ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 2, 2010

Ms. Julia Gannaway
Lynn, Pham & Ross, LLP
306 West Broadway Avenue
Fort Worth, Texas 76104

OR2010-13380

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# 392377.

The City of La Marque (the "city"), which you represent, received a request for 1) all e-mails and scans to or from a specified individual during a specific time period; 2) e-mails given by a specified individual to department heads that affect council members and the mayor; 3) credit card use by a specified individual during a specific time period; 4) information pertaining to expenditures from a specified individual's budget during a specified time period, including petty cash; and 5) three categories of information pertaining to real estate business between a specified individual and the requestor. You state you have redacted social security numbers pursuant to section 552.147 of the Government Code.[1] You state the city has released some of the requested information. You claim the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.117, 552.136, and 552.137

[1]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. Gov't Code § 552.147(b).

of the Government Code.[2] We have considered the exceptions you claim and reviewed the submitted information.[3]

Initially, we note that the present request was made by the city's mayor. The purpose of the Act is to prescribe conditions under which members of the general public can obtain information from a governmental body. *See* Attorney General Opinion JM-119 (1983) (statutory predecessor). An official of a governmental body who, in an official capacity, requests information held by the governmental body does not act as a member of the public in doing so. Thus, exceptions to public disclosure under the Act do not control the right of access of an official of a governmental body to information maintained by the governmental body. *See id.* at 3 (member of community college district board of trustees, acting in official capacity, has an inherent right of access to information maintained by district); *see also* Gov't Code §§ 552.201 (chief administrative officer of governmental body is officer for public information for governmental body), .204 (officer for public information is responsible for release of public information as required by Act). The city states that the requestor is the city's mayor but that the city is treating the request as a request from the mayor in her personal capacity as a member of the public. It is unclear from our review whether the mayor is requesting the information in her personal capacity as a member of the public or in her official capacity as the city's mayor. Accordingly, we rule conditionally on this matter. Therefore, in the event the requestor is acting in her official capacity, we find the present request is not a request by a member of the public under the Act and we determine that the city may not withhold the requested information from the mayor pursuant to the Act's exceptions to required public disclosure. *See* Attorney General Opinion JM-119 (1983). In the event, however, the requestor is making the present request in her personal capacity as a member of the public, we will address your claimed exceptions.

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 made confidential by statute, such as the Americans with Disabilities Act (the "ADA"), 42 U.S.C. § 12101 *et seq.* Section 552.101 of the Government Code also encompasses information protected by 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

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[2]Although you raised section 552.130 of the Government Code as an exception to disclosure of the requested information, you have provided no arguments regarding the applicability of this section. Accordingly, we do not address that exception.

[3]We 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.

separate forms, (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 (the "EEOC") determined that 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). You claim portions of the submitted information are confidential under the ADA. However, you do not explain, and the information does not reveal, how this information pertains to any individual with a disability for purposes of the ADA. Accordingly, we find that you have failed to establish that any portion of the submitted information is confidential under the ADA, and the city may not withhold any information under section 552.101 of the Government Code in conjunction with the ADA.

Section 552.101 also encompasses section 143.089 of the Local Government Code. The city is a civil service city under chapter 143 of the Local Government Code. Section 143.089 provides for the existence of two different types of personnel files relating to a police officer: one that must be maintained as part of the officer's civil service file and another the police department may maintain for its own internal use. *See* Local Gov't Code § 143.089(a), (g). The officer's civil service file must contain certain specified items, including commendations, periodic evaluations by the police officer's supervisor, and documents relating to any misconduct in which the department took disciplinary action against the officer under chapter 143 of the Local Government Code.[4] *Id.* § 143.089(a)(1)-(2). In cases in which a police department investigates a police officer's misconduct and takes disciplinary action against an officer, it is required by section 143.089(a)(2) to place all investigatory records relating to the investigation and disciplinary action, including background documents such as complaints, witness statements, and documents of like nature from individuals who

[4]Chapter 143 prescribes the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. Local Gov't Code §§ 143.051-.055.

were not in a supervisory capacity, in the police officer's civil service file maintained under section 143.089(a). *See Abbott v. Corpus Christi*, 109 S.W.3d 113, 122 (Tex. App.—Austin 2003, no pet.). All investigatory materials in a case resulting in disciplinary action are "from the employing department" when they are held by or are in the possession of the department because of its investigation into a police officer's misconduct, and the department must forward them to the civil service commission for placement in the civil service personnel file. *Id.* Such records may not be withheld under section 552.101 of the Government Code in conjunction with section 143.089 of the Local Government Code. *See* Local Gov't Code § 143.089(f); Open Records Decision No. 562 at 6 (1990). However, information maintained in a police department's internal file pursuant to section 143.089(g) is confidential and must not be released. *City of San Antonio v. Tex. Attorney Gen.*, 851 S.W.2d 946, 949 (Tex. App.—Austin 1993, writ denied).

