



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 17, 2011

Mr. Humberto Aguilera  
Escamilla, Poneck & Cruz, L.L.P.  
P.O. Box 200  
San Antonio, Texas 78291-0200

OR2011-17000

Dear Mr. Aguilera:

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# 436326.

The Border Region Mental Health Mental Retardation Community Center (the "center"), which you represent, received a request for the personnel file of a named center employee. You state the center will redact information subject to section 552.117 of the Government Code pursuant to section 552.024 of the Government Code, under section 552.130 of the Government Code, and pursuant to Open Records Decision No. 684 (2009).<sup>1</sup> You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.107, and 552.115 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>2</sup>

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<sup>1</sup>Section 552.024(c)(2) of the Government Code authorizes a governmental body to redact the home address and telephone number, emergency contact information, social security number, and family member information of a current or former official or employee of a governmental body protected by section 552.117(a)(1) of the Government Code without the necessity of requesting a decision under the Act if the current or former employee or official to whom the information pertains timely chooses not to allow public access to the information. *See* Gov't Code § 552.024(c)(2). Section 552.130(c) of the Government Code allows a governmental body to redact the motor vehicle record information described in subsections 552.130(a)(1) and (a)(3) without the necessity of seeking a decision from the attorney general. *See* Act of May 30, 2011, 82nd Leg., R.S., S.B. 602, § 22 (to be codified at Gov't Code § 552.130(c)). Further, Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including a copy of a Texas driver's license under section 552.130 of the Government Code, without the necessity of requesting an attorney general decision.

<sup>2</sup>We assume 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 those records contain substantially different types of information than that submitted to this office.

Initially, we note the information submitted as Exhibits E and G includes a report of a completed investigation subject to section 552.022(a)(1) of the Government Code. Section 552.022(a)(1) provides for required public disclosure of “a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[,]” unless the information is expressly confidential under “other law” or excepted from disclosure under section 552.108 of the Government Code. Gov’t Code § 552.022(a)(1). Although you claim the information in Exhibit E is subject to section 552.107(1) of the Government Code, that section protects a governmental body’s interest and may be waived. *See* Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.107(1) is not “other law” that makes information confidential for purposes of section 552.022. Accordingly, the information at issue may not be withheld under section 552.107(1). However, the Texas Supreme Court has held the Texas Rules of Evidence are “other law” that make information expressly confidential for the purposes of section 552.022 of the Government Code. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will consider your attorney-client privilege argument for this information under rule 503 of the Texas Rules of Evidence. We will also consider your argument under section 552.107 of the Government Code for the information not subject to section 552.022.

Rule 503 of the Texas Rules of Evidence enacts the attorney-client privilege. Rule 503(b)(1) provides as follows:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

- (A) between the client or a representative of the client and the client’s lawyer or a representative of the lawyer;
- (B) between the lawyer and the lawyer’s representative;
- (C) by the client or a representative of the client, or the client’s lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
- (D) between representatives of the client or between the client and a representative of the client; or
- (E) among lawyers and their representatives representing the same client.

Tex. R. Evid. 503(b)(1). A communication is “confidential” if 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). 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. *See* ORD 676 at 6-7.

Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You state the completed investigation in Exhibit E consists of a communication between a center attorney and center employees made in furtherance of the rendition of professional legal services to the center. You claim this communication was not intended for release to third parties, and the confidentiality of the communication has been maintained. Therefore, based on your representations and our review, we conclude the center may withhold the completed investigation in Exhibit E under rule 503 of the Texas Rules of Evidence.

Section 552.101 of the Government Code exempts 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 other statutes, including section 6103(a) of title 26 of the United States Code. Section 6103(a) renders tax return information confidential. Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision No. 600 (1992) (W-4 forms). Section 6103(b) defines the term “return information” as “a taxpayer’s identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments or tax payments, . . . or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary [of the Internal Revenue Service] with respect to a return or with respect to the determination of the existence, or possible existence, of liability . . . for any tax, penalty, . . . , or offense[.]” *See* 26 U.S.C. § 6103(b)(2)(A). Federal courts have construed the term “return information” expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer’s liability under title 26 of the United States Code. *See Mallas v. Kolak*, 721 F. Supp. 748, 754 (M.D.N.C. 1989), *aff’d in part*, 993 F.2d 1111 (4th Cir. 1993). Consequently, the center must withhold the submitted W-4 forms in Exhibit A and in Exhibit G pursuant to section 552.101 in conjunction with section 6103(a).

