



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 14, 2012

Mr. Russell W. Malm
County Attorney
Midland County
500 North Loraine, Suite 1101
Midland, Texas 79701

OR2012-07103

Dear Mr. Malm:

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# 452156.

The Midland County District Attorney's Office (the "district attorney's office") received a request for a named individual's e-mails for a specified time period.¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.108, 552.111, 552.117, and 552.137 of the Government Code.² You also believe release of the information may implicate the interests of the named individual. Accordingly, you state you have notified the named individual of the request and the individual's right to submit arguments

¹We note the district attorney's office sought and received clarification of the request for information. See Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if a large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); *City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date the request is clarified or narrowed).

²Although you raise section 552.024 of the Government Code as an exception to disclosure, we note that this section is not an exception to public disclosure under the Act. Rather, this section permits a current or former official or employee of a governmental body to choose whether to allow public access to certain information relating to the current or former official or employee that is held by the employing governmental body. See Gov't Code § 552.024. We note section 552.117 of the Government Code is the proper exception to assert.

to this office. *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 information, a portion of which is a representative sample.³

Initially, we note some of the submitted information is not subject to the Act. The Act is only applicable to "public information." *See id.* § 552.021. Section 552.002(a) defines public information as "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it." *Id.* § 552.002(a). We note some of the submitted e-mails consist of personal e-mails that do not relate to the transaction of official district attorney's office business. *See* Open Records Decision No. 635 (1995) (statutory predecessor not applicable to personal information unrelated to official business and created or maintained by state employee involving *de minimis* use of state resources). Thus, we find the e-mails at issue do not constitute "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business" by or for the district attorney's office. *See* Gov't Code § 552.021. Accordingly, we conclude the e-mails at issue, a representative sample of which we have marked, are not subject to the Act and need not be released in response to this request.

Next, we note some of the remaining submitted information, which we have indicated, is not responsive to the instant request because it does not consist of the e-mails of the named individual at issue. The district attorney's office need not release nonresponsive information in response to this request, and this ruling will not address that information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. This section 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. This office has found that personal financial information not related to a financial transaction between an individual and a governmental body is highly intimate or embarrassing and of no legitimate public interest. *See* Open Records Decision Nos. 545 (1990) (deferred compensation information, mortgage payments, assets, bills, and credit history protected under common-law privacy), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy). Upon review, we find the information we have marked is highly

³We assume 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 those records contain substantially different types of information than those submitted to this office.

intimate or embarrassing and of no legitimate public interest. Accordingly, the district attorney's office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.102(a) of the Government Code excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."⁴ 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.*, 354 S.W.3d 336 (Tex. 2010). We have marked birth dates that must be withheld under section 552.102(a) of the Government Code.

You raise section 552.108 of the Government Code for some of the remaining information at issue, a representative sample of which you have indicated. Section 552.108 provides in pertinent part:

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [required public disclosure] if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution;

...

(3) the internal record or notation:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

Gov't Code § 552.108(b)(1), (3). Subsection 552.108(b)(1) of the Government Code is intended to protect "information which, if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate the laws of this State." *City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.). To prevail on its claim that subsection 552.108(b)(1) excepts information from disclosure, a governmental body

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

must do more than merely make a conclusory assertion that releasing the information would interfere with law enforcement. Instead, the governmental body must meet its burden of explaining how and why release of the requested information would interfere with law enforcement and crime prevention. *See* Open Records Decision No. 562 at 10 (1990) (construing statutory predecessor). In addition, generally known policies and techniques may not be withheld under section 552.108. *See, e.g.,* Open Records Decision Nos. 531 at 2-3 (1989) (Penal Code provisions, common law rules, and constitutional limitations on use of force are not protected under law enforcement exception), 252 at 3 (1980) (governmental body did not meet burden because it did not indicate why investigative procedures and techniques requested were any different from those commonly known). The determination of whether the release of particular records would interfere with law enforcement is made on a case-by-case basis. *See* Open Records Decision No. 409 at 2 (1984) (construing statutory predecessor).

