



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 13, 2013

Ms. Molly Cost
Assistant General Counsel
Texas Department of Public Safety
P.O. Box 4087
Austin, Texas 78773-0001

OR2013-14110

Dear Ms. Cost:

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# 494680 (DPS PIR # 13-1897).

The Texas Department of Public Safety (the "department") received a request for all e-mails to or from a specified individual during a specified time period. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.106, 552.107, and 552.108 of the Government Code.¹ 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." Gov't Code § 552.101. This exception encompasses information other statutes make confidential, including article 62.005(b) of the Code of Criminal Procedure. Article 62.051 of the Code of Criminal Procedure requires a sex offender registrant to provide the following information to the department sex offender registration database: the person's full name; date of birth; sex; race; height; weight; eye color; hair color; social security number; driver's license number; shoe size; home address; each alias; home, work, or cellular telephone number; a recent color photograph, or if possible, an electronic image of the person; a complete set of

¹Although you also raise Texas Rule of Evidence 503, we note the proper exception to raise when asserting the attorney-client privilege for information not subject to 552.022 of the Government Code is section 552.107 of the Government Code. See Open Records Decision Nos. 677 (2002), 676 (2002).

fingerprints; the type of offense the person was convicted of; the age of the victim; the date of conviction; the punishment received; an indication as to whether the person is discharged, paroled, or released on juvenile probation, community supervision, or mandatory supervision; an indication of each license, as defined by article 62.005(g), that is held or sought by the person; an indication as to whether the person is or will be employed, carrying on a vocation, or a student at a particular public or private institution of higher education in this state or another state, and the name and address of that institution; the identification of any online identifier established or used by the person; and any other information required by the department. *See* Crim. Proc. Code art. 62.051(c). This information is public information with the exception of the person's social security number; driver's license number; home, work, or cellular telephone number; the identification of any online identifier established or used by the person; all information required by the department outside of the enumerated categories of information; and any information that would identify the victim of the offense for which the person is subject to registration. *See id.* art. 62.005(b). Upon review, we agree the information you have indicated is subject to section 62.005 of the Code of Criminal Procedure. Thus, the department must withhold or release the information you have indicated in accordance with article 62.005(b). *See* Open Records Decision Nos. 613 at 4 (1993) (exceptions in Act cannot impinge on statutory right of access to information), 451 (1986) (specific statutory right of access provisions overcome general exceptions to disclosure under the Act).

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 satisfied. *Id.* at 681-82. This office has found 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). We note, however, that the public generally has a legitimate interest in information that relates to public employment and public employees. *See* 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 (public has legitimate interest in job qualifications and performance of public employees), 444 at 5-6 (1986) (public 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). Further, we note dates of birth of members of the public are generally not highly intimate or embarrassing. *See* ORD 455 at 7 (home addresses, telephone numbers, dates of birth not protected under privacy). Upon review, we find the information we have marked is highly intimate or embarrassing and of no legitimate public interest. Accordingly, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find none of the remaining

information is highly intimate or embarrassing and not of legitimate public interest. Therefore, none of the remaining information may be withheld under section 552.101 on the basis of common-law privacy.

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 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). We have marked dates of birth that must be withheld under section 552.102(a) of the Government Code. However, we find the department has failed to demonstrate the applicability of section 552.102(a) of the Government Code to any of the remaining information. Therefore, the department may not withhold any of the remaining information on this basis.

Section 552.106 of the Government Code excepts from disclosure “[a] draft or working paper involved in the preparation of proposed legislation” and “[a]n internal bill analysis or working paper prepared by the governor’s office for the purpose of evaluating proposed legislation[.]” Gov’t Code § 552.106(a), (b). Section 552.106 ordinarily applies only to persons with a responsibility to prepare information and proposals for a legislative body. Open Records Decision No. 460 (1987). The purpose of section 552.106 is to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the members of the legislative body, and therefore, it does not except from disclosure purely factual information. *Id.* at 2. However, a comparison or analysis of factual information prepared to support proposed legislation is within the ambit of section 552.106. *Id.* A proposed budget constitutes a recommendation by its very nature and may be withheld under section 552.106. *Id.* Section 552.106 protects only policy judgments, advice, opinions, and recommendations involved in the preparation or evaluation of proposed legislation; it does not except purely factual information from public disclosure. *See* ORD 460 at 2.

