



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 22, 2013

Ms. Melanie Barton
Assistant District Attorney
Dallas County
411 Elm Street, 5th Floor
Dallas, Texas 75202-3317

OR2013-08549

Dear Ms. Barton:

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# 487943.

The Dallas County District Attorney's Office (the "district attorney's office") received a request for records pertaining to a specified investigation, documents pertaining to certain individuals and a specified entity received by or generated by the district attorney's office, and documents pertaining to a specified visit. The district attorney's office received a second request from a different requestor for agreements or settlements between the district attorney's office and individuals or defendants whose cases were handled by the district attorney's office's public integrity or specialized crime divisions for a specified time period.¹ You state you have released some information to the first requestor. You claim the submitted information is excepted from disclosure under sections 552.107, 552.108, and 552.111 of the Government Code and privileged under rule 192.5 of the Texas Rules of

¹You state the district attorney's office sought and received clarification of the requested information from the second requestor. *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 governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, ten-day period to request attorney general ruling is measured from date request is clarified or narrowed).

Civil Procedure.² We have considered your arguments and reviewed the submitted representative sample of information.³ We have also received and considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note the district attorney's office did not fully comply with section 552.301 of the Government Code. Subsection (b) of section 552.301 requires a governmental body requesting an open records ruling from this office to "ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the tenth business-day after the date of receiving the written request." *Id.* § 552.301(b). While you raised section 552.108 within the ten-business-day time period required by subsection 552.301(b) for the information you submitted as responsive to the second request, you did not raise section 552.108 until after the ten-business-day deadline had passed for the same information, which you also submitted as responsive to the first request.⁴ Generally, if a governmental body fails to timely raise an exception, that exception is waived. *See generally id.* § 552.302; Open Records Decision No. 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions). Section 552.108 is a discretionary exception to disclosure which protects a governmental body's interests and may be waived. *See* Gov't Code § 552.007; Open Records Decision No. 177 (1977) (statutory predecessor to section 552.108 subject to waiver), 665 at 2 n.5 (2000) (discretionary exceptions generally). Consequently, by failing to comply with section 552.301(b) with respect to its claim under section 552.108 for the information you submitted as responsive to the first request, the district attorney's office has waived its claim under this section for this information. In waving section 552.108 for the first request, you have waived this section for the same information in the second request. Accordingly, the department may not withhold the information at issue under section 552.108 of the Government Code for either request. However, we will address your timely raised exceptions for the information at issue, as well as your arguments for the remaining information.

Next, we note the submitted information is part of a completed investigation that is subject to section 552.022(a)(1) of the Government Code. Section 552.022(a)(1) provides for the

²Although you raise section 552.101 of the Government Code in conjunction with Texas Rule of Civil Procedure 192.5, this office has concluded section 552.101 does not encompass discovery privileges. *See* Open Records Decision No. 575 at 2 (1990).

³We assume the "representative sample" of information 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 those records contain substantially different types of information than those submitted to this office.

⁴We note a portion of the information in Exhibit C of the first request is submitted as Exhibit 4 for the second request.

required public disclosure of “a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by section 552.108.” Gov’t Code § 552.022(a)(1). Pursuant to section 552.022(a)(1), a completed investigation is expressly public unless it is either excepted under section 552.108 of the Government Code or is made confidential under the Act or other law. You claim portions of the completed investigation are excepted from disclosure under sections 552.107 and 552.111 of the Government Code. However, sections 552.107 and 552.111 are discretionary exceptions to disclosure that protect a governmental body’s interests and do not make information confidential under the Act. *See* Open Records Decision Nos. 677 at 10 (2002) (attorney work product privilege under section 552.111 may be waived), 676 at 10-11 (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (discretionary exceptions generally), 663 (governmental body may waive section 552.111). Therefore, the district attorney’s office may not withhold any of the submitted information under section 552.107 or section 552.111. However, the Texas Supreme Court has held the Texas Rules of Civil Procedure and Texas Rules of Evidence are “other law” within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). The attorney-client privilege is also found under Texas Rule of Evidence 503, and the attorney work product privilege is also found under Texas Rule of Civil Procedure 192.5. Accordingly, we will consider your assertion of the attorney-client privilege under Texas Rule of Evidence 503. We note, however, the Texas Rules of Civil Procedure apply only to “actions of a civil nature.” *See* TEX. R. CIV. P. 2. Thus, because the submitted information relates to a criminal case, the attorney work product privilege found in Texas Rule of Civil Procedure 192.5 does not apply to the information at issue, and it may not be withheld on that basis. However, we will consider the applicability of Texas Rule of Evidence 503 to the submitted information. Further, as sections 552.101, 552.117, 552.130, 552.136, and 552.137 of the Government Code make information confidential under the Act, we will also consider the applicability of those sections to the submitted information.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;

