



ATTORNEY GENERAL OF TEXAS
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Ms. Bonnie Lee Goldstein
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OR2012-12621

Dear Ms. Goldstein:

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# 461996.

The City of Princeton (the "city"), which you represent, received eleven requests from two requestors for the following categories of information: (1) the original applications and employment contracts for the city's former police chief (the "chief") and two named individuals; (2) all vacation, sick time, and leave requests for the chief; (3) all cellular telephone records for telephones issued to the chief; (4) information related to the termination or resignation of the chief, including all severance packages and city council meeting minutes involving his termination; (5) all internal investigations against or done on behalf of a named individual; (6) all information pertaining to a specified case; (7) all information pertaining to named officer, including awards, distinguished merits and records of firing and leaving; and (8) all complaints and accusations against the chief. You state the city does not have information responsive to portions of the requests.¹ You state you have released some of the requested information. You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.107, 552.108, 552.111, 552.117, and 552.1175 of the Government Code and privileged under Texas Rule of

¹We note the Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Attorney General Opinion H-90 (1973); Open Records Decision Nos. 452 at 2-3 (1986), 342 at 3 (1982), 87 (1975); see also Open Records Decision Nos. 572 at 1 (1990), 555 at 1-2 (1990), 416 at 5 (1984).

Evidence 503 and Texas Rule of Civil Procedure 192.5. We have considered your arguments and reviewed the submitted representative sample of information.² We have also considered comments received from one of the requestors and an attorney representing the same requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

You state the city sought clarification of portions of the requests. *See* Gov't Code § 552.222 (if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed). You state the city has not received a response to the requests for clarification. Thus, for the portions of the requested information for which you have sought but have not received clarification, we find the city is not required to release information in response to those portions of the requests. However, if the requestor clarifies those portions of the requests for information, the city must seek a ruling from this office before withholding any responsive information from the requestor. *See id.*

Next, you inform us some of the responsive information was previously the subject of three requests for information, in response to which this office issued Open Records Letter Nos. 2009-03816 (2009), 2009-06877 (2009), and 2009-14145 (2009). In Open Records Letter No. 2009-03816, we concluded that with the exception of basic information, the city may withhold the submitted information under section 552.108(a)(2) of the Government Code. In Open Records Letter No. 2009-06877, we concluded the city (1) may withhold the information marked under section 552.108(b)(1) of the Government Code, (2) must withhold the information marked under section 552.117(a)(2) of the Government Code, and (3) must withhold the information marked under section 552.136 of the Government Code. As we have no indication the law, facts, and circumstances on which Open Records Letter Nos. 2009-03816 and 2009-06877 were based have changed, the city must continue to rely on these prior rulings as previous determinations and withhold the identical information in accordance with Open Records Letter Nos. 2009-03816 and 2009-06877. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes information is or is not excepted from disclosure).

²We 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.

However, you inform us the investigation at issue in Open Records Letter No. 2009-14145, which was pending at the time of the previous request, has since been completed. Therefore, the circumstances have changed with respect to that ruling, and the city may not rely on Open Records Letter No. 2009-14145 as a previous determination. *See id.* Accordingly, we will address your arguments for this information and the remaining requested information that is not encompassed by Open Records Letter Nos. 2009-03816 and 2009-06877.

We note the submitted information contains a completed investigation that is 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 made confidential under this chapter or other law or is excepted from disclosure under section 552.108 of the Government Code. Gov’t Code § 552.022(a)(1). Although you claim these records are subject to sections 552.107 and 552.111 of the Government Code, these sections are discretionary and do not make information confidential under the Act. *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). Accordingly, the submitted information may not be withheld under sections 552.107 and 552.111. However, the Texas Supreme Court has held the Texas Rules of Evidence and the Texas Rules of Civil Procedure are “other law” for the purposes of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001) (addressing applicability of Texas Rules of Evidence and Texas Rules of Civil Procedure to information encompassed by section 552.022). Therefore, we will consider your arguments under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5.

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 city administrator, with knowledge of the city council, directed the city attorney to conduct the investigation at issue. You explain the information at issue was gathered and compiled as a result of the investigation and was presented to the city administrator and council in Executive Session for the purpose of providing legal advice on the issues raised in the investigation. You further state the information was not intended to be disclosed to third persons. Therefore, based on your representations and our review, we conclude the city may withhold the information we have marked under rule 503 of the Texas Rules of Evidence.³ *See Harlandale Indep. Sch. Dist. v. Cornyn*, 25 S.W.3d 328 (Tex. App.—Austin 2000, pet. denied) (attorney’s entire investigative report is protected by attorney-client privilege where attorney was retained to conduct investigation in capacity as attorney for purpose of providing legal services and advice).