You claim the information you have marked in the submitted information, which consists of communications between the city manager and the city's chief of police regarding two police officers, is confidential under section 143.089(g). You assert that the information at issue "is not contained solely in the 'g' file" but that it does "reference information that was ultimately placed in the 'g' file." The city may not engraft the confidentiality afforded to records under section 143.089(g) to other records that exist independently of an officer's departmental file. Based on your representations and our review, we find that no portion of the information at issue was taken from the city police department's personnel files or is maintained in confidence by the city police department for its own use. Consequently, no portion of the submitted information may be withheld under section 552.101 of the Government Code based on section 143.089(g) of the Local Government Code.

Section 552.101 of the Government Code also encompasses the common-law right of privacy. The doctrine of common-law privacy 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. 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). We note that the fact that a public employee is sick is public information, but specific information about illnesses is excepted from disclosure. *See* ORD 470 at 4. You claim that the information you have marked is confidential pursuant to common-law privacy. Upon review, we agree that portions of the information you have marked are 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 in conjunction with common-law privacy. However, we find that the remaining information at issue is either not highly intimate or embarrassing or is of legitimate public interest. Thus, the remaining information you have

marked is not confidential under common-law privacy, and the city may not withhold it under section 552.101 on that ground.

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 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, and lawyer representatives. TEX. R. EVID. 503(b)(1). 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.*, 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 state that the submitted information includes communications between attorneys for the city, the city manager, and city personnel. You state that these communications were made in furtherance of the rendition of legal services to the city, and you inform this office that these communications have remained confidential. Based on your representations and our review, we agree that the e-mails we have marked constitute privileged attorney-client communications. Accordingly, the city may withhold the information we have marked under section 552.107 of the Government Code. However, we note the remaining

information consists of communications with outside parties. Because you have not demonstrated that these outside parties are privileged parties, we find you have failed to establish that the remaining information at issue constitutes or documents privileged attorney-client communications. Thus, we find that you have not established the applicability of the attorney-client privilege to the remaining information at issue and it may not be withheld under section 552.107 of the Government Code.

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. Gov't Code § 552.117(a)(1). 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 the 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 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. 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. We note section 552.117 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). You do not indicate whether the city employees whose information is at issue requested confidentiality pursuant to section 552.024. Accordingly, if these employees timely elected confidentiality, then the city must withhold the information we have marked under section 552.117(a)(1); however, the city may only withhold the marked cellular telephone numbers if the numbers are not paid for by the city. If the employees did not timely elect confidentiality, the city may not withhold any of the marked information under section 552.117(a)(1).

Section 552.117(a)(2) excepts from public disclosure a peace officer's home address and telephone number, social security number, and family member information regardless of whether the peace officer made an election under section 552.024 of the Government Code. Gov't Code § 552.117(a)(2). Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. We have marked the cellular telephone number of a licensed peace officer under section 552.117(a)(2) of the Government Code. Accordingly, if the officer pays for the cellular telephone service with his own funds, the city must withhold the information we have marked under section 552.117(a)(2). However, if the cellular telephone service is paid for by the city, this number may not be withheld under section 552.117(a)(2) of the Government Code.

Section 552.136(b) of the Government Code states that "[n]otwithstanding any other provision of [the Act], 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." *Id.* § 552.136(b); *see id.* § 552.136(a) (defining "access device"). Upon review, we agree the city must withhold the bank account number you have marked pursuant to section 552.136 of the Government Code.

You claim the e-mail addresses you have marked are excepted from public disclosure under section 552.137 of the Government Code. Section 552.137 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). Accordingly, the city must withhold the personal e-mail addresses you have marked under section 552.137 of the Government Code, in addition to the e-mail addresses we have marked, unless the owners of the addresses have affirmatively consented to their public disclosure.

In summary, in the event the requestor is acting in her official capacity as mayor, we find the present request is not a request by a member of the public under the Act and we determine that the city may not withhold the requested information from the mayor. If the requestor is making the present request in her personal capacity as a member of the public; 1) the city must withhold the information we have marked pursuant to section 552.101 of the Government Code in conjunction with common-law privacy; 2) the city may withhold the information we have marked under section 552.107 of the Government Code; 3) to the extent the employees whose information is at issue timely elected to keep their personal information confidential under section 552.024 of the Government Code, the city must withhold the information we have marked under section 552.117(a)(1) of the Government Code; 4) the city must withhold the cellular telephone number we have marked under section 552.117(a)(2) of the Government Code, unless the cellular telephone service is paid for by the city; 5) the city must withhold the bank account number you have marked pursuant to section 552.136 of the Government Code; and 6) the city must withhold the personal e-mail addresses you have marked, in addition to the e-mail addresses we have marked, under section 552.137 of the Government Code, unless the owners of the addresses have affirmatively consented to their public disclosure.[5] The remaining requested information must be released.

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[5]We 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 bank account numbers under section 552.136 of the Government Code and e-mail addresses under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision..

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,

Laura Ream Lemus
Assistant Attorney General
Open Records Division

LRL/jb

Ref: ID# 392377

Enc. Submitted documents

c: Requestor
(w/o enclosures)