You state the information you have indicated consists of communications between department employees, legislators’ offices, and other governmental bodies regarding the development, analysis, and evaluation of proposed legislation related to the department. Upon review, we find the information we have marked constitutes advice, opinion, analysis, and recommendations regarding legislation related to the department. Therefore, the department may withhold the information we have marked and indicated under section 552.106 of the Government Code. However, we find you have failed to demonstrate how the remaining information at issue constitutes advice, opinion, analysis, or recommendations for purposes of section 552.106. Accordingly, the department may not withhold any of the remaining information at issue under section 552.106.

Section 552.107(1) 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* ORD 676 at 6-7. 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, 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. *See 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 claim the information you have indicated is protected by section 552.107(1) of the Government Code. You state the information at issue consists of communications involving employees and attorneys of the department. You state the communications were made in confidence for the purpose of facilitating the rendition of professional legal services to the department and that these communications 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. Thus, the district may generally withhold the information you have indicated under section 552.107(1) of the Government Code. We note, however, one of the e-mail strings at issue includes an e-mail received from a non-privileged party. Furthermore, if the e-mail received from the non-privileged party is removed from the e-mail string and stands alone, it is responsive to the request for information. Therefore, if this non-privileged e-mail, which we have marked, is maintained by the department separate and apart from the otherwise privileged e-mail string in which

it appears, then the department may not withhold this non-privileged e-mail under section 552.107(1) of the Government Code.

Section 552.108(a)(1) 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 . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov’t Code § 552.108(a)(1). A governmental body must reasonably explain how release of the information at issue would interfere with the detection, investigation, or prosecution of crime. *See id.* § 552.301(e)(1)(A) (governmental body must provide comments explaining why exceptions raised should apply to information requested); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state the information you have indicated relates to pending criminal investigations. Based on this representation and our review of the information, we find release of the information at issue would interfere with the detection, investigation, or prosecution of a crime. *See Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court describes law enforcement interests that are present in active cases), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Therefore, the department may withhold the information you have indicated under section 552.108(a)(1) of the Government Code.

Section 552.108(b)(1) of the Government Code excepts from disclosure “[a]n internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution . . . if . . . release of the internal record or notation would interfere with law enforcement or prosecution[.]” Gov’t Code § 552.108(b)(1). Section 552.108(b)(1) is intended to protect “information which, if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate the laws of this State.” *City of Fort Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no writ). To demonstrate the applicability of this exception, a governmental body must meet its burden of explaining how and why release of the requested information would interfere with law enforcement and crime prevention. Open Records Decision No. 562 at 10 (1990). This office has concluded section 552.108(b) excepts from public disclosure information relating to the security or operation of a law enforcement agency. *See, e.g.*, Open Records Decision Nos. 531 (1989) (release of detailed use of force guidelines would unduly interfere with law enforcement), 252 (1980) (section 552.108 designed to protect investigative techniques and procedures used in law enforcement), 143 (1976) (disclosure of specific operations or specialized equipment directly related to investigation or detection of crime may be excepted). Section 552.108(b)(1) is not applicable, however, to generally known policies and procedures. *See, e.g.*, ORDs 531 at 2-3 (Penal Code provisions, common law rules, and constitutional limitations on use of force not protected), 252 at 3 (governmental body failed to indicate why investigative procedures and techniques requested were any different from those commonly known). The determination of whether the release of particular records would interfere with law enforcement is made on a case-by-case basis. Open Records Decision No. 409 at 2 (1984).

