



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 13, 2012

Ms. Tamra J. English
Office of General Counsel
The University of Texas System
201 West Seventh Street
Austin, Texas 78701

OR2012-18262

Dear Ms. English:

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# 471017 (UT OGC No. 145956).

The University of Texas Southwestern Medical Center at Dallas ("UT Southwestern") received a request for communications with authorities or internal communications regarding charges brought against a named individual, who is now deceased, and the names of prosecutors and UT Southwestern executives who urged for criminal charges to move forward. You state you will release some information to the requestor. You claim that some of the information is not subject to the Act. You argue the remaining requested information is excepted from disclosure under sections 552.107, 552.108, 552.117, 552.130, 552.136, and 552.147 of the Government Code. We have considered your arguments and reviewed the submitted representative sample of information.¹

Initially, we address your argument that some information is not subject to the Act. The Act is applicable to "public information," which is defined in section 552.002 of the Government

¹We 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.

Code as “information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it.” Gov’t Code § 552.002. This office has ruled, however, that tangible physical items are not “information” as that term is contemplated under the Act. *See, e.g.*, Open Records Decision No. 581 (1990). In this instance, the requestor seeks documents and communications regarding the charges at issue. Accordingly, we find the requestor does not seek any tangible physical items. You state UT Southwestern “has in its possession a sealed envelope of documentation and two sealed boxes of documentation that, as a whole, are considered physical evidence[.]” The Act requires a governmental body to make a good faith effort to relate a request to information that the governmental body holds or to which it has access. *See* Open Records Decision Nos. 561 at 8-9 (1990), 555 at 1-2 (1990), 534 at 2-3 (1989). Upon review of your comments, we conclude the envelope and boxes of documentation you reference do not constitute tangible physical items as contemplated under the Act. Accordingly, we find any of this documentation is subject to the Act. As you have submitted a representative sample of the information at issue, we will address your arguments against disclosure.

Next, we note you have marked the identifying information of an individual within the submitted documents. We understand you to argue this information is not responsive to the request because the information pertains to a person who is not the subject of the request. However, the requestor generally seeks documents and communications regarding certain criminal charges. Thus, any information found on such documents is responsive to the request. Therefore, we find the information you have marked is responsive.

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). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact 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, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *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. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). 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 you have marked consists of communications between UT Southwestern attorneys, employees, and officials that were made to facilitate the rendition of legal services. You state these communications were intended to be, and have remained, confidential. Based on your representations and our review, we agree UT Southwestern may withhold the information you have marked under section 552.107 of the Government Code.

Section 552.108 of the Government Code provides:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

(1) release of the information would interfere with the detection, investigation or prosecution of crime;

(2) 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;

(3) it is information relating to a threat against a peace officer or detention officer collected or disseminated under Section 411.048; or

(4) it is information that:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

(b) An internal record or notation of law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from the requirements of Section 552.021 if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution;

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication; or

(3) the internal record or notation:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

Gov't Code § 552.108(a)-(b). Section 552.108 protects certain specific types of law enforcement information. You generally assert portions of the submitted information are excepted from disclosure under section 552.108. However, you have not specified the subsection of section 552.108 that applies to the information, nor have you submitted any specific arguments explaining how section 552.108 applies to the information. *See* Gov't Code § 552.301(e)(1)(A) (stating it is the governmental body's burden to establish applicability of claimed exception or otherwise explain why requested information should not be released). Consequently, you have failed to establish the applicability of section 552.108 of the Government Code to the submitted information, and UT Southwestern may not withhold any information on this 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. Section 552.101 encompasses the doctrine of common-law privacy. Common-law privacy protects information that (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). The type of information considered intimate or 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 determined that some kinds of medical information or information indicating disabilities or specific illnesses is protected by 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 that personal financial information not relating to the financial transaction between an individual and a governmental body is excepted from required public disclosure under common-law privacy. *See* Open Records Decision No. 600 (1992), 545 (1990). However, this office has noted the behavior of a public employee in the workplace and the conditions for his continued employment are generally matters of legitimate public interest that are not protected by common-law privacy. *See* Open Records Decision No. 438 (1986). Likewise, information about a public employee's qualifications, disciplinary action, and background is generally not protected by common-law privacy. *See* Open Records Decision Nos. 444 at 5-6 (1986) (public has interest in public employee's qualifications and performance and the circumstances of his resignation or termination), 405 at 2-3 (1983) (public has interest in manner in which public employee performs his job). We note because privacy is a personal right that lapses at death, the common-law right to privacy does not encompass information that relates only to a deceased individual. Accordingly, information pertaining to a deceased individual may not be withheld on common-law privacy grounds. *See Moore v. Charles B. Pierce Film Enters. Inc.*, 589 S.W.2d 489, 491 (Tex. App.—Texarkana 1979, writ ref'd n.r.e.); *see also* Open Records Decision No. 272 at 1 (1981) (privacy rights lapse upon death). Upon review, we find some of the information at issue, which we have marked, constitutes highly intimate or embarrassing information of no legitimate public interest pertaining to living individuals. Therefore, UT Southwestern must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find the remaining information either pertains to a deceased individual, or is of legitimate public interest. Therefore, none of the remaining information may be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