We understand you to claim Exhibit C is confidential under section 2052.003 of the Government Code, which requires certain state agencies to include in their annual reports to the Texas Workforce Commission the number of “(1) individuals with disabilities whom the agency employs; and (2) individuals for whom state or federal guidelines encourage a more

equitable balance whom the agency employs.”<sup>3</sup> Gov’t Code § 2052.003(a). We note, however, this statute does not make any information confidential. Therefore, the center may not withhold any of the submitted information under section 552.101 in conjunction with section 2052.003. *See* Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality provision must be express and cannot be implied), 478 at 2 (1987) (language of confidentiality statute controls scope of protection), 465 at 4-5 (1987) (statute explicitly required confidentiality).

Section 552.101 also encompasses the doctrine of common-law privacy, which 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. 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 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 some 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) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps).

We note most of the submitted information relates to public employees and public employment. As this office has stated on many occasions, the public generally has a legitimate interest in public employment and public employees. *See* Open Records Decision No. 444 at 6 (1986) (public has genuine interest in information concerning employee’s qualifications and performance and circumstances of his termination or resignation). The behavior of a public employee in the workplace and the conditions for his or her continued employment are generally matters of legitimate public interest that are not protected by common-law privacy. *See* Open Records Decision No. 438 (1986). Likewise, information about a public employee’s qualifications, disciplinary action, and background is generally not protected by common-law privacy. *See* Open Records Decision Nos. 444 at 5-6, 405 at 2-3 (1983) (public has interest in manner in which public employee performs his job), 329 at 2 (1982) (information relating to complaints against public employees and discipline resulting therefrom is not protected under former sections 552.101 or 552.102), 208 at 2 (1978) (information relating to complaint against public employee and disposition of the complaint is not protected under either the constitutional or common-law right of privacy). However, this office has found personal financial information not relating to a financial

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<sup>3</sup>Although you cite to Senate Bill 926, in which the Sixty-Ninth Legislature required certain state agencies to include in their annual reports to the Office of the Governor “the number of handicapped persons employed by the agency[.]” we note the Seventy-Third Legislature repealed this predecessor statute when it adopted title 10 of the Government Code. *See* Act of May 25, 1985, 69th Leg., R.S., ch. 648, § 2, 1985 Tex. Gen. Laws 2398, 2398, *repealed by* Act of April 30, 1993, 73d Leg., R.S., ch 268, § 46(1), 1993 Tex. Gen. Laws 583, 986; *see also id.* at § 1.

transaction between an individual and a governmental body is generally protected by common-law privacy. *See* Open Records Decision Nos. 600 (1992) (employee's designation of retirement beneficiary, choice of insurance carrier, election of optional coverages, direct deposit authorization, 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). On the other hand, there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See* ORD 600 at 9 (information revealing employee participates in group insurance plan funded partly or wholly by governmental body not excepted from disclosure); *see also* Open Records Decision Nos. 545 (financial information pertaining to receipt of funds from governmental body or debts owed to governmental body not protected by common-law privacy), 523 (1989). Whether financial information is subject to a legitimate public interest and therefore not protected by common-law privacy must be determined on a case-by-case basis. *See* Open Records Decision No. 373 (1983).

In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), the court addressed the applicability of common-law privacy to information relating to an investigation of alleged sexual harassment. The investigation files in *Ellen* contained individual witness statements, an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. *See Ellen*, 840 S.W.2d at 525. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating the public's interest was sufficiently served by the disclosure of such documents. *Id.* The *Ellen* court held "the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.* Thus, if there is an adequate summary of an investigation of sexual harassment, the summary must be released along with the statement of the person accused of sexual harassment, but the identities of the victims and witnesses must be redacted and their detailed statements must be withheld from disclosure. If no adequate summary of the investigation exists, then detailed statements regarding the allegations must be released, but the identities of victims and witnesses must be redacted from the statements. In either event, the identity of the individual accused of sexual harassment is not protected from public disclosure. We note supervisors are generally not witnesses for purposes of *Ellen*, except where their statements appear in a non-supervisory context.