In this instance, you have not provided any arguments as to how subsection 552.108(b)(1) applies to the information at issue. Thus, we find you have failed to meet your burden to demonstrate how the release of the information at issue would interfere with law enforcement and crime prevention. Accordingly, the district attorney's office may not withhold any of the information at issue under subsection 552.108(b)(1).

You also contend the information at issue is subject to subsection 552.108(b)(3). You state the information at issue consists of e-mails between members of the district attorney's office discussing strategy used and to be used in the prosecution of criminal cases. Based on your representations and our review, we find the information we have marked was prepared by an attorney in anticipation of or in the course of preparing for criminal litigation or reflects the mental processes or legal reasoning of an attorney. Accordingly, the district attorney's office may withhold this information under section 552.108(b)(3) of the Government Code.⁵ However, we find you have failed to demonstrate how the remaining information at issue was prepared by an attorney in anticipation of or in the course of preparing for criminal litigation or reflects the mental processes or legal reasoning of an attorney. Thus, we find you have not established how the remaining information at issue is subject to subsection 552.108(b)(3), and the district attorney's office may not withhold this information on that basis.

Section 552.111 of the Government Code excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." *See* Gov't Code § 552.111. This section encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines work product as:

⁵As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

(1) [M]aterial prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or

(2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5(a). A governmental body seeking to withhold information under this exception bears the burden of demonstrating the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. *Id.*; ORD 677 at 6-8. In order for this office to conclude that the information was made or developed in anticipation of litigation, we must be satisfied that

a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

Nat'l Tank Co. v. Brotherton, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204; ORD 677 at 7.

You contend the remaining e-mail in the representative sample of information consists of an e-mail between members of the district attorney's office discussing strategy used and to be used in the prosecution of criminal cases. Upon review, we find you have failed to demonstrate how any portion of the information at issue was prepared in anticipation of litigation for the purposes of section 552.111; thus, the district attorney's office may not withhold any portion of the information at issue as attorney work product under section 552.111 of the Government Code.

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 is also applicable to personal cellular telephone numbers and pager numbers, provided the cellular telephone and pager 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). In this instance, it is unclear as to whether the individuals whose information we have marked under section 552.117(a)(2) are currently licensed peace officers as defined by article 2.12. Accordingly, if the individuals whose information is at issue are currently licensed peace officers as defined by article 2.12, the district attorney's office must withhold the information we have marked under section 552.117(a)(2) of the Government Code. Further, if a governmental body did not pay for the officers' cellular telephone and pager service, the district attorney's office must withhold these officers' cellular telephone and pager numbers under section 552.117(a)(2) of the Government Code. Conversely, if the individuals whose information is at issue are no longer licensed peace officers as defined by article 2.12, then the district attorney's office may not withhold the marked information under section 552.117(a)(2).

Section 552.117(a)(1) of the Government Code excepts from disclosure 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 who requests that this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). *See* Open Records Decision No. 670 at 6 (2001) (extending section 552.117 exception to personal cellular telephone number and personal pager number of employee who elects to withhold home telephone number in accordance with section 552.024). 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. Therefore, to the extent the individuals previously discussed are no longer licensed peace officers, and to the extent these individuals timely requested confidentiality under section 552.024, the district attorney's office must withhold the information we have marked under section 552.117(a)(1); however, their marked cellular telephone and pager numbers may be withheld only if a governmental body did not pay for the service. Additionally, to the extent the other individuals whose information we have marked timely requested confidentiality under section 552.024 of the Government Code, the district attorney's office must withhold this information under section 552.117(a)(1); however, their marked cellular telephone numbers may be withheld only if a governmental body did not pay for the service. Conversely, if any of the individuals at issue did not timely request confidentiality under section 552.024, or a governmental body pays for the marked cellular telephone or pager numbers, the district attorney's office may not withhold the marked information under section 552.117(a)(1).⁶ Further, we find none of the remaining information consists of the home address, telephone number, emergency contact information, social security number, or family member information of a current or former employee of the district attorney's

⁶Regardless of the applicability of section 552.117 of the Government Code, we note 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. *See* Gov't Code § 552.147(b).

office, and the district attorney's office may not withhold any of the remaining information under section 552.117(a)(1).