You also raise section 552.117 of the Government Code. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, 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* Gov't Code §§ 552.117, .024. We note, however, that section 552.117 applies only to records that a governmental body is holding in an employment capacity. The information at issue consists of law enforcement records of UT Southwestern's police department, and is not held by UT Southwestern as an employer. Therefore, we find section 552.117 of the Government Code does not apply in this situation, and UT Southwestern may not withhold any portion of the information you have marked on that basis.

Section 552.130 of the Government Code provides information relating to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by an agency of this state or another state or country is excepted from public release. *Id.* § 552.130. The purpose of section 552.130 is to protect the privacy interests of individuals. Because the

right of privacy lapses at death, motor vehicle record information that pertains solely to a deceased individual may not be withheld under section 552.130. *See Moore*, 589 S.W.2d at 491; *see also* Attorney General Opinions JM-229 (1984), H-917 (1976); ORD 272 at 1. Thus, section 552.130 is not applicable to the deceased individual's driver's license information, and UT Southwestern may not withhold it on that basis. Accordingly, UT Southwestern must only withhold the information we have marked under section 552.130 of the Government Code.

Section 552.136 of the Government Code states that “[n]otwithstanding any other provision of this chapter, 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). Section 552.136(a) defines “access device” as “a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to . . . obtain money, goods, services, or another thing of value [or] initiate a transfer of funds other than a transfer originated solely by paper instrument.” *Id.* § 552.136(a) (defining access device). We note section 552.136 also protects the privacy interests of individuals, and, as previously noted, the right to privacy lapses at death. *See Moore*, 589 S.W.2d at 491. Therefore, if the account numbers and information we have marked pertain solely to a deceased individual, they may not be withheld under section 552.136. If the account numbers and information pertain to accounts in which a living individual has an interest, UT Southwestern must withhold the marked information under section 552.136 of the Government Code.

Section 552.147 of the Government Code states “[t]he social security number of a living person is excepted from” required public disclosure under the Act. Gov’t Code § 552.147(a). Therefore, UT Southwestern may not withhold the deceased individual's social security number under section 552.147. However, UT Southwestern may withhold the social security numbers we have marked under section 552.147 of the Government Code.²

In summary, UT Southwestern may withhold the information you have marked under section 552.107 of the Government Code. UT Southwestern must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. UT Southwestern must withhold the information we have marked under sections 552.130 and 552.136 of the Government Code. However, the account numbers and information belonging to the deceased individual may only be withheld under section 552.136 of the Government Code if a living individual has an interest in the accounts.

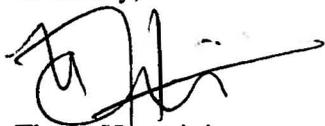
²Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act. Gov’t Code § 552.147(b).

UT Southwestern may withhold the social security numbers we have marked under section 552.147 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,

A handwritten signature in black ink, appearing to read 'Thana Hussaini', with a long horizontal stroke extending to the right.

Thana Hussaini
Assistant Attorney General
Open Records Division

TH/som

Ref: ID# 471017

Enc. Submitted documents

c: Requestor
(w/o enclosures)