



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 9, 2012

Mr. Ross Fischer
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OR2012-10510

Dear Mr. Fischer:

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# 458270.

The City of Buda (the "city"), which you represent, received a request for information from a specified folder associated with a specified e-mail address. You state you will make most of the requested information available to the requestor. You claim portions of the submitted information are excepted from disclosure under sections 552.101, 552.103, 552.107, 552.109, 552.117, and 552.152 of the Government Code. We have considered the exceptions you claim and reviewed the submitted 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." Gov't Code § 552.101. This section encompasses information protected by other statutes, such as section 33.032 of the Government Code, which states "[e]xcept as otherwise provided by this section and [s]ection 33.034, the papers filed with and proceedings before the [State Commission on Judicial Conduct (the "commission")] are confidential prior to the filing of formal charges." *Id.* § 33.032(a). You state Exhibit C may be confidential under section 33.032. Chapter 33 governs the actions of and proceedings before the commission. *See, e.g., id.* §§ 33.002 (establishing commission), .021 (stating powers of commission). Section 33.032 authorizes only the commission to withhold information it maintains for investigative proceedings and other actions, and does not make records maintained by the city confidential. *See* Open Records Decision Nos. 649 at 3 (1996) (noting express language of confidentiality statute controls scope of statute's protection), 478 at 2 (1987) (same). Accordingly, we find you have failed to demonstrate the information at issue is confidential under section 33.032 and it may not be withheld on that basis.

Section 552.101 also encompasses section 33.0321 of the Government Code, which states “[o]n the request of a complainant, the commission may keep the complainant’s identity confidential.” Gov’t Code § 33.0321. You state Exhibit C may be confidential under section 33.0321. However, we find section 33.0321 authorizes only the commission to withhold the complainant’s identity. The request was received by the city. Accordingly, we find you have failed to demonstrate the information at issue is confidential under section 33.0321 and it may not be withheld under section 552.101 of the Government Code on that basis.

Section 552.101 also encompasses the Medical Practice Act (“MPA”), subtitle B of title 3 of the Occupations Code, which governs release of medical records. *See* Occ. Code §§ 151.001-168.202. Section 159.002 of the MPA provides in part:

(a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient’s behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Id. § 159.002(a)-(c). Information subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004; Open Records Decision No. 598 (1991). This office has concluded the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). You claim the e-mails submitted in Exhibit J contain information protected under the MPA. Upon review, we find the city failed to demonstrate the records in Exhibit J are medical records or information obtained from medical records that are subject to the MPA. Thus, the city may not withhold any of the information in Exhibit J under the MPA.

Section 552.103 of the Government Code provides in relevant 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). The city has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date of the receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The city must meet both prongs of this test for information to be excepted under section 552.103(a).

You state a lawsuit styled *Carlos Gonzalez v. City of Buda*, Cause No. 11-0800, was filed in the 428th Judicial District Court of Hays County prior to the date the city received the request. You also state the information in Exhibit K is directly related to the pending litigation because it consists of conversations between city staff and representatives of the Texas Municipal League Intergovernmental Risk Pool, which is defending the city in this case. Based on your representations and our review, we determine the litigation was pending on the date the city received the request for information and Exhibit K is related to the pending litigation for the purposes of section 552.103. Accordingly, the city may withhold Exhibit K under section 552.103 of the Government Code.

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

You claim Exhibits D, E, F, G, and H are excepted from disclosure under section 552.107 of the Government Code. Section 552.107(1) 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 to only 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. 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 to only a confidential communication, *id.*, 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 the information at issue constitutes attorney-client communications between city employees and city attorneys that were made for the purpose of facilitating the rendition of professional legal services to the city. You indicate the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find the city may withhold Exhibits D, E, F, G, and H under section 552.107(1) of the Government Code.

Section 552.117(a)(2) of the Government Code excepts from public disclosure the home addresses, home telephone numbers, 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 section 552.024 or section 552.1175 of the Government Code. Gov’t Code § 552.117(a). Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. Accordingly, the city must withhold the information we have marked under section 552.117(a)(2) of the Government Code.

