



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 29, 2012

Ms. Jessica Scott
Counsel for the City of Sunset Valley
Scanlan, Buckle & Young, PC
602 West 11th Street
Austin, Texas 78701-2099

OR2012-17244

Dear Ms. Scott:

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# 469342.

The City of Sunset Valley (the "city"), which you represent, received four requests for information. The first request seeks (1) complaints filed against the former police chief during a specified time period, (2) complaints filed against two named individuals during the last five years, (3) gag orders issued to city employees concerning a specified investigation, and (4) documents concerning the requestor in a specified investigation. The second request seeks the personnel file of the former police chief and information pertaining to an investigation of the police chief before her resignation. The third and fourth requests seek information during specified time periods regarding the investigation of the former police chief and her resignation. You state the city has no information responsive to part two of the first request.¹ You state some information has been released to the second requestor. You ~~claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.107, 552.108, 552.117, and 552.137 of the Government Code.~~ We have considered the claimed exceptions and reviewed the submitted information.

¹The Act does not require a governmental body to release information that did not exist when it received a request or to create responsive information. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990).

Initially, you state some of the information you have submitted is responsive only to certain of the instant requests. We note the city is not required to release information that is not responsive to a request.

You argue Exhibit E contains telephone numbers that were provided to the city with the expectation they would be treated as confidential. However, information is not confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract.”), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to Gov’t Code § 552.110). Consequently, unless the information falls within an exception to disclosure, it must be released, notwithstanding any expectations or agreement specifying otherwise.

Section 552.108(a)(2) of the Government Code excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication.” Gov’t Code § 552.108(a)(2). A governmental body claiming section 552.108(a)(2) must demonstrate the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. *See id.* § 552.301(e)(1)(A) (governmental body must provide comments explaining why exceptions raised should apply to information requested). You raise section 552.108(a)(2) for Exhibit C, which pertains to an internal affairs investigation. Section 552.108 is generally not applicable to the records of an internal affairs investigation that is purely administrative in nature and that does not involve the investigation or prosecution of crime. *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no pet.); *Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. Civ. App.—El Paso 1992, writ denied) (statutory predecessor to section 552.108 not applicable to internal investigation that did not result in criminal investigation or prosecution); *see also* Open Records Decision No. 350 at 3-4 (1982). However, you state, and provide a statement from the city’s police department confirming, Exhibit C relates to a concluded criminal investigation that did not result in conviction or deferred adjudication. Based on these representations and our review, we find section 552.108(a)(2) applies to Exhibit C.

However, as you acknowledge, section 552.108 does not except from disclosure “basic information about an arrested person, an arrest, or a crime.” Gov’t Code § 552.108(c). Basic information refers to the information held to be public in *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975) (summarizing types of information considered to be basic information), *writ ref’d n.r. e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Basic information must be released even if it does not literally appear on the front page of an offense or arrest report. *See* Open Records Decision

No. 127 (1976) (summarizing types of information deemed public by *Houston Chronicle*). Thus, with the exception of basic information, the city may withhold Exhibit C under section 552.108(a)(2).²

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.” Gov’t Code § 552.102(a). The Texas Supreme Court has 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). You assert Exhibit E is confidential under section 552.102. Upon review, we find none of the information in Exhibit E is protected by section 552.102, and it may not be withheld on that basis.

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 the common-law right to 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.*, 540 S.W.2d at 685. To demonstrate the applicability of common-law privacy, both prongs of this test must be met. *Id.* at 681-82. This office has stated in numerous opinions the work behavior and performance of a public employee and the conditions for his or her continued employment are generally matters of legitimate public interest not protected by the common-law right of privacy. *See* Open Records Decision Nos. 470 at 4 (1987) (public has legitimate interest in job performance of public employees), 438 at 4 (1986) (public has legitimate interest in details of accusation of misconduct against city supervisor), 405 at 2-3 (1983) (public has interest in manner in which public employee performs his job), 329 at 2 (1982) (information relating to complaints against public employees and discipline resulting therefrom is not protected under former section 552.101), 208 at 2 (1978) (information relating to complaint against public employee and disposition of the complaint is not protected under either the constitutional or common-law right of privacy). Similarly, the public has a legitimate interest in knowing the reasons for the dismissal of public employees and the circumstances surrounding their termination. Open Records Decision No. 444 at 6 (1986); *see* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow). However, this office has found that personal financial information not related to a financial transaction between an individual and a governmental body ordinarily satisfies the first element of the common-law privacy test. *See* Open Records Decision Nos. 545 at 4 (1990) (attorney general has found information regarding receipt of governmental funds or debts owed to governmental entities is not excepted from public disclosure by common-law privacy), 523 at 4 (1989) (noting distinction under common-law privacy between confidential background financial information furnished to public body about individual and basic facts regarding particular