In this instance, the submitted information includes information pertaining to a sexual harassment investigation that does not include a summary of the investigation. Therefore, the center must generally release the information pertaining to the investigation, except for the identities of the victim and witnesses. The center must withhold the identifying information of the victim and witnesses, which we have marked, under section 552.101 in conjunction with common-law privacy under *Ellen*. Furthermore, we find additional portions of the information in Exhibits C, D, and G, which we have marked, are highly intimate or embarrassing and of no legitimate public interest. Therefore, the center must withhold this information under section 552.101 of the Government Code in conjunction with common-law privacy. We note, however, the information in Exhibit B pertains to a financial

transaction between an individual and a governmental body and the remaining information in Exhibit G relates to the performance of public employees. We find this information is not highly intimate or embarrassing, or there is a legitimate public interest in this information; therefore, the center may not withhold any of Exhibit B or the remaining information in Exhibit G under section 552.101 of the Government Code on the basis of common-law privacy.

You raise section 552.102(a) of the Government Code for a portion of the remaining information. Section 552.102(a) excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” Gov’t Code § 552.102(a). The Texas Supreme Court recently held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, No. 08-0172, 2010 WL 4910163 (Tex. Dec. 3, 2010). Having carefully reviewed the remaining information, we have marked the information the center must withhold under section 552.102(a) of the Government Code.

Section 552.107(1) of the Government Code protects information that comes 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). 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, 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.* 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, orig. proceeding). 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 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 remaining information in Exhibit E consists of communications between center attorneys and center staff that were made for the purpose of facilitating the rendition of professional legal services to the center. 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 the information at issue. Accordingly, the center may withhold the remaining information in Exhibit E, and the duplicate documents in Exhibit G, under section 552.107(1) of the Government Code.

Next, you assert the birth certificate submitted as Exhibit F is excepted from disclosure under section 552.115 of the Government Code. 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 official. *See Open Records Decision No. 338* (1982). Therefore, because it is maintained by the center, the submitted birth certificate may not be withheld under section 552.115 of the Government Code.

We note the remaining information contains motor vehicle record information in addition to the information the center is allowed to withhold without seeking a ruling from this office under section 552.130 of the Government Code or pursuant to Open Records Decision No. 684. Section 552.130 excepts from public disclosure information relating to a motor vehicle title or registration issued by an agency of this state or another state or country. Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 4 (to be codified as an amendment to Gov’t Code § 552.130). Accordingly, the center must also withhold the information we have marked under section 552.130 of the Government Code.

We note a portion of the remaining information is subject to section 552.136 of the Government Code.<sup>4</sup> Section 552.136 provides “[n]otwithstanding 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(b); *see id.* § 552.136(a) (defining “access device”). Accordingly, the center must withhold the bank account number we have marked under section 552.136 of the Government Code.

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<sup>4</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See Open Records Decision Nos. 481* (1987), *480* (1987), *470* (1987).

In summary, the center may withhold the completed investigation in Exhibit E, and the duplicate documents in Exhibit G, under rule 503 of the Texas Rules of Evidence. The center must withhold the submitted W-4 forms in Exhibit A and in Exhibit G pursuant to section 552.101 in conjunction with section 6103(a) of title 26 of the United States Code. The center must withhold the information in Exhibits C, D, and G we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The center must withhold the information we have marked under section 552.102(a) of the Government Code. The center may withhold the remaining information in Exhibit E, and the duplicate documents in Exhibit G, under section 552.107(1) of the Government Code. The center must withhold the additional motor vehicle record information we have marked under section 552.130 of the Government Code. The center must withhold the bank account number we have marked under section 552.136 of the Government Code. The center must release the remaining information.

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,



Mack T. Harrison  
Assistant Attorney General  
Open Records Division

MTH/em

Ref: ID# 436326

Enc. Submitted documents

c: Requestor  
(w/o enclosures)