Section 552.1175 of the Government Code applies to information pertaining to peace officers that the district attorney's office does not hold in an employment context and provides in part:

(a) This section applies only to:

(1) peace officers as defined by Article 2.12, Code of Criminal Procedure[.]

...

(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)(1), (b). Section 552.1175 is also applicable to cellular telephone and pager numbers, provided the cellular telephone or pager service is not paid for by a governmental body. *See* ORD 506 at 5-6. We determine the district attorney's office must withhold the information we have marked under section 552.1175 if the individuals to whom the information pertains are licensed peace officers and elect to restrict access to their information in accordance with section 552.1175(b). However, the district attorney's office may withhold the cellular telephone number only if the service is not paid for with government funds. If the individuals are not licensed peace officers or no elections are made, the district attorney's office may not withhold the individuals' information under section 552.1175 of the Government Code.

Section 552.130 of the Government Code provides information relating to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by an agency of this state or another state or country is excepted from public release. *See* Gov't Code § 552.130(a)(1)-(2). Accordingly, the district attorney's office must withhold the motor vehicle record information we marked under section 552.130 of the Government Code.

Section 552.136 of the Government Code 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.” *Id.* § 552.136(b); *see id.* § 552.136(a) (defining “access device”). This office has concluded an insurance policy number is an access device number for purposes of section 552.136. Upon review, we find the district attorney’s office must withhold the information we 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 Gov’t Code* § 552.137(a)-(c). The e-mail addresses at issue are not specifically excluded by section 552.137(c). As such, the district attorney’s office must withhold the e-mail addresses at issue, a representative sample of which we have marked, under section 552.137 of the Government Code, unless the owners of the addresses affirmatively consent to their release. *See id.* § 552.137(b).

In summary, some of the submitted e-mails, a representative sample of which we have marked, are not subject to the Act and need not be released in response to this request. The district attorney’s office must withhold the information we have marked under section 552.101 of the Government Code in conjunction common-law privacy. The district attorney’s office must withhold the information we have marked under sections 552.102(a) of the Government Code. The district attorney’s office may withhold the information we have marked under section 552.108(a)(3) of the Government Code. If the individuals whose information we have marked under section 552.117(a)(2) of the Government Code are currently licensed peace officers as defined by article 2.12 of the Code of Criminal Procedure, the district attorney’s office must withhold the information we have marked under section 552.117(a)(2); however, their marked cellular telephone and pager numbers may be withheld only if a governmental body did not pay for the service. To the extent these individuals are no longer licensed peace officers, and to the extent these individuals timely requested confidentiality under section 552.024 of the Government Code, the district attorney’s office must withhold their information we have marked under section 552.117(a)(1); however, their marked cellular telephone and pager numbers may be withheld only if a governmental body did not pay for the service. Additionally, to the extent the other individuals whose information we have marked timely requested confidentiality under section 552.024 of the Government Code, the district attorney’s office must withhold this information under section 552.117(a)(1); however, their marked cellular telephone numbers may be withheld only if a governmental body did not pay for the service. The district attorney’s office must withhold the information we have marked under section 552.1175 of the Government Code if the individuals to whom the information pertains are licensed peace officers and elect to restrict access to their information in accordance with section 552.1175(b); however, the district attorney’s office may withhold the cellular telephone number only if the service is not paid for with government funds. The district attorney’s office must withhold the information we have marked under sections 552.130 and 552.136 of the Government Code. The district attorney’s office must withhold the e-mail addresses at issue, a representative sample of which we have marked,

under section 552.137 of the Government Code, unless the owners of the addresses affirmatively consent to their release. The district attorney's office must release the remaining responsive 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,



Sean Nottingham
Assistant Attorney General
Open Records Division

SN/akg

Ref: ID# 452156

Enc. Submitted documents

c: Requestor
(w/o enclosures)