



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 30, 2012

Ms. Tiffany N. Evans
Assistant City Attorney
City of Houston
P.O. Box 368
Houston, Texas 77001-0368

OR2012-06221

Dear Ms. Evans:

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# 451972 (GC 19390).

The Houston Police Department (the "department") received a request for communications and correspondence between a named individual and the Harris County District Attorney's Office (the "district attorney's office") during a specified time period. You claim that the requested information is excepted from disclosure under sections 552.107 and 552.108 of the Government Code. You state you have notified the district attorney's office, which may have an interest in some of the requested information, pursuant to section 552.304 of the Government Code. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

You seek to withhold Exhibits 2, 3, 4, and 6 under section 552.108 of the Government Code. Section 552.108 provides in pertinent part:

¹We assume that 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 that those records contain substantially different types of information than that submitted to this office.

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime; [or]

(2) it is information that the deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication[.]

Id. § 552.108(a)(1)-(2). We note that the protections offered by subsections 552.108(a)(1) and 552.108(a)(2) of the Government Code are, generally, mutually exclusive. Section 552.108(a)(1) generally applies to information that pertains to criminal investigations or prosecutions that are currently pending, while section 552.108(a)(2) protects law enforcement records that pertain to criminal investigations and prosecutions that have concluded in final results other than criminal convictions or deferred adjudications. A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why the exception it claims is applicable to the information the governmental body seeks to withhold. *See id.* § 552.301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977).

You state Exhibits 2, 4, and 6 relate to pending criminal investigations. You also state Exhibits 2, 3, and 6 pertain to closed criminal investigations that did not result in convictions or deferred adjudication. Based upon these representations, we find release of Exhibit 4 would interfere with the detection, investigation, or prosecution of crime and, thus, section 552.108(a)(1) is applicable to this information. *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 that are present in active cases), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). We further find section 552.108(a)(2) is applicable to Exhibit 3. Therefore, the department may withhold Exhibit 4 under section 552.108(a)(1) of the Government Code and Exhibit 3 under section 552.108(a)(2) of the Government Code.

However, you have provided conflicting representations regarding Exhibits 2 and 6. Based on your conflicting representations, we are unable to determine whether the information in Exhibits 2 and 6 relates to an ongoing criminal case or a closed case that did not result in conviction or deferred adjudication. Thus, we find you have failed to demonstrate the applicability of section 552.108 to Exhibits 2 and 6; therefore, no portion of this information may be withheld on this basis.

You also claim Exhibits 2, 5, and 6 are excepted from disclosure under section 552.107(1) of the Government Code, which protects information coming within the attorney-client privilege. Gov't Code § 552.107(1). 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). 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, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (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 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 information submitted as Exhibits 2, 5, and 6 consists of “active working files in the custody of the [district attorney’s office, including] communications between employees of the [district attorney’s office and two named assistant district attorneys].” However, we note you have not identified any of the other parties to these communications, many of whom appear to be department employees, and we are unable to assume all of the parties are privileged. *See* ORD 676 at 8 (governmental body must inform this office of identities and capacities of individuals to whom each communication at issue has been made; this office cannot necessarily assume that communication was made among only categories of individuals identified in rule 503); *see generally* Gov’t Code § 552.301(e)(1)(A). Additionally, you have not explained the communications at issue were made for the purpose of facilitating the rendition of professional legal services to the department and some of the

information does not consist of communications with an attorney. Accordingly, we find you have failed to demonstrate that any of the information in Exhibits 2, 5, and 6 is protected by the attorney-client privilege. Therefore, the department may not withhold any of this information under section 552.107 of the Government Code.

We note some of the remaining information is excepted from public disclosure under section 552.101 of the Government Code.² 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. 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 (Tex.1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *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. This office has also found some kinds of medical information or information indicating disabilities or specific illnesses are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps).

Upon review, we find Exhibit 2 contains information that is highly intimate or embarrassing and not of legitimate public concern. Therefore, the department must withhold this information, which we have marked, under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.117(a)(2) of the Government Code excepts from public disclosure the home address, home telephone number, emergency contact information, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with sections 552.024 and 552.1175 of the Government Code. *See* 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. We note section 552.117(a)(2) is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *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). Accordingly, if an individual whose information is at issue is currently a licensed peace officer as defined by article 2.12, the department must withhold the information we have

²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

marked under section 552.117(a)(2) of the Government Code. Conversely, if an individual whose information is at issue is no longer a licensed peace officer as defined by article 2.12, then the department may not withhold the marked information under section 552.117(a)(2).

If an individual whose information is at issue is not a licensed peace officer, then his or her personal information may be subject to section 552.117(a)(1) of the Government Code. Section 552.117(a)(1) excepts from disclosure the home address and telephone number, social security number, emergency contact information, 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. *See* Gov't Code § 552.117(a)(1). Section 552.117(a)(1) is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* ORD 506 at 5-6. 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 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. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee who did not timely request under section 552.024 the information be kept confidential.

Therefore, if an individual whose information is at issue is not a licensed peace officer as defined by article 2.12 and the individual timely requested confidentiality under section 552.024, the department must withhold the information we have marked under section 552.117(a)(1); however, the department may only withhold a cellular telephone number if the individual paid for the cellular service. Conversely, if the individual at issue did not timely request confidentiality under section 552.024 or a governmental body pays for the cellular service, the department may not withhold the marked information under section 552.117(a)(1) of the Government Code.

We note a portion of the remaining information may be excepted from disclosure under section 552.1175 of the Government Code. Section 552.1175 provides in part:

(a) This section applies only to:

...

(5) employees of a district attorney, criminal district attorney, or county or municipal attorney whose jurisdiction includes any criminal law or child protective services matters[.]

(b) Information that relates to the home address, home telephone number, emergency contact information, or Social Security number of an individual

to whom this section applies, or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

- (1) chooses to restrict public access to the information; and
- (2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Gov't Code § 552.1175(a)(5), (b). We note section 552.1175 also is applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* ORD 506 at 5-6. Therefore, to the extent an individual whose cellular telephone number we have marked elects to restrict access to this information in accordance with section 552.1175(b), and if the cellular telephone service is not paid for by a governmental body, the department must withhold this number under section 552.1175 of the Government Code. If the individual does not elect to restrict access to the information we have marked or a governmental body pays for the cellular service, then the department may not withhold this information under section 552.1175.

In summary, the city may withhold Exhibit 4 under section 552.108(a)(1) of the Government Code and Exhibit 3 under section 552.108(a)(2) of the Government Code. The city must withhold the information we have indicated in Exhibit 2 under section 552.101 of the Government Code in conjunction with common-law privacy. The department must withhold the information we have marked under section 552.117(a)(2) of the Government Code if the individual whose information is at issue is currently a licensed peace officer as defined by article 2.12; however, the department may only withhold a cellular telephone number if the officer paid for the cellular service. If an individual whose information is at issue is not a licensed peace officer as defined by article 2.12 and the individual timely requested confidentiality under section 552.024, the department must withhold the information we have marked under section 552.117(a)(1) of the Government Code; however, the department may only withhold a cellular telephone number if the individual paid for the cellular service. To the extent an individual whose cellular telephone number we have marked elects to restrict access to this information in accordance with section 552.1175(b), and if the cellular telephone service is not paid for by a governmental body, the department must withhold this number under section 552.1175 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, 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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/dls

Ref: ID# 451972

Enc. Submitted documents

c: Requestor
(w/o enclosures)