²Because our ruling as to Exhibit C is dispositive, we do not address your remaining arguments against disclosure of portions of Exhibit C.

financial transaction between individual and public body). Whether the public's interest in obtaining personal financial information is sufficient to justify its disclosure must be made on a case-by-case basis. *See* Open Records Decision No. 373 at 4 (1983). We find the information we have marked in Exhibit E is highly intimate or embarrassing and of no legitimate public interest. The city must withhold the marked information under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find none of the remaining information in Exhibit E is private, and it may not be withheld under section 552.101 on that basis.

You generally raise section 552.101 of the Government Code for some of the remaining information in Exhibit E. As noted, 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. However, you have not directed our attention to any law, nor are we aware of any law, under which any of the remaining information in Exhibit E is considered to be confidential for purposes of section 552.101 of the Government Code. *See* Open Records Decision Nos. 611 at 1 (1992) (common-law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality). Therefore, the city may not withhold any of the remaining information you have marked in Exhibit E under section 552.101 of the Government Code.

Section 552.107 of the Government Code protects information coming 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. 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. 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). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. 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. *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 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 Exhibit D consists of communications between individuals you have identified as a city employee, a city official, and an attorney for the city. You state the communications were made for the purpose of facilitating the rendition of legal services to the city. We understand these communications were intended to be, and have remained, confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to Exhibit D. Accordingly, the city may withhold Exhibit D under section 552.107(1).

We note a portion of Exhibit E is subject to section 552.117 of the Government Code. Section 552.117(a)(2) of the Government Code excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of a peace officer, regardless of whether the peace officer made an election under sections 552.024 or 552.1175 of the Government Code to keep such information confidential. Gov't Code § 552.117(a); *see also id.* § 552.024. 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) if the individual at issue is a currently licensed peace officer.

However, if the individual at issue is not a currently licensed peace officer, then the marked information is subject to section 552.117(a)(1) of the Government Code. Section 552.117(a)(1) of the Government Code excepts from disclosure the personal information of a current or former official or employee of a governmental body who timely requests that this information be kept confidential under section 552.024 of the Government Code. *See id.* §§ 552.117, .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. Thus, if the individual at issue is not a currently licensed peace officer but timely requested confidentiality under section 552.024, the city must withhold the information we have marked under section 552.117(a)(1). Conversely, if the individual did not make a timely election under section 552.024, the city may not withhold such information under section 552.117(a)(1).³

³We note even if the individual at issue is not a currently licensed peace officer and did not timely elect confidentiality under section 552.024, 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 an attorney general decision under the Act. *See Gov't Code* § 552.147(b).

In summary, with the exception of basic information, the city may withhold Exhibit C under section 552.108(a)(2) of the Government Code. The city must withhold the information we marked in Exhibit E under section 552.101 of the Government Code in conjunction with common-law privacy. The city may withhold Exhibit D under section 552.107(1) of the Government Code. The city must withhold the information we marked in Exhibit E under section 552.117(a)(2) of the Government Code if the individual at issue is a currently licensed peace officer. If the individual is not a currently licensed peace officer but made a timely election under section 552.024 of the Government Code, the city must withhold the information marked under section 552.117(a)(1) of the Government Code. Basic information from Exhibit C and the remaining information in Exhibit E must be released to the requestors who have requested such 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,



Misty Haberer Barham
Assistant Attorney General
Open Records Division

MHB/som

Ref: ID# 469342

Enc. Submitted documents

c: 4 Requestors
(w/o enclosures)