



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 10, 2010

Ms. Julia Gannaway
Attorney for City of La Marque
Lynn, Pham & Ross, L.L.P.
306 West Broadway Avenue
Fort Worth, Texas 76104

OR2010-13751

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# 393183.

The City of La Marque (the "city"), which you represent, received a request for (1) a specified open records request; (2) e-mails of a named city employee from June 16, 2010 through June 22, 2010; and (3) information pertaining to the rental or use of city parks. You state the city released some information to the requestor. You claim portions of the submitted information are excepted from disclosure under sections 552.101, 552.107, 552.117, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, we note a portion of Exhibit B, which we have marked, is not responsive to the instant request as it was created after the date the request was received. This ruling does not address the public availability of non-responsive information, and the city is not required to release non-responsive information in response to this request.

¹We 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.

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 exception encompasses information protected by other statutes. You raise section 552.101 in conjunction with the Americans with Disabilities Act (the "ADA"), which provides for the confidentiality of certain medical records of employees and employment applicants. 42 U.S.C. § 12112(d)(3), (4). Specifically, the ADA provides that information about the medical conditions and medical histories of applicants for employment or employees must be (1) collected and maintained on separate forms, (2) kept in separate medical files, and (3) treated as a confidential medical record. *Id.*; 29 C.F.R. § 1630.14(b)(1), (c)(1), (d)(1). The Equal Employment Opportunity Commission ("EEOC") 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). You highlighted information within Exhibits C and D you claim is confidential under the ADA. However, you do not explain, and the submitted information does not reveal, how this information pertains to any individual with a disability for purposes of the ADA. Accordingly, we find you have failed to establish that any portion of Exhibit C or Exhibit D is confidential under the ADA, and the city may not withhold any information under section 552.101 in conjunction with the ADA.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the information 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 medical information or information indicating disabilities or specific illnesses is 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). Upon review, we find the information we marked in Exhibit D is highly intimate or embarrassing and of no legitimate public interest. Therefore, the city must withhold the information we marked in Exhibit D under section 552.101 in conjunction with common-law privacy. However, we find the remaining information you highlighted in Exhibit D, as well as the information you highlighted in Exhibit C do not contain highly intimate or embarrassing facts. Thus, the city may not withhold any of the remaining information under section 552.101 on the basis of common-law privacy.

Next, 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). 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.* 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 state the responsive information in Exhibit B constitutes attorney-client communications that were made for the purpose of providing legal services to the city. You have identified the parties to the communications. You indicate the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find the city may generally withhold the responsive information in Exhibit B under

section 552.107(1). However, we note an individual e-mail and its attachment contained in one of the submitted e-mail strings consists of a communication with a non-privileged party. Accordingly, to the extent this non-privileged e-mail and its attachment, which we have marked, exist separate and apart from the submitted e-mail strings, the city may not withhold it under section 552.107(1).

Section 552.117(a)(1) of the Government Code 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(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). We have marked personal information pertaining to a city employee in Exhibits C and D that is subject to section 552.117(a)(1). Accordingly, to the extent the employee timely elected confidentiality for her personal information under section 552.024, the city must withhold the information we marked under section 552.117(a)(1). However, the remaining information you seek to withhold in Exhibit C does not consist of an employee's home address or telephone number, social security number, or family member information. Consequently, none of the remaining information in Exhibit C may be withheld under section 552.117.

Lastly, you seek to withhold a personal e-mail address in Exhibit E. 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). Gov't Code § 552.137(a)-(c). Additionally, we marked an e-mail address within the non-privileged e-mail in Exhibit B. These e-mail addresses do not appear to be of a type specifically excluded by section 552.137(c). Thus, the city must withhold the e-mail address you marked in Exhibit E, and to the extent the non-privileged e-mail exists separate and apart from the submitted e-mail strings and must be released, the city must also withhold the e-mail address we marked within the non-privileged e-mail under section 552.137, unless their owners affirmatively consent to their release.²

In summary, the city must withhold the information we marked in Exhibit D under section 552.101 of the Government Code in conjunction with common-law privacy. The city may generally withhold Exhibit B under section 552.107(1) of the Government Code, but may not withhold the marked communication with the non-privileged party to the extent the

²We 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 an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

communication exists separate and apart from the e-mail string in which it appears. The city must withhold the information we marked in Exhibits C and D under section 552.117(a)(1) of the Government Code if the employee at issue made a timely election for confidentiality under section 552.024 of the Government Code. The city must withhold personal e-mail address you highlighted in Exhibit E under section 552.137 of the Government Code, unless the owner of the e-mail address affirmatively consents to its release. Additionally, the city must withhold the e-mail address we marked within the non-privileged e-mail in Exhibit B under section 552.137 of the Government Code if the e-mail exists separate and apart from the submitted e-mail strings. 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# 393183

Enc. Submitted documents

c: Requestor
(w/o enclosures)