



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 3, 2010

Ms. Renee Mauzy  
General Counsel  
Texas Department of Information Resources  
P.O. Box 13564  
Austin, Texas 78711-3564

OR2010-16676

Dear Ms. Mauzy:

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# 398946.

The Texas Department of Information Resources (the "department") received two requests from the same requestor for information pertaining to an investigation that led to the termination of the requestor, all documentation related to any employee termination or discipline involving employee conduct during a certain time period, and specified notebooks.<sup>1</sup> You state you have released some of the requested information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.107, 552.111, 552.117, and 552.139 of the Government Code.<sup>2</sup> You also state you have notified certain individuals to whom the requested information relates in accordance with section 552.304 of the Government Code. *See* Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for Attorney General ruling should or should not be released). We have considered the exceptions you

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<sup>1</sup>You state the department sought clarification of the second request. *See* Gov't Code § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request).

<sup>2</sup>Although you do not explicitly raise section 552.102 of the Government Code in your brief, based on your comments to our office, we understand you to raise section 552.102.

claim and reviewed the submitted information. We have also considered comments submitted by two of the notified individuals. *See id.* § 552.304(a).

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 section encompasses information made confidential by statute. Sections 418.176 through 418.182 of the Government Code were added to chapter 418 of the Government Code as part of the Texas Homeland Security Act (the “HSA”). We understand you to assert a portion of the submitted information is excepted from public disclosure under section 552.101 in conjunction with section 418.176 of the HSA. Section 418.176 provides in part:

(a) Information is confidential if the information is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, responding to, or investigating an act of terrorism or related criminal activity and:

(1) relates to staffing requirements of an emergency response provider, including law enforcement agency, a fire-fighting agency, or an emergency services agency; [or]

(2) relates to a tactical plan of the provider; [or]

(3) consists of a list or compilation of pager or telephone numbers, including mobile and cellular telephone numbers of the provider[.]

*Id.* § 418.176(a). The fact that information may be related to a governmental body’s emergency response preparedness or security concerns does not make such information *per se* confidential under the HSA. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). Furthermore, the mere recitation by a governmental body of a statute’s key terms is not sufficient to demonstrate the applicability of a claimed provision. As with any exception to disclosure, a governmental body asserting one of the confidentiality provisions of the HSA must adequately explain how the responsive records fall within the scope of the claimed provision. *See* Gov’t Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

Although you generally assert the information at issue is confidential, you have not provided any arguments explaining this assertion. Accordingly, we find you have failed to demonstrate that the information at issue is confidential under the HSA, and the department may not withhold any of this information under section 552.101 on that basis.

Next, you claim the portions of the submitted information you have marked are confidential on the basis of common-law privacy, which is encompassed by section 552.101 of the Government Code. We also understand you to raise section 552.102 of the Government Code for this information. Section 552.102(a) of the Government Code 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). Section 552.102 is applicable to information that relates to public officials and employees. *See* Open Records Decision No. 327 at 2 (1982) (anything relating to employee's employment and its terms constitutes information relevant to person's employment relationship and is part of employee's personnel file). The privacy analysis under section 552.102(a) is the same as the common-law privacy standard under section 552.101. *See Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref'd n.r.e.) (addressing statutory predecessor). We will, therefore, consider the applicability of common-law privacy under section 552.101 together with your claim regarding section 552.102.

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 elements of the test must be established. *Id.* at 681-82. The type of information considered intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* included 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. We note that names, addresses, telephone numbers, educational history and work background of individuals are not highly intimate or embarrassing. *See* Open Records Decision No. 455 at 7 (1987) (names and addresses are not protected by privacy). You generally cite to *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), in support of your argument under common-law privacy for the submitted information. In *Ellen*, the court addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. Here, however, the information at issue does not relate to an allegation of sexual harassment. Because the allegation does not concern sexual harassment, we find that *Ellen* is not applicable in this instance. Consequently, the department may not withhold any of the information you have marked under section 552.101 in conjunction with common-law privacy on the basis of *Ellen*.

We note the information at issue pertains to the requestor's job performance and work conduct as a former public employee. This office has found that information pertaining to the work conduct and job performance of public employees is subject to a legitimate public interest and is, therefore, generally not protected from disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (public employee's job performance does not generally constitute employee's private affairs), 455 (public employee's job performance or

abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employee), 423 at 2 (1984) (scope of public employee privacy is narrow). Upon review, we find that none of the information at issue is highly intimate or embarrassing and not of legitimate public interest. Therefore, the department may not withhold any portion of the marked information under section 552.101 in conjunction with common-law privacy or section 552.102(a).

You also raise section 552.107(1) of the Government Code for portions of the submitted information. Section 552.107 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 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, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *See* TEX. R. EVID. 503(b)(1)(A)-(E). 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).

In this instance, you have provided no arguments to demonstrate that the information you seek to withhold constitutes privileged attorney-client communications. Accordingly, you may not withhold any portion of the submitted information under section 552.107 of the Government Code.

You generally assert portions of the submitted information are excepted from public disclosure under section 552.111 of the Government Code. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." Gov't Code § 552.111. This exception encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined that section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5. A governmental body's policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. *See* Open Records Decision No. 631 at 3 (1995). Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *See* ORD 615 at 5. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

You generally claim some of the submitted information is confidential under section 552.111 of the Government Code. However, you have failed to explain how the information you seek to withhold under section 552.111 consists of or reveals advice, recommendations, and opinions that reflect the policymaking processes of the department. Therefore, we conclude the information at issue is not excepted under the deliberative process aspect of section 552.111 and no part of it may be withheld on that basis.

