



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 28, 2011

Ms. Debra A. Drayovitch
For the City of Corinth
Drayovitch, P.C.
620 W. Hickory Street
Denton, Texas 76201

OR2011-17454

Dear Ms. Drayovitch:

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# 437157.

The Corinth Police Department (the "department"), which you represent, received a request for all records pertaining to a specified internal affairs investigation. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.117, and 552.119 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments submitted by an interested third party. *See* Gov't Code § 552.304 (interested third party may submit comments stating why information should or should not be released).

Initially, we note the submitted information consists of a completed internal affairs investigation subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part, the following:

Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public

¹You inform us the department withdraws its initial claim under section 552.102 of the Government Code.

information and not excepted from required disclosure unless made confidential under this chapter or other law:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Act of May 30, 2011, 82nd Leg., R.S., S.B. 602, § 2 (to be codified as an amendment to Gov't Code § 552.022(a)). Although you assert the submitted information is excepted from disclosure under sections 552.103 and 552.107, these sections are discretionary and do not make information confidential under the Act. *Id.* §§ 3-26, 28-37 (providing for “confidentiality” of information under specified exceptions); *see Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 676 at 6 (2002) (section 552.107 is not other law for purposes of section 552.022), 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the department may not withhold the submitted information under sections 552.103 or 552.107. The Texas Supreme Court, however, has held the Texas Rules of Evidence are “other law” within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Accordingly, we will consider your assertion of this privilege under rule 503. We note section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov't Code § 552.101. Additionally, sections 552.117 and 552.119 of the Government Code make information confidential under chapter 552. *See* Act of May 30, 2011, 82nd Leg., R.S., S.B. 602, §§ 9, 11 (to be codified as amendments to Gov't Code §§ 552.117, .119) (providing for “confidentiality” of information under sections 552.117 and 552.119). Accordingly, because section 552.101 excepts from disclosure information that is made confidential under other law and sections 552.117 and 552.119 make information confidential under chapter 552, we will also consider your arguments under these exceptions.

Rule 503 of the Texas Rules of Evidence enacts the attorney-client privilege and provides:

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). Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show 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 the communication is confidential by explaining it was not intended to be disclosed to third persons and 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 claim a portion of the submitted information consists of confidential attorney-client communications made in furtherance of the rendition of professional legal services to the department. Upon review, however, we find you have failed to establish any of the submitted information constitutes privileged attorney-client communications. Therefore, none of this information may be withheld under rule 503 of the Texas Rules of Evidence.

Section 552.101 of the Government Code encompasses the common-law right to 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 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be demonstrated. *Id.* at 681-82. The types of information considered intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* include information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *See Indus. Found.* 540 S.W.2d at 683. In addition, this office has found that some kinds of medical information or information indicating disabilities or

specific illnesses to be 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). However, this office also has found a legitimate public interest in information relating to employees of governmental bodies and their employment qualifications and job performance. *See* Open Records Decision Nos. 542 at 5 (1990), 470 at 4 (public has legitimate interest in job qualifications and performance of public employees); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow). Upon review, we have marked portions of the report that are highly intimate or embarrassing and of no legitimate public interest. Accordingly, the department must withhold the information we have marked, and the corresponding information in the submitted video recordings, under section 552.101 of the Government Code in conjunction with common-law privacy. You have failed to demonstrate how any of the remaining information is highly intimate or embarrassing and of no legitimate public interest. Thus, the department may not withhold any of the remaining information under section 552.101 in conjunction with common-law privacy.

Section 552.117(a)(2) of the Government Code excepts from public disclosure a peace officer's home address and telephone number, social security number, family member information, and emergency contact information, regardless of whether the peace officer made an election under section 552.024 of the Government Code. Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 2 (to be codified as an amendment to Gov't Code § 552.117(a)(2)). Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. Therefore, the department must withhold the personal information of the peace officers we have marked, and the corresponding information in the submitted video recordings, under section 552.117(a)(2) of the Government Code. We note that the remaining information also contains personal information of the requestor, who is a former peace officer of the department. Although the department would ordinarily be required to withhold the requestor's personal information under section 552.117(a)(2), this exception protects personal privacy. The requestor has a right of access to his own private information under section 552.023 of the Government Code.² *See* Gov't Code § 552.023. Therefore, the department may not withhold the requestor's personal information in this instance under section 552.117(a)(2).³

Section 552.119 of the Government Code provides as follows:

²Section 552.023 provides in part that "[a] person or a person's authorized representative has a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect that person's privacy interests." Gov't Code § 552.023(a).

³Should the department receive another request for this information from a person who would not have a right of access to this requestor's private information, the department should resubmit this information and request another decision. *See* Gov't Code §§ 552.301, .302.

(a) A photograph that depicts a peace officer as defined by Article 2.12, Code of Criminal Procedure, or a security officer commissioned under Section 51.212, Education Code, the release of which would endanger the life or physical safety of the officer, is excepted from [required public disclosure] unless:

- (1) the officer is under indictment or charged with an offense by information;
- (2) the officer is a party in a fire or police civil service hearing or a case in arbitration; or
- (3) the photograph is introduced as evidence in a judicial proceeding.

(b) A photograph exempt from disclosure under Subsection (a) may be made public only if the peace officer or security officer gives written consent to the disclosure.

Id. § 552.119. Under section 552.119, a governmental body must demonstrate, if the documents do not demonstrate on their face, that release of the photograph would endanger the life or physical safety of a peace officer. In this instance, you assert that release of the submitted video recordings would endanger the lives of the officers depicted in the video recordings. Upon review, we find that the department has failed to demonstrate that release of the submitted video recordings would endanger the officers' lives or physical safety. Accordingly, the remaining information may not be withheld under section 552.119.

In summary, the department must withhold the information we have marked, and the corresponding information in the submitted video recordings, under section 552.101 of the Government Code in conjunction with common-law privacy. The department must withhold the personal information of the peace officers we have marked, and the corresponding information in the submitted video recordings, under section 552.117(a)(2) of the Government Code. The department 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, 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 "Sean Nottingham".

Sean Nottingham
Assistant Attorney General
Open Records Division

SN/agn

Ref: ID# 437157

Enc. Submitted documents

c: Requestor
(w/o enclosures)