⁵The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

(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 contend some of the submitted information is protected by the attorney-client privilege. Upon review, we find you have established the applicability of the attorney-client privilege to the information we have marked. Accordingly, the district attorney's office may withhold the marked information under rule 503 of the Texas Rules of Evidence. However, the remaining information at issue consists of communications between the district attorney's office and defense counsel. Because the defense counsel is an adversarial party, we find this information does not constitute privileged communications protected by rule 503 and may not be withheld on that basis.

Section 552.101 of the Government Code exempts 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 258.102 of the Occupations Code. Section 258.102 provides in pertinent part as follows:

(a) The following information is privileged and may not be disclosed except as provided by this subchapter:

- (1) a communication between a dentist and a patient that relates to a professional service provided by the dentist; and
- (2) a dental record.

Occ. Code § 258.102(a). A “dental record” means dental information about a patient that is created or maintained by a dentist and relates to the history or treatment of the patient. *See id.* § 258.101(1). Upon review, we find the information we have marked constitutes dental records the district attorney’s office must withhold under section 552.101 of the Government Code in conjunction with section 258.102 of the Occupations Code.

Section 552.101 of the Government Code also encompasses the doctrine of common-law 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. 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 established. *Id.* at 681-82. 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 Nos. 455 (1987) (information pertaining to prescription drugs, specific illnesses, operations and procedures, and physical disabilities protected from disclosure), 422 (1984), 343 (1982). This office has also found 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 Nos. 600 (1992), 545 (1990). Upon review, we find the information we have marked is highly intimate or embarrassing and not of legitimate public concern. Therefore, the district attorney’s office must withhold the information we have marked pursuant to section 552.101 of the Government Code in conjunction with common-law privacy.

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 current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Gov’t Code § 552.117(a)(1). Section 552.117 also encompasses a personal cellular telephone number, provided that a governmental body does not pay for the cellular phone service. *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). 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 be withheld under section 552.117(a)(1) only 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. We have marked the cellular telephone number of a district attorney's office employee. If the employee whose cellular telephone number is at issue timely elected to keep this number confidential pursuant to section 552.024 and the cellular service is not paid for by a governmental body, the district attorney's office must withhold the information we have marked under section 552.117(a)(1) of the Government Code. The district attorney's office may not withhold this information under section 552.117(a)(1) if the employee did not timely elect to keep his cellular telephone number confidential pursuant to section 552.024 or if the cellular service is paid for by a governmental body.

Section 552.130 of the Government Code provides information relating to a motor vehicle operator's or driver's license issued by an agency of Texas or another state or country is excepted from public release. Gov't Code § 552.130(a)(1). Upon review, we conclude the district attorney's office must withhold the information we have marked under section 552.130 of the Government Code.

Section 552.136 of the Government Code states, "[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." *Id.* § 552.136. Accordingly, we conclude the district attorney's office must withhold the bank account and routing numbers we have marked under section 552.136 of the Government Code.

Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body," unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *Id.* § 552.137(a)-(c). Accordingly, the district attorney's office must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the addresses affirmatively consent to their release. *See id.* § 552.137(b).

In summary, the district attorney's office may withhold the information we have marked under rule 503 of the Texas Rules of Evidence. The district attorney's office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 258.102 of the Occupations Code and common-law privacy. If the employee whose cellular telephone number is at issue timely elected to keep this number confidential pursuant to section 552.024 and the cellular service is not paid for by a governmental body, the district attorney's office must withhold the information we have marked under section 552.117(a)(1) of the Government Code. The district attorney's office must also withhold the driver's license information we have marked under section 552.130 of the Government Code, the bank account and routing numbers we have marked under

section 552.136 of the Government Code, and the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the addresses affirmatively consent to their release. The remaining information must be released.⁶

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,



Nneka Kanu
Assistant Attorney General
Open Records Division

NK/bhf

Ref: ID# 487943

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁶We note the information being released contains social security numbers. 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).