how any portion of the information at issue is highly intimate or embarrassing and not of legitimate public interest. Accordingly, none of the information at issue is confidential under the doctrine of common-law privacy, and it may not be withheld under either section 552.101 or section 552.102 on that basis.

Next, you contend a portion of Exhibit E is excepted pursuant to section 1703.306 of the Occupations Code, which is also encompassed by section 552.101 of the Government Code, and provides as follows:

> (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:
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> > (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 [Texas Department of Licensing and Regulation] 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. The requestor does not fall within any of the enumerated categories; therefore, the city must withhold the polygraph information we have marked in Exhibits C and E under section 552.101 in conjunction with section 1703.306.

Next, we address your assertion the attorney-client privilege protects Exhibit F. Texas Rule of Evidence 503(b)(1) provides as follows:

> 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. 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 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 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 the communications in Exhibit F consist of correspondence between the city attorney and city officials. We understand the communications were intended to be and have remained confidential. Based on your representations and our review, we agree Exhibit F consists of privileged attorney-client communications. Therefore, the city may withhold Exhibit F under Rule 503.

Next, we address your claim under section 552.108 of the Government Code for Exhibit D and a portion of Exhibit C. Section 552.108(a)(2) excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . 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)(2). Section 552.108(a)(2) is applicable only if the information at issue relates to a concluded criminal case that did not result in a conviction or a deferred adjudication. A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why this exception is applicable to the information that the governmental body seeks to withhold. *See id.* § 552.301(e)(1)(A). We note section 552.108(a)(2) is not applicable to records of an internal affairs investigation that is purely administrative in nature and did not involve the investigation or prosecution of crime. *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no pet.) (section 552.108 not applicable to information police department holds as employer); *Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. Civ. App.—El Paso 1992, writ denied) (statutory predecessor to section 552.108 not applicable to internal investigation that did not result in criminal investigation or prosecution).

Although you have marked a portion of Exhibit C under section 552.108(a)(2), we note Exhibit C was generated entirely as part of an internal administrative investigation conducted by the city. You do not provide any arguments explaining how the internal investigation resulted in a criminal investigation or prosecution. Accordingly, the city may not withhold any portion of Exhibit C under section 552.108(a)(2).

You also claim Exhibit D is excepted under section 552.108(a)(2). You state Exhibit D was provided by the Lewisville Police Department (the "department") to the city. You have provided a representation from the department objecting to the release of Exhibit D. The department states Exhibit D pertains to a concluded criminal investigation that did not result in conviction or deferred adjudication. Based on these representations and our review, we find section 552.108(a)(2) is applicable to Exhibit D. *See* Open Records Decision No. 372 (1983) (statutory predecessor to section 552.108 may be invoked by any proper custodian of law enforcement information). Thus, the city may withhold Exhibit D under section 552.108(a)(2).

Next, we address the applicability of section 552.117(a)(1) of the Government Code to the remaining information. Section 552.117 excepts from disclosure the 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 that this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). Whether a particular piece of information is protected by section 552.117 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) if the individuals at issue elected confidentiality under section 552.024 prior to the date on which the request for information was made. Thus, if the individuals whose information is at issue timely elected confidentiality, the city must withhold the marked personal information, and the corresponding information in the submitted videos, pursuant to section 552.117(a)(1). The city may not withhold this information under section 552.117(a)(1), however, if the individuals at issue did not make timely elections to keep the information confidential. If the city lacks the technical capability to redact the information subject to section 552.117(a)(1) in the submitted videos, the city must withhold the videos in their entirety.

Lastly, we note the remaining information contains a Sam's Club Direct commercial credit account number and membership number. Section 552.136 of the Government Code provides "[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(b). An access device number is one that may be used to (1) obtain money, goods, services, or another thing of value, or (2) initiate a transfer of funds other than a transfer originated solely by paper instrument, and includes an account number. *See id.* § 552.136(a) (defining "access device"). Accordingly, the city must withhold the account number and membership number we have marked under section 552.136.

In summary, the city must withhold the polygraph information we have marked in Exhibits C and E under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code. The city may withhold Exhibit F under Texas Rule of Evidence 503. The city may also withhold Exhibit D under section 552.108(a)(2) of the Government Code. The city must withhold the information we marked under section 552.117(a)(1) of the Government Code in the remaining documents if the employees whose information is at issue timely elected to keep their information confidential. If the city lacks the technical capability to redact the information subject to section 552.117(a)(1) in the submitted videos, the city must withhold the videos in their entirety. The city also must withhold the account number and membership number we marked in the remaining documents under section 552.136 of the Government Code. 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/eeg

Ref: ID# 388247

Enc. Submitted documents

c: Requestor
(w/o enclosures)