



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 6, 2010

Mr. C. David Richards
Assistant General Counsel
Texas Department of State Health Services
P.O. Box 149347
Austin, Texas 78714-9347

OR2010-15240

Dear Mr. Richards:

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# 395966 (DSHS File: 17738/2010).

The Texas Department of State Health Services (the "department") received a request for eleven categories of information pertaining to specified correspondence, permits, licenses, complaints, and expenses.¹ You claim portions of the submitted information are excepted from disclosure under sections 552.101, 552.107, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we address the requestor's assertion that the department failed to meet its obligations under the Act by not timely requesting a ruling from this office. Section 552.301 of the Government Code prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(b), a governmental body must ask for a decision

¹We have received correspondence from the requestor who states he has withdrawn his request for information responsive to categories four through seven of the request. Accordingly, that information is not responsive to the present request for information. This ruling does not address the public availability of any information that is not responsive to the request and the department is not required to release that information in response to the request.

from this office and state the exceptions that apply within ten business days of receiving the written request. *Id.* § 552.301(b). You state, and the submitted documents reflect, that the department received the request for information on July 19, 2010. Thus, the department's ten business day deadline was August 2, 2010. The department's request for a ruling from this office was faxed to this office on August 2, 2010. Consequently, we conclude the department did not fail to comply with the Act in requesting a ruling from 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." *Id.* § 552.101. This section encompasses confidentiality provisions such as section 402.154 of the Occupations Code, which provides:

(h) All information and materials subpoenaed or compiled by the [State Committee of Examiners in the Fitting and Dispensing of Hearing Instruments (the "committee")] in connection with a complaint and investigation are confidential and not subject to disclosure under [the Act], and not subject to disclosure, discovery, subpoena, or other means of legal compulsion for their release to anyone other than the committee or its employees or agents involved in discipline of the holder of a license, except that this information may be disclosed to:

- (1) persons involved with the committee in a disciplinary action against the holder of a license;
- (2) professional licensing or disciplinary boards for the fitting and dispensing of hearing instruments in other jurisdictions;
- (3) peer assistance programs approved by the board under Chapter 467, Health and Safety Code;
- (4) law enforcement agencies; and
- (5) persons engaged in bona fide research, if all individual-identifying information has been deleted.

(i) The filing of formal charges by the committee against a holder of a license, the nature of those charges, disciplinary proceedings of the committee, and final disciplinary actions, including warnings and reprimands, by the committee are not confidential and are subject to disclosure in accordance with [the Act].

Occ. Code § 402.154(h), (i). You indicate a portion of the submitted documents, which you have marked, were gathered or created by the committee, which is a part of the department's Professional Licensing and Certification Unit, in response to a complaint and related investigation regarding a particular licensed fitter and dispenser of hearing instruments. You

state that none of the exceptions to confidentiality under section 402.154(h) are applicable in this instance. You indicate that none of the information at issue is subject to release under section 402.154(i). Based on your representations and our review, we conclude the marked information is confidential in its entirety pursuant to section 402.154(h) of the Occupations Code. Therefore, the department must generally withhold this information under section 552.101 of the Government Code.

We note the requestor asserts he has a right of access under section 552.023 of the Government Code to the information made confidential pursuant to section 402.154(h) of the Occupations Code. Section 552.023 provides that a person or person's authorized representative has a special right of access to information protected from public disclosure by laws intended to protect that person's privacy interests. *See* Gov't Code § 552.023. We note, however, that section 402.154(h) has its own release provisions. Thus, the department may disclose the information at issue only in accordance with these release provisions. *See* Occ. Code § 402.154(h). We find the requestor has failed to demonstrate any such release provisions are applicable in this instance. Accordingly, the information you have labeled under section 402.154(h) of the Occupations Code must be withheld under section 552.101 of the Government Code.

You raise section 552.101 of the Government Code in conjunction with common-law privacy and constitutional privacy for portions of the remaining information. The doctrine of 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. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The types of information considered to be intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* include 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. *Id.* at 683. In addition, this office has found certain 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), 455 (1987) (information pertaining to prescription drugs, specific illnesses, operations and procedures, and physical disabilities protected from disclosure). Upon review, we find some of the remaining information is highly intimate or embarrassing and not of legitimate interest to the public. Thus, the department must withhold the information we have marked under section 552.101 in conjunction with common-law privacy. However, you have failed to demonstrate how any of the remaining information you have marked as private is highly intimate or embarrassing and not of legitimate public interest. Therefore, the department may not withhold any of this information under section 552.101 on the basis of common-law privacy.

Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. *See Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); Open Records Decision Nos. 600 at 3-5, 478 at 4 (1987), 455 at 3-7. The first type protects an

individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. ORD 455 at 4. The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* at 7. The scope of information protected is narrower than that under the common-law doctrine of privacy; constitutional privacy under section 552.101 is reserved for "the most intimate aspects of human affairs." *Id.* at 5 (quoting *Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985)). Upon review, we find the department has not demonstrated that any of the remaining information at issue falls within the zones of privacy or implicates an individual's privacy interests for purposes of constitutional privacy. Therefore, the department may not withhold any of this information under section 552.101 on the basis of constitutional privacy.

Next, you seek to withhold a portion of the remaining information under section 552.107 of the Government Code. Section 552.107(1) 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 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 Texas 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 department attorneys represent the department's "programs, regions, hospitals, etc." Further, you state that when a department attorney advises personnel in a department program, region, or hospital, the attorney is rendering legal advice to a client. You state the information you have marked consists of confidential communications between department attorneys and committee personnel that were made for the purpose of rendering professional legal advice. You also state the confidentiality of the communications has been maintained. Based on your representations and our review of the information at issue, we agree the information you have marked consists of privileged attorney-client communications, and the department may withhold this information under section 552.107.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address, home telephone number, social security number, and family member information of a current or former employee of a governmental body who requests 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 department may only withhold information 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 on which the request for this information was made. You state the employee whose information is at issue in the remaining information timely elected to keep certain personal information confidential. Therefore, the department must withhold the information you have marked under section 552.117(a)(1) of the Government Code.

We understand you have marked an e-mail addresses within the remaining information under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).² 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). Gov't Code § 552.137(a)-(c). We note this exception is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. You have marked an email address maintained by a governmental entity under section 552.137. This email address, which we have marked for release, may not be withheld under section 552.137. However, some of the remaining information includes additional e-mail addresses subject to section 552.137. Thus, the department must withhold the e-mail

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 e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

addresses you have marked, and the additional e-mail addresses we have marked, under section 552.137, unless the department receives consent for their release.

In summary, the department must withhold the information you have labeled under section 552.101 of the Government Code in conjunction with section 402.154(h) of the Occupations Code. The department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The department may withhold the information you have marked under section 552.107 of the Government Code. The department must withhold the information you have marked under section 552.117(a)(1) of the Government Code. The department must withhold the e-mail addresses you have marked, and the additional e-mail addresses we have marked, under section 552.137 of the Government Code, unless the department receives consent for their release. 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,



Christina Alvarado
Assistant Attorney General
Open Records Division

CA/em

Ref: ID# 395966

Enc. Submitted documents

cc: Requestor
(w/o enclosures)