



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 20, 2010

Ms. LeAnne Lundy
Rogers, Morris & Grover, L.L.P.
5718 Westheimer Road, Suite 1200
Houston, Texas 77057

OR2010-19123

Dear Ms. Lundy:

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# 404573.

The Klein Independent School District (the "district"), which you represent, received two requests from the same requestor for all information in a named former employee's file. You state some information will be released to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.115, 552.117, 552.136, and 552.137 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

Initially, we must address the district's obligations under the Act. 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. Gov't Code § 552.301. Section 552.301(b) requires that a governmental body ask for a

¹We note that although you also raise sections 552.111, 552.116, and 552.130 of the Government Code, you make no arguments to support these exceptions. Therefore, we assume you have withdrawn your claims that these sections apply to the submitted information.

²We assume that the "representative sample" of information 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.

decision from this office and state which exceptions apply to the requested information by the tenth business day after receiving the request. *Id.* § 552.301(b). You state the district received the first request for information on October 8, 2010. Accordingly, the tenth business day after the receipt of the first request was October 22, 2010. Although you timely submitted your initial request for a decision to this office, you did not raise section 552.136 of the Government Code until October 29, 2010, which was more than ten business days after the district's receipt of the first request for information. Thus, with respect to the assertion of section 552.136 for the first request, the district failed to comply with the procedural requirements mandated by section 552.301(b).

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the waiver of its claims under the exception at issue, unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). Generally, a compelling reason exists when third party interests are at stake or when information is confidential under other law. Open Records Decision No. 177 (1977). Because section 552.136 of the Government Code can provide a compelling reason to overcome the presumption of openness, we will address your argument under this section, as well as your timely raised arguments.

Section 552.103 of the Government Code provides in relevant part as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date that the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Thomas*

v. Cornyn, 71 S.W.3d 473, 487 (Tex. App.—Austin 2002, no pet.); *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, *writ ref'd n.r.e.*); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body’s receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.³ Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be “realistically contemplated”). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982).

You state the district reasonably anticipates litigation will ensue between the district and the requestor’s client based on correspondence between the district and the requestor. You state the requestor “has made allegations against [the district] and its employees for failure to complete appropriate paperwork for [the named former employee] resulting in a denial of benefits.” You contend the requestor was retained in relation to these allegations and intends to file suit against the district. However, you do not provide, and the submitted information does not reveal, any concrete evidence showing that the requestor or the requestor’s client actually threatened to file a lawsuit against the district or otherwise took any objective steps toward filing suit prior to the district’s receipt of the request. Accordingly, you failed to demonstrate the district reasonably anticipated litigation on the date the district received the request, and the district may not withhold any portion of the requested information under section 552.103 of the Government Code.

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 the doctrine of common-law privacy, which 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

³Among other examples, this office has concluded that litigation was reasonably anticipated where the opposing party took the following objective steps toward litigation: (1) filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); (2) hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and (3) threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

(Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be demonstrated. *Id.* at 681-82. A compilation of an individual's criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *Cf. United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (when considering prong regarding individual's privacy interest, court recognized distinction between public records found in courthouse files and local police stations and compiled summary of information and noted that individual has significant privacy interest in compilation of one's criminal history). Furthermore, we find a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. However, because privacy is a personal right that lapses at death, the common-law right to privacy does not encompass information that relates only to a deceased individual. Accordingly, information pertaining to a deceased individual may not be withheld on common-law privacy grounds. *See Moore v. Charles B. Pierce Film Enters. Inc.*, 589 S.W.2d 489, 491 (Tex. App.—Texarkana 1979, writ ref'd n.r.e.); *see also* Open Records Decision No. 272 at 1 (1981) (privacy rights lapse upon death). Upon review, we find the information you seek to withhold under common-law privacy pertains to a deceased individual. Thus, none of this information may be withheld under section 552.101 on the basis of common-law privacy.

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 document you have marked is a communication between district employees and the district's attorney. You state the communication was made to facilitate the rendition of legal advice to the district. You have identified the parties to the communication. You state that this communication was made in confidence and its confidentiality has been maintained. Based on your representations and our review, we conclude the district may withhold the document you have marked under section 552.107(1) of the Government Code.

You raise section 552.115 of the Government Code for the submitted death certificate. Section 552.115 excepts from disclosure "[a] birth or death record maintained by the bureau of vital statistics of the Texas Department of Health or a local registration official[.]" Gov't Code § 552.115(a). Section 552.115 is applicable only to information maintained by the bureau of vital statistics or local registration officials. *See Open Records Decision No. 338 (1982)* (finding that statutory predecessor to section 552.115 excepted only those birth and death records which are maintained by the bureau of vital statistics and local registration officials). Because section 552.115 does not apply to information held by the district, the submitted death certificate may not be withheld on this basis.