We note some of the remaining information may be excepted from disclosure under 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, 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. *See id.* § 552.117(a)(1). We note that section 552.117 encompasses a personal cellular telephone number, provided that a governmental body does not pay for the cell phone service. *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). 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 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 information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who did not timely request under section 552.024 that the information be kept confidential. Therefore, if the individual whose information we have marked timely requested confidentiality under section 552.024, the city must withhold the marked information under section 552.117(a)(1) of the Government Code; the city may only withhold the individual's cellular telephone number if she pays for the cellular telephone service with her own funds. If the individual whose information is at issue did not make a timely election under section 552.024, the city may not withhold the information at issue under section 552.117(a)(1) of the Government Code.

Section 552.101 of the Government Code 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 established. *Id.* at 681-82. This office has found that 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). This office has also found personal financial information not relating to a financial transaction between an individual and a governmental body is excepted from disclosure under common-law privacy. *See Open Records Decision Nos. 600 (1992)* (finding personal financial information to include designation of beneficiary of employee's retirement benefits and optional insurance coverage; choice of particular insurance carrier; direct deposit authorization; and 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). Upon review, we find portions of the remaining information are highly intimate or embarrassing and not of legitimate public concern. Accordingly, the city must withhold the information we have marked under section 552.101 in conjunction with common-law privacy. We note a portion of the remaining information pertains to an individual who has been de-identified and whose privacy interests are thus protected.

Additionally, you have failed to demonstrate the remaining information at issue is highly intimate or embarrassing and not of legitimate public interest. Therefore, the city may not withhold any of the remaining information at issue under section 552.101 in conjunction with common-law privacy.

Section 552.109 of the Government Code excepts from public disclosure “[p]rivate correspondence or communications of an elected office holder relating to matters the disclosure of which would constitute an invasion of privacy[.]” Gov’t Code § 552.109. This office has held the test to be applied to information under section 552.109 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation*, 540 S.W.2d at 685, for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the Government Code. As noted above, common-law privacy protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person and (2) not of legitimate concern to the public. *Indus. Found.*, 540 S.W.2d at 685. You claim Exhibit C may be excepted under section 552.109. Upon review, we find no portion of the remaining information at issue is highly intimate or embarrassing and of no legitimate public interest. Consequently, the city may not withhold any part of the remaining information in Exhibit C under section 552.109 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).¹ *See id.* § 552.137(a)-(c). The e-mail addresses we have marked are not of the type excluded by section 552.137(c). Accordingly, the city must withhold the e-mail addresses we have marked under section 552.137, unless their owners affirmatively consent to public disclosure.

You claim Exhibit C is subject to section 552.152 of the Government Code, which provides:

Information in the custody of a governmental body that relates to an employee or officer of the governmental body is excepted from the requirements of Section 552.021 if, under the specific circumstances pertaining to the employee or officer, disclosure of the information would subject the employee or officer to a substantial threat of physical harm.

Id. § 552.152. You generally assert release of Exhibit C may compromise the safety of a public officer. Upon review, we find you have not demonstrated release of Exhibit C would subject an employee or officer to a specific substantial risk of physical harm. Accordingly,

¹The 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).*

the city may not withhold the remaining information in Exhibit C under section 552.152 of the Government Code.

In summary, the city may withhold Exhibit K under section 552.103 of the Government Code and Exhibits D, E, F, G, and H under section 552.107 of the Government Code. The city must withhold the information we have marked under section 552.117(a)(2) of the Government Code. To the extent the employee paid for the cellular telephone service with personal funds and made a timely election under section 552.024 of the Government Code, the city must withhold the information we have marked under section 552.117(a)(1) of the Government Code. The city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy, and the e-mail addresses we have marked under section 552.137 of the Government Code, unless their owners affirmatively consent to public disclosure. 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,



Charles Galindo Jr.
Assistant Attorney General
Open Records Division

CG/bs

Ref: ID# 458270

Enc. Submitted documents

c: Requestor
(w/o enclosures)