



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 9, 2011

Ms. Judith N. Benton  
Assistant City Attorney  
City of Waco  
P.O. Box 2570  
Waco, Texas 76702-2570

OR2011-06368

Dear Ms. Benton:

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# 417104 (City of Waco Reference # LGL-11-245).

The City of Waco (the "city") received a request for all police, fire, and building inspection documentation regarding a specified address and/or a named business during a specified time period. You indicate you will release some of the requested information. You claim the submitted information is excepted from disclosure under sections 552.103, 552.107, 552.108, 552.130, and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

You raise section 552.103 of the Government Code for Exhibit 4. Section 552.103 provides in part:

(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 that claims section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information it seeks to withhold. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See* Open Records Decision No. 551 at 4 (1990).

This office has long held that for purposes of section 552.103, "litigation" includes "contested cases" conducted in a quasi-judicial forum. *See* Open Records Decision Nos. 474 (1987), 368 (1983), 336 (1982), 301 (1982). Likewise, "contested cases" conducted under the Texas Administrative Procedure Act, chapter 2001 of the Government Code, constitute "litigation" for purposes of section 552.103. *See* Open Records Decision Nos. 588 (1991) (concerning former State Board of Insurance proceeding), 301 (1982) (concerning hearing before Public Utilities Commission). In determining whether an administrative proceeding is conducted in a quasi-judicial forum, this office has focused on the following factors: (1) whether the dispute is, for all practical purposes, litigated in an administrative proceeding where (a) discovery takes place, (b) evidence is heard, (c) factual questions are resolved, and (d) a record is made; and (2) whether the proceeding is an adjudicative forum of first jurisdiction, *i.e.*, whether judicial review of the proceeding in district court is an appellate review and not the forum for resolving a controversy on the basis of evidence. *See* ORD 588.

You argue Exhibit 4, which consists of incident reports, relates to litigation of a civil nature that the city is or may be a party to. You explain the requestor's client's license to operate a sexually oriented business was suspended due to a violation of section 20-39 of the city's Code of Ordinances. You state the requestor's client is appealing the license suspension. We note that pursuant to section 20-41 of the city's Code of Ordinances, the aggrieved party may appeal the action to the city council. However, you have not explained how or why an appeal of a violation of this ordinance to the city council qualifies as an administrative proceeding conducted in a quasi-judicial forum. Thus, as you have not demonstrated the information at issue is related to litigation, we conclude the city may not withhold this information on the basis of section 552.103.

Section 552.108(a)(1) of the Government Code excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]" Gov't Code § 552.108(a)(1). A governmental body must reasonably explain how and why section 552.108 is applicable to the information

at issue. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You have provided documentation from the Waco Police Department that reflects some of the submitted reports within Exhibit 4 relate to pending criminal investigations or prosecutions involving the specified address or business listed in the instant request. Based on these representations, we find that section 552.108(a)(1) is applicable to the reports we have marked. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests present in active cases), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Although you have submitted a letter from the Texas Alcoholic Beverage Commission stating an investigation is pending, the investigation does not involve the business or address specified in the present request. Further, you have failed to explain how the release of any of the remaining reports in Exhibit 4 would interfere with the detection, investigation, or prosecution of crime. Thus, none of the remaining reports in Exhibit 4 may be withheld on the basis of section 552.108 of the Government Code.

We note section 552.108 does not except from disclosure “basic information about an arrested person, an arrest, or a crime.” Gov’t Code § 552.108(c). Section 552.108(c) refers to the basic front-page information held to be public in *Houston Chronicle*. 531 S.W.2d at 186-87; *see* Open Records Decision No. 127 (1976) (summarizing types of information made public by *Houston Chronicle*). Basic information includes a detailed description of the offense and an arrested person’s social security number. *See* ORD 127. However, basic information does not include information subject to section 552.130 of the Government Code. *See* 531 S.W.2d at 186-88; ORD 127. Thus, with the exception of basic information, the city may withhold the reports we have marked within Exhibit 4 under section 552.108(a)(1).

We note some of the basic information in one of the reports we have marked under section 552.108, as well as portions of the remaining reports in Exhibit 4, are subject to common-law privacy, which is encompassed by section 552.101 of the Government Code.<sup>1</sup> 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. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The types 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 workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *See id.* at 683. This office has found the following types of information are excepted from required public disclosure under common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470

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<sup>1</sup>Section 552.101 of the Government Code is a mandatory exception to disclosure that protects “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

(1987) (illness from severe emotional and job-related stress); and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). Additionally, this office has found 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. U. S. 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). However, active warrant information or other information relating to an individual's current involvement in the criminal justice system does not constitute criminal history information for the purposes of section 552.101. *See* Gov't Code § 411.081(b) (police department allowed to disclose information pertaining to person's current involvement in the criminal justice system).

Upon review, we find portions of the basic information in one of the reports we have marked under section 552.108, as well as portions of the remaining reports in Exhibit 4, are highly intimate or embarrassing and not of legitimate public interest. Accordingly, in releasing the basic information from one of the reports marked under section 552.108, the city must withhold the information we have marked under section 552.101 in conjunction with common-law privacy. The city must also withhold the information we have marked in the remaining reports within Exhibit 4 under section 552.101 in conjunction with common-law privacy. However, we find none of the remaining information at issue is highly intimate or embarrassing and of no legitimate concern. Therefore, none of the remaining information in Exhibit 4 may be withheld on this basis.

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 Exhibit 7 consists of communications between a city attorney and city employees made to facilitate the rendition of legal advice to the city. You state these communications were made in confidence and their confidentiality has been maintained. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to Exhibit 7. Accordingly, the city may withhold this information under section 552.107 of the Government Code

Section 552.130 of the Government Code excepts from disclosure information related to a motor vehicle operator's or driver's license or permit issued by an agency of this state or a motor vehicle title or registration issued by an agency of this state. *See Gov't Code* § 552.130(a)(1), (2). Accordingly, the city must withhold the Texas motor vehicle record information we have marked in the remaining information under section 552.130 of the Government Code.

Section 552.136 of the Government Code provides that “[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”). Accordingly, the city must withhold the credit card number, bank account number, and bank routing number you have marked in the remaining information under section 552.136 of the Government Code.

Section 552.147 of the Government Code provides “[t]he social security number of a living person is excepted from” required public disclosure under the Act. *Id.* § 552.147(a). We find the city may withhold the social security numbers you have marked, in addition to the information we have marked, in the remaining information under section 552.147 of the Government Code.<sup>2</sup>

In summary, with the exception of basic information, the city may withhold the reports we have marked in Exhibit 4 under section 552.108(a)(1) of the Government Code. When releasing basic information under section 552.108(c), the city must withhold the information we have marked from one of the reports under section 552.101 in conjunction with

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<sup>2</sup>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. *Gov't Code* § 552.147(b).

common-law privacy. The city must also withhold the information we have marked in the remaining submitted reports within Exhibit 4 under section 552.101 in conjunction with common-law privacy. The city must withhold the Texas motor vehicle record information we have marked in the remaining information under section 552.130 of the Government Code.<sup>3</sup> The city must withhold the credit card number, bank account number, and bank routing number we have marked in the remaining information under section 552.136 of the Government Code. The city may withhold the social security numbers you have marked, in addition to the information we have marked, in the remaining information under section 552.147 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/tf

Ref: ID# 417104

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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<sup>3</sup>We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including Texas driver's license and license plate numbers under section 552.130 of the Government Code; and a credit card, bank account, and routing number under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.