



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

September 22, 2010

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

OR2010-14371

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# 394302.

The City of La Marque (the "city"), which you represent, received a request for all of the requestor's e-mails during a specific time period.¹ You state the city has released some of the requested information. You claim portions of the submitted information are excepted from disclosure under sections 552.101, 552.107, 552.117, 552.130, 552.136, 552.137, and 552.147 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted information.³

¹You inform us that the city received a clarification of the information requested. *See* Gov't Code § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request); *see also* Open Records Decision No. 31 (1974) (when presented with broad requests for information rather than for specific records, governmental body may advise requestor of types of information available so that request may be properly narrowed).

²Although you raise the attorney-client privilege under rule 503 of the Texas Rules of Evidence, we note section 552.107 is the proper exception to raise for your attorney-client privilege claim in this instance. *See* Open Records Decision No. 676 (2002).

³We 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.

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 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 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). This office has also found that personal financial information not relating to the financial transaction between an individual and a governmental body is excepted from disclosure under common-law privacy. 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). You claim that the information you have marked is confidential pursuant to common-law privacy. Upon review, we agree that portions of the submitted information consist of medical and personal financial information that is 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). We also note that an individual's personal post office box number is not a "home address" and, therefore, may not be withheld under 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). You do not indicate whether the current or former 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 you have marked, as well as the additional information we have marked, under section 552.117(a)(1); however, the city may only withhold the marked cellular telephone number if the number is 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 552.130 excepts from disclosure "information [that] relates to . . . a motor vehicle operator's or driver's license issued by an agency of this state [.]” Gov't Code § 552.130(a)(1). We note that Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including Texas driver's license numbers under section 552.130 of the Government Code, without the necessity of requesting an attorney general decision. *See* ORD 684. Upon review, we agree that the city may withhold the Texas driver's license numbers you have marked pursuant to Open Records Decision No. 684, without seeking a decision from our office. We note that the driver's license class that you have marked is not subject to Open Records Decision No. 684 and may not be withheld without seeking a ruling from this office. Upon review, we find the city must withhold the Texas driver's license class you have marked, as well as the additional information we have marked, under section 552.130 of the Government Code.

Section 552.136 of the Government Code provides as follows:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device 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.

(b) Notwithstanding 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. You seek to withhold two user identification names, a password, and several account numbers you have marked under section 552.136. Upon review, we agree that the marked account numbers and the password are access device numbers which must be withheld under section 552.136 of the Government Code. However, you do not explain how the marked user identification names can be used to obtain money, goods, services, or another thing of value or initiate a transfer of funds. Thus, the marked user identification

names may not be withheld under section 552.136. As you raise no further exception to their disclosure, we have marked the user identification names for release.

Next, you claim the e-mail address you have marked is 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). As you acknowledge, Open Records Decision No. 684 also authorizes governmental bodies to withhold 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.. *See* ORD 684. Accordingly, we agree that the city may withhold the e-mail address you have marked pursuant to Open Records Decision No. 684, without seeking a decision from our office. In addition, we find the city must withhold the additional personal e-mail addresses we have marked under section 552.137, unless the owners of the addresses have affirmatively consented to their public disclosure.

You indicate you are withholding social security numbers under section 552.147 of the Government Code. Section 552.147 provides "[t]he social security number of a living person is excepted from" required public disclosure under the Act. *Id.* § 552.147. 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. *Id.* § 552.147(b). Accordingly, we agree that the city may withhold the social security numbers of living individuals under section 552.147, without the necessity of requesting a ruling from this office. However, you have also marked Federal Employee Identification Numbers ("EINs") as information excepted under section 552.147. Because section 552.147 only applies to social security numbers, we find that the city may not withhold the marked EINs under section 552.147 of the Government Code. As you raise no further exceptions to the release of the marked EINs, they must be released to the requestor.

Finally, we note that one of the submitted documents bears notice of copyright protection. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672. A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, 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 information you have marked, as well as the information we have marked, under section 552.130 of the Government Code; 5) except for the information we have marked for release, the city must withhold the information you have marked pursuant to section 552.136 of the Government Code; 6) the city must withhold the personal e-mail address 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; and 7) the city may withhold the social security numbers of living individuals you have marked under section 552.147 of the Government Code. The remaining requested information must be released in accordance with copyright law.

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/eb

Ref: ID# 394302

Enc. Submitted documents

c: Requestor
(w/o enclosures)