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. Section 552.101 encompasses section 1701.454 of the Occupations Code, which governs the public availability of information submitted to the Texas Commission on

³As our ruling is dispositive for this information, we need not address your remaining arguments against its disclosure.

Law Enforcement Officer Standards and Education (“TCLEOSE”) under subchapter J of chapter 1701 of the Occupations Code.⁴ Section 1701.454 provides as follows:

(a) All information submitted to [TCLEOSE] under this subchapter is confidential and is not subject to disclosure under [the Act], unless the person resigned or was terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses.

(b) Except as provided by this subchapter, a [TCLEOSE] member or other person may not release information submitted under this subchapter.

Occ. Code § 1701.454. Upon review, the city must withhold the F-5 forms under section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code.⁵

Section 552.117(a)(2) of the Government Code exempts 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 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. Section 552.117 also applies to the personal cellular telephone number of a current or former official or employee of a governmental body, provided the cellular telephone service is not paid 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). You state the telephone numbers marked under categories one and two in the requested cellular telephone bills consist of home telephone or personal cellular telephone numbers of peace officers and telephone numbers that would reveal the family members of police officers. Accordingly, we conclude the city must withhold the telephone numbers marked under categories one and two under section 552.117(a)(2).

Section 552.108(b)(1) of the Government Code exempts from disclosure “[a]n 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 . . . if . . . release of the internal record or notation would interfere with law enforcement or prosecution[.]” Gov’t Code § 552.108(b)(1). This section 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

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

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

State.” *City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.). This office has concluded that this provision protects certain kinds of information, the disclosure of which might compromise the security or operations of a law enforcement agency. *See, e.g.*, Open Records Decision Nos. 531 (1989) (detailed guidelines regarding police department’s use of force policy), 508 (1988) (information relating to future transfers of prisoners), 413 (1984) (sketch showing security measures for forthcoming execution). In Open Records Decision No. 506 (1988), this office determined the statutory predecessor to section 552.108(b) excepted from disclosure “cellular mobile phone numbers assigned to county officials and employees with specific law enforcement responsibilities.” Open Records Decision No. 506 at 2. We noted the purpose of the cellular telephones was to ensure immediate access to individuals with specific law enforcement responsibilities and public access to these numbers could interfere with that purpose. *Id.* To claim this aspect of section 552.108 protection, however, a governmental body must meet its burden of explaining how and why release of the requested information would interfere with law enforcement and crime prevention. Open Records Decision No. 562 at 10 (1990). Further, commonly known policies and techniques may not be withheld under section 552.108. *See, e.g.*, Open Records Decision Nos. 531 at 2-3 (Penal Code provisions, common-law rules, and constitutional limitations on use of force are not protected under section 552.108), 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 with law enforcement and crime prevention). To prevail on its claim that section 552.108(b)(1) excepts information from disclosure, a law-enforcement agency must do more than merely make a conclusory assertion that releasing the information would interfere with law enforcement. The determination of whether the release of particular records would interfere with law enforcement is made on a case-by-case basis. Open Records Decision No. 409 at 2 (1984).

We understand the cellular telephone numbers marked under category four in the requested cellular telephone bills are used by city employees in carrying out their law enforcement responsibilities. You contend release of these cellular telephone numbers would interfere with law enforcement. Based on your representations and our review, we conclude the city may withhold the cellular telephone numbers marked under category four under section 552.108(b)(1) of the Government Code.

We note the remaining information contains a cellular telephone account number. Section 552.136(b) of the Government Code states “[n]otwithstanding any other provision of [the Act], 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). Therefore, the city must withhold the cellular telephone account number marked under section 552.136 of the Government Code.

In summary, the city must continue to rely on Open Records Letter Nos. 2009-03816 and 2009-06877 as previous determinations and withhold or release the information we previously ruled on in accordance with those prior rulings. The city may withhold the information we have marked under Texas Rule of Evidence 503. The city must withhold the

submitted F-5 forms under section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code. The city must withhold the telephone numbers marked under categories one and two under section 552.117(a)(2) of the Government Code. The city may withhold the cellular telephone numbers marked under category four under section 552.108(b)(1) of the Government Code. The city must withhold the cellular telephone account number marked under section 552.136 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,



Kathleen J. Santos
Assistant Attorney General
Open Records Division

KJS/eb

Ref: ID# 461996

Enc. Submitted documents

c: Requestor
(w/o enclosures)