



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 30, 2012

Ms. Kimberley "Kasey" Ellars  
State Preservation Board  
P.O. Box 13286  
Austin, Texas 78711

OR2012-13785

Dear Ms. Ellars:

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# 463697.

The State Preservation Board (the "board") received a request for the date the requestor is alleged to have been paid for two hours that could not be accounted for, the log sheets for that date, and information pertaining to a DPS investigation regarding the requestor. You state you have released some of the requested information. You claim the submitted information is excepted from disclosure under sections 552.101, 552.107, 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" and encompasses information made confidential by statute. Gov't Code § 552.101. Section 552.101 encompasses the common-law physical safety exception that the Texas Supreme Court recognized in *Texas Department of Public Safety v. Cox Texas Newspapers, L.P. & Hearst Newspapers, L.L.C.*, 343 S.W.3d 112, 117 (Tex. 2011) ("freedom from physical harm is an independent interest protected under law, untethered to the right of privacy"). In the *Cox* decision, the Supreme Court recognized, for the first time, a common-law physical safety exception to required disclosure. *Cox*, 343 S.W.3d at 118. Pursuant to this common-law physical safety exception, the court determined "information may be withheld [from public release] if disclosure would create a substantial threat of

physical harm." *Id.* In applying this new standard, the court noted "deference must be afforded" law enforcement experts regarding the probability of harm, but further cautioned "vague assertions of risk will not carry the day." *Id.* at 119. You claim Exhibit C, which consists of notes regarding a telephone conversation with a board employee, should be excepted in its entirety under the common-law physical safety exception. We conclude you have not sufficiently demonstrated that a substantial risk of physical harm would result from the disclosure of Exhibit C. We therefore conclude the board may not withhold Exhibit C under section 552.101 of the Government Code in conjunction with the common-law physical safety exception.

You also seek to withhold Exhibit C in its entirety under 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 [required public disclosure] 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.

Gov't Code § 552.152. Upon review, we find you have not demonstrated release of the Exhibit C would subject an employee or officer to a substantial risk of physical harm. Accordingly, the board may not withhold Exhibit C under section 552.152 of the Government Code.

Section 552.101 of the Government Code also encompasses common-law privacy, which 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. 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. The type of information considered intimate and 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 found a compilation of an individual's criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *Cf. United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) Furthermore, we find a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. 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 handicaps). However, this office has found information pertaining to the work conduct and job performance of public employees is subject to a legitimate public interest, and, therefore, generally not protected

from disclosure under common-law privacy. *See, e.g.*, Open Records Decision Nos. 470 at 4 (1987) (public has legitimate interest in job qualifications and performance of public employees), 455 (1987) (public employee's job performance or abilities generally not protected by privacy), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of governmental employees), 423 at 2 (1984) (scope of public employee privacy is narrow).

You seek to withhold Exhibit C in its entirety under section 552.101 in conjunction with common-law privacy. Upon review, we find the information we have marked is highly intimate or embarrassing and of no legitimate public concern. Accordingly, the board must withhold the information we have marked in Exhibit C under section 552.101 in conjunction with common-law privacy. However, the remaining information pertains to the workplace conduct of board employees, and is of legitimate public interest. Accordingly, the board may not withhold the remaining information in Exhibit C under section 552.101 in conjunction with common-law privacy.

You seek to withhold portions of the remaining information in Exhibit C under the Family Medical Leave Act (the "FMLA"), section 2654 of title 29 of the United States Code, which is also encompassed by section 552.101 of the Government Code. Section 825.500 of chapter V of title 29 of the Code of Federal Regulations identifies the record-keeping requirements for employers that are subject to the FMLA. Subsection (g) of section 825.500 states:

Records and documents relating to medical certifications, recertifications or medical histories of employees or employees' family members, created for purposes of FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files, and if the [Americans with Disabilities Act (the "ADA")], as amended, is also applicable, such records shall be maintained in conformance with ADA confidentiality requirements . . . except that:

- (1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations;
- (2) First aid and safety personnel may be informed (when appropriate) if the employee's physical or medical condition might require emergency treatment; and
- (3) Government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.

29 C.F.R. § 825.500(g) (internal citation omitted). Upon review, we find that none of the information at issue relates to medical certifications, recertifications, or medical histories of employees or employees’ families created for the purpose of the FMLA. Consequently, none of the information at issue may be withheld under section 552.101 of the Government Code on this basis.

Section 552.107 of the Government Code protects information that comes within the attorney-client privilege. 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* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate 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. *See* 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. *See 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 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. *See* 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 only to 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. *See 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 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 seek to withhold Exhibit A and the information you have marked in Exhibit B under section 552.107, and state this information consists of attorney-client privileged communications made between a board employee and an attorney with the Office of the Attorney General as legal counsel for the board for the purpose of the rendition of professional legal services to the board. You have identified the parties to the

communications, and state the communications were intended to be, and have remained, confidential. Accordingly, we find you have established the applicability of the attorney-client privilege to the information at issue. Therefore, the department may withhold Exhibit A and the information you have marked in Exhibit B under section 552.107 of the Government Code.

In summary, the board must withhold the information we have marked in Exhibit C under section 552.101 of the Government Code in conjunction with common-law privacy. The board may withhold Exhibit A and the information you have marked in Exhibit B under section 552.107 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](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,



Kristi L. Wilkins  
Assistant Attorney General  
Open Records Division

KLW/ag

Ref: ID# 463697

Enc. Submitted documents

c: Requestor  
(w/o enclosures)