Section 552.111 of the Government Code also encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines work product as:

(1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or

(2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5. A governmental body seeking to withhold information under this exception bears the burden of demonstrating the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. *Id.*; ORD 677 at 6-8. In order for this office to conclude the information was made or developed in anticipation of litigation, we must be satisfied: (a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation there was a substantial chance litigation would ensue; and (b) the party resisting discovery believed in good faith there was a substantial chance litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. *See Nat'l Tank Co. v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204; ORD 677 at 7. In the case of a communication, a governmental body must show the communication was between a party and the party's representatives. ORD 677 at 7-8.

As previously stated, a governmental body bears the burden of establishing the applicability of the work product privilege to information it seeks to withhold under section 552.111 of the Government Code. Although you generally assert the work product privilege applies to portions of the submitted information, you have not provided any arguments explaining this assertion. Consequently, you have failed to demonstrate the applicability of the attorney work product privilege under section 552.111 of the Government Code to the information at issue, and it may not be withheld on this basis.

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). Section 552.117 encompasses a personal cellular telephone number, provided that a governmental body does not pay for the cellular telephone service. *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). 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 employees whose information you have highlighted in the submitted information timely elected to keep their home telephone numbers confidential. Upon review, we find the department must withhold the home telephone numbers we have marked under section 552.117(a)(1) of the Government Code. We note some of the remaining submitted information includes the cellular telephone numbers of department employees. You do not inform this office whether the employees whose cellular telephone numbers are included in the remaining information elected to keep their cellular telephone numbers confidential before the department received the instant request for information or that they pay for their own cellular telephone service. Therefore, we must rule conditionally. To the extent the employees at issue timely elected to withhold their cellular telephone numbers under section 552.024 and pay for their own cellular telephone service, the department must withhold the cellular telephone numbers we marked under section 552.117(a)(1). If the employees at issue did not timely elect confidentiality or do not pay for their own cellular service, the marked cellular telephone numbers may not be withheld under section 552.117(a)(1).

We note that portions of the remaining information you have highlighted relate to individuals employed by other Texas agencies. You seek to withhold information that relates to these individuals under section 552.117(a)(1) of the Government Code. We note that the responsibilities under section 552.117(a)(1) of a governmental body that receives a request for information encompass only the current and former employees and officials of the governmental body that received the request. *See* Open Records Decision No. 674 at 4 (2001) (governmental body is normally obliged under Gov't Code § 552.117 to protect only information pertaining to employees and officials of that governmental body). In this regard, section 552.024(a) provides only that an employee of a governmental body may deny public access to certain information "in the custody of the governmental body." *Id.* Moreover, the Act provides no mechanism for a governmental body to inform itself of whether a particular individual either is or has been an employee or official of another governmental body or, in that event, whether such an individual has elected under section 552.024 to keep his or her section 552.117 information confidential. Gov't Code § 552.024(a)-(b). Thus, there is no legislative indication that section 552.117(a)(1) requires a governmental body that receives a request for information to protect information relating to an individual who neither is nor has been an employee or official of the governmental body that received the request. We therefore conclude the department may not withhold any of the information relating to the individuals employed by other Texas agencies under section 552.117 of the Government Code. Further, we note the remaining information you have highlighted under section 552.117 does not constitute an employee's home address or telephone number, social security number, or family member information. Therefore, the department may not withhold any of this information under section 552.117(a)(1) of the Government Code.

You contend portions of the remaining information are excepted from disclosure under section 552.139 of the Government Code, which provides:

(a) Information is excepted from [required public disclosure] if it is information that relates to computer network security, to restricted information under Section 2059.055 [of the Government Code], or to the design, operation, or defense of a computer network.

(b) The following information is confidential:

(1) a computer network vulnerability report; and

(2) any other assessment of the extent to which data processing operations, a computer, or a computer program, network, system, or system interface, or software of a governmental body or of a contractor of a governmental body is vulnerable to unauthorized access or harm, including an assessment of the extent to which the governmental body's or contractor's electronically stored information containing sensitive or critical information is vulnerable to alteration, damage, erasure, or inappropriate use.

*Id.* § 552.139. Section 2059.055 of the Government Code provides in pertinent part:

(b) Network security information is confidential under this section if the information is:

(1) related to passwords, personal identification numbers, access codes, encryption, or other components of the security system of a state agency;

(2) collected, assembled, or maintained by or for a governmental entity to prevent, detect, or investigate criminal activity; or

(3) related to an assessment, made by or for a governmental entity or maintained by a governmental entity, of the vulnerability of a network to criminal activity.

*Id.* § 2059.055(b). You indicate the information you have marked relates to computer network security or to the design, operation, or defense of a computer network. You also indicate portions of the remaining information consist of computer usernames and passwords used to access computer networks. Upon review, we find the information we have marked must be withheld under section 552.139 of the Government Code. However, we find you have failed to demonstrate the remaining information at issue relates to computer network

security, restricted information under section 2059.055, or to the design, operation, or defense of a computer network as contemplated in section 552.139(a). *See id.* § 2059.055 (defining confidential network information for purposes of section 2059.055). Further, we find you have not demonstrated this information consists of a computer network vulnerability report or assessment as contemplated by section 552.139(b). Accordingly, none of the remaining information at issue may be withheld under section 552.139.

In summary, the department must withhold the home telephone numbers we have marked under section 552.117(a)(1) of the Government Code. To the extent the employees at issue timely elected to withhold their cellular telephone numbers under section 552.024 of the Government Code and pay for their own cellular telephone service, the department must withhold the cellular telephone numbers we have marked under section 552.117(a)(1) of the Government Code. The department must withhold the information we have marked under section 552.139 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](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/tp

Ref: ID# 398946

Enc. Submitted documents

c: Requestor  
(w/o enclosures)