



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 8, 2012

Ms. Lisa D. Mares
Counsel for the City of Crowley
Taylor Olson Adkins Sralla & Elam, L.L.P.
6000 Western Place, Suite 200
Fort Worth, Texas 76107-4654

OR2012-18029

Dear Ms. Mares:

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# 470399.

The City of Crowley (the "city"), which you represent, received a request for specified investigation documents. You inform us the city will release some of the requested information. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.107, 552.111, and 552.117 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

¹Although you raise section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5, this office has concluded that section 552.101 does not encompass discovery privileges. See Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Further, although you assert the attorney-client privilege under rule 503 and the attorney work-product privilege under rule 192.5, we note none of the information for which you claim these privileges is subject to section 552.022 of the Government Code. Thus, sections 552.107 and 552.111 of the Government Code are the proper exceptions to raise, respectively, for your attorney-client and work-product privilege claims in this instance. See generally ORD 676. In addition, although you also raise section 552.103 of the Government code for attorney work-product, the proper exception to raise for the substance of your argument is section 552.111. See Open Records Decision No. 677 (2002). We also note that although you raise section 552.1175 of the Government Code, section 552.117 is the proper exception to raise for information the city holds in its capacity as an employer.

Section 552.107(1) 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 inform us Exhibits B through B-2 consists of communications between or among an attorney for the city and city employees and officials in their capacities as client representatives that were made for the purpose of facilitating the rendition of legal services to the city. You state 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 the information at issue. Accordingly, the city may withhold Exhibits B through B-2 under section 552.107(1) of the Government Code.²

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

²As our ruling for this information is dispositive, we need not address our remaining arguments against its disclosure.

with the agency.” Gov’t Code § 552.111. Section 552.111 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:

(1) material 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 governmental body seeking to withhold information under this exception bears the burden of demonstrating that the information was created or developed for trial or in anticipation of litigation by or for a party or a party’s representative. TEX. R. CIV. P. 192.5; 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 claim the attorney work product privilege under section 552.111 for Exhibit B-3. You inform us this information was prepared by an attorney for the city in anticipation of litigation concerning alleged city employee misconduct. Based on your representations and our review, we agree that Exhibit B-3 is protected as attorney work product. Accordingly, the city may withhold this information under the work product privilege of section 552.111 of the Government Code.³

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

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

Code § 552.101. This section encompasses information that other statutes make confidential, such as section 611.002 of the Health and Safety Code, which provides in part:

(a) Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

(b) Confidential communications or records may not be disclosed except as provided by Section 611.004 or 611.0045.

Health & Safety Code § 611.002(a)-(b); *see also id.* § 611.001 (defining “patient” and “professional”). Section 611.001 defines a “professional” as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate, or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. *See id.* § 611.001(2). Sections 611.004 and 611.0045 of the Health and Safety Code provide for access to information that section 611.002 makes confidential only by certain individuals. *See id.* §§ 611.004, 611.0045; ORD 565. Upon review, we have marked a mental health record in Exhibit C that is confidential under section 611.002. Thus, the city must withhold this information under section 552.101 of the Government Code in conjunction with section 611.002(a) of the Health and Safety Code.⁴

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 demonstrated. *See 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 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 No. 455 (1987) (information pertaining to prescription drugs, specific illnesses, operations and procedures, and physical disabilities protected from disclosure). We note the scope of a public employee’s privacy is narrow. *See* Open Records Decision No. 423 at 2 (1984). This office has determined in numerous formal decisions that the public has a legitimate interest in the qualifications and performance of public employees. *See e.g.*, Open Records Decisions Nos. 562 at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs, but in fact touches on matters of legitimate public concern), 542 (1990), 470 at 4 (1987) (public has legitimate interest in job qualifications and performance of public employees), 444 at 5-6 (1986) (public

⁴As our ruling for this information is dispositive, we need not address our remaining arguments against its disclosure.

has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 423 at 2 (1984) (scope of public employee privacy is narrow). Generally, only highly intimate information that implicates the privacy of an individual is withheld. However, in certain instances, where it is demonstrated the requestor knows the identity of the individual involved, as well as the nature of certain incidents, the entire report must be withheld to protect the individual's privacy.

You claim Exhibit C is protected in its entirety by common-law privacy. Upon review, however, you have not demonstrated, nor does it otherwise appear, this is a situation in which this information must be withheld in its entirety on the basis of common-law privacy. However, upon review, we agree that portions of Exhibit C are highly intimate or embarrassing and of no legitimate public concern. Accordingly, the city must withhold this information, which we have marked, under section 552.101 of the Government Code in conjunction with common-law privacy.⁵ The city has failed to demonstrate, however, how the remaining information in Exhibit C is highly intimate or embarrassing and not of legitimate public concern. Therefore, the city may not withhold any of this information under section 552.101 in conjunction with common-law privacy.

You also raise section 552.102 of the Government Code for Exhibit C. This section excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwanted invasion of personal privacy." Gov't Code § 552.102(a). You assert the privacy analysis under section 552.102(a) is the same as the common-law privacy test under section 552.101, which is noted above. *See Indus. Found.*, 540 S.W.2d at 685. In *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the Third Court of Appeals ruled the privacy test under section 552.102(a) is the same as the *Industrial Foundation* privacy test. However, the Texas Supreme Court expressly disagreed with *Hubert's* interpretation of section 552.102(a) and held its privacy standard differs from the *Industrial Foundation* test under section 552.101. *See Tex. Comptroller of Pub. Accounts*, 354 S.W.3d at 342 (Tex. 2010). The Supreme Court then considered the applicability of section 552.102, and 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. *See id.* at 346. Upon review, we find no portion of Exhibit C is subject to section 552.102(a) of the Government Code, and the city may not withhold any of this information on that basis.

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

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

Criminal Procedure. Accordingly, the city must withhold the personal information of the peace officer we have marked in Exhibit C under section 552.117(a)(2) of the Government Code.⁶

In summary, the city may withhold Exhibits B through B-2 under section 552.107(1) of the Government Code. The city may withhold Exhibit B-3 under section 552.111 of the Government Code. The city must withhold the information we have marked in Exhibit C under section 552.101 of the Government Code and section 611.002(a) of the Health and Safety Code and common-law privacy. The city must withhold the information we have marked in Exhibit C under section 552.117(a)(2) of the Government Code. The city must release the remaining 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,



Kenneth Leland Conyer
Assistant Attorney General
Open Records Division

KLC/bhf

Ref: ID# 470399

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁶We note Open Records Decision No. 670 is a previous determination to all governmental bodies authorizing them to withhold the home addresses and telephone numbers, personal pager and cellular telephone numbers, social security numbers, and family member information of their peace officers under section 552.117(a)(2) of the Government Code without the necessity of requesting an attorney general decision.