Next, you raise section 552.117(a)(1) of the Government Code, which 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 the information be kept confidential under section 552.024 of the Government Code. *See Gov't Code § 552.117(a)(1)*. We note the employee whose personal information you have marked is deceased. Because the protection afforded by section 552.117 includes "current or former" officials or employees, we note that the protection generally does not lapse at death, as it is also intended to protect the privacy of the employee's family members. We note, however, because the protection of social security numbers under section 552.117 is intended solely to protect the privacy of the employee, it lapses at death. *See Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 491 (Tex. App.—Texarkana 1979, writ ref'd n.r.e.); *see also* Attorney General Opinions JM-229; H-917. 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. Accordingly, to the extent the employee whose information is at issue timely elected confidentiality under section 552.024, the district must generally withhold the information we have marked under section 552.117(a)(1) of the

Government Code. However, the district may not withhold the deceased employee's social security number under section 552.117(a)(1).

We note the requestor may be the authorized representative of the individualS whose information is at issue. Therefore, if the requestor is the authorized representative of the individualS at issue, then the district may not withhold the information we have marked under section 552.117(a)(1) of the Government Code. *See* Gov't Code § 552.023 (person or person's authorized representative has special right of access, beyond right of general public, to information held by governmental body that relates to person and is protected from public disclosure by laws intended to protect person's privacy interests). If the requestor is not the authorized representative of the individualS at issue, then the district must withhold the information we have marked under section 552.117(a)(1).

Section 552.136(b) of the Government Code states "[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"). The bank account and routing numbers we have marked constitute access device numbers for purposes of section 552.136. Thus, the district must withhold the marked bank account and routing numbers under section 552.136 of the Government Code. We note the check number you have marked does not constitute an access device number and may not be withheld under section 552.136. This office has determined insurance policy numbers are also "access device" numbers for purposes of section 552.136. You have marked insurance policy numbers you seek to withhold under section 552.136. However, section 552.136 protects the privacy interests of individuals, and the right to privacy lapses at death. *See Moore*, 589 S.W.2d at 491. Therefore, if the insurance policy numbers you marked are associated with insurance policies that belonged solely to a deceased individual, they are not excepted from disclosure under section 552.136. However, to the extent a living individual has an interest in the insurance policy numbers at issue, the district must generally withhold them under section 552.136 of the Government Code. We note the requestor may be the authorized representative of the living individuals who may have an interest in the insurance policy numbers at issue. *See* Gov't Code § 552.023; Open Records Decision No. 481 at 4 (1987). Therefore, if living individuals have interests in the insurance policy numbers at issue and the requestor is not the authorized representative of these individuals, the district must withhold the insurance policy numbers you have marked under section 552.136 of the Government Code. If the insurance policy numbers you marked are associated with insurance policies that belonged solely to a deceased individual or the requestor is the authorized representative of living individuals who may have interests in the insurance policy numbers at issue, then the district may not withhold the insurance policy numbers you have marked under section 552.136 of the Government Code.

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). *See id.* § 552.137(a)-(c). The e-mail address at issue is not excluded by subsection (c). Therefore, the district must withhold the personal e-mail address we have marked under section 552.137 of the Government Code, unless the owner affirmatively consents to its public disclosure.

In summary, the district may withhold the document you have marked under section 552.107 of the Government Code. If the former employee whose information is at issue timely elected confidentiality under section 552.024 and the requestor is not the authorized representative of the individuals at issue, the district must withhold the information we have marked under section 552.117(a)(1) of the Government Code. In the alternative, if the employee whose information is at issue did not timely elect confidentiality under section 552.024 or the requestor is the authorized representative of the individuals at issue, the district may not withhold the information we have marked under section 552.117(a)(1) of the Government Code. The district must withhold the bank account and routing numbers we have marked under section 552.136 of the Government Code. If living individuals have interests in the insurance policy numbers you have marked and the requestor is not the authorized representative of these individuals, the district must withhold the marked insurance policy numbers under section 552.136 of the Government Code. If the insurance policy numbers you marked are associated with insurance policies that belonged solely to a deceased individual or the requestor is the authorized representative of living individuals who may have interests in the insurance policy numbers at issue, then the district may not withhold the insurance policy numbers you have marked under section 552.136 of the Government Code. The district must withhold the personal e-mail address we have marked under section 552.137 of the Government Code, unless the owner affirmatively consents to its public disclosure.⁴ The remaining information must be released.⁵

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.

⁴In Open Records Decision No. 684 (2009), this office issued a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including bank account, routing, and insurance policy numbers under section 552.136 of the Government Code and 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.

⁵We note the information being released in this instance contains confidential information to which the requestor’s client may have a right of access. *See* Gov’t Code § 552.023(a) (person or person’s authorized representative has special right of access, beyond right of general public, to information held by governmental body that relates to person and is protected from public disclosure by laws intended to protect person’s privacy interests). If the district receives another request for this same information from a different requestor, then the district should again seek a decision from this office.

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,

A handwritten signature in black ink, appearing to read "Jennifer Burnett", with a horizontal line extending to the right from the end of the signature.

Jennifer Burnett
Assistant Attorney General
Open Records Division

JB/dls

Ref: ID# 404573

Enc. Submitted documents

c: Requestor
(w/o enclosures)