You state revealing the information you have indicated would provide wrong-doers, drug traffickers, terrorists, and other criminals with invaluable information concerning equipment, techniques, and procedures used by the department to detect, investigate, and assess the necessary response to possible criminal activity. Further, you inform us some of the information you have indicated contains details about contraband concealment methods by criminal offenders and the methods used by law enforcement to monitor and apprehend individuals engaged in criminal activity. Based on your representations and our review, we find the department may withhold the information we have indicated under section 552.108(b)(1) of the Government Code. However, we find the department has failed to demonstrate how release of any of the remaining information would interfere with law enforcement or crime prevention. We, therefore, conclude the department may not withhold any of the remaining information under section 552.108(b)(1) of the Government Code.

Section 552.117(a)(2) of the Government Code excepts from public disclosure the home addresses, home telephone numbers, emergency contact information, and social security number of a peace officer,² as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with section 552.024 or section 552.1175 of the Government Code.³ Gov't Code § 552.117(a). We note section 552.117 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *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). We have marked and indicated some personal information, including cellular telephone numbers, of individuals currently or formerly employed by the department. It is unclear, however, whether or not the individuals at issue are currently licensed peace officers as defined by article 2.12. Thus, if the individuals are currently licensed peace officers as defined by article 2.12, the department must withhold the personal information we have marked and indicated under section 552.117(a)(2) of the Government Code; however, the department may only withhold the cellular telephone numbers if the cellular services are not paid for by a governmental body. If, however, the individuals at issue are not currently licensed peace officers, their personal information may not be withheld under section 552.117(a)(2) of the Government Code.

If the individuals are currently not licensed peace officers, then the personal information we have marked and indicated may be subject to section 552.117(a)(1) of the Government Code, which 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 this information be kept

²"Peace officer" is defined by Article 2.12 of the Texas Code of Criminal Procedure.

³The 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).

confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a). 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 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. If the individuals whose information is at issue made timely elections under section 552.024, the department must withhold the personal information we have marked under section 552.117(a)(1) of the Government Code; however, the department may only withhold the cellular telephone numbers if the cellular services are not paid for by a governmental body. If these individuals did not make a timely election under section 552.024, the information at issue may not be withheld under section 552.117(a)(1) of the Government Code.

We note the remaining information contains information subject to section 552.137 of the Government Code. Section 552.137 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). *See* Gov't Code § 552.137(a)-(c). The e-mail addresses at issue are not excluded by subsection (c). Therefore, the department must withhold the personal e-mail addresses we have marked and indicated under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure.⁴

In summary, the department must withhold or release the information you have indicated that is subject to article 62.005 of the Code of Criminal Procedure in accordance with article 62.005(b). The department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The department must withhold the information we have marked under section 552.102(a) of the Government Code. The department may withhold the information we have marked under section 552.106 of the Government Code. The district may generally withhold the information you have indicated under section 552.107(1) of the Government Code; however, if the non-privileged e-mail we have marked is maintained by the department separate and apart from the otherwise privileged e-mail string in which it appears, then the department may not withhold this non-privileged e-mail under section 552.107(1). The department may withhold the information you have indicated under section 552.108(a)(1) of the Government Code. The department may withhold the information we have indicated under section 552.108(b)(1) of the Government Code. If the individuals at issue are currently licensed peace officers as defined by article 2.12 of the Criminal Code of Procedure, the

⁴We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

department must withhold the personal information we have marked and indicated under section 552.117(a)(2) of the Government Code; however, the department may only withhold the cellular telephone numbers if the cellular services are not paid for by a governmental body. If the individuals whose information is at issue made timely elections under section 552.024 of the Government Code, the department must withhold the personal information we have marked and indicated under section 552.117(a)(1) of the Government Code. The department must withhold the personal e-mail addresses we have marked and indicated under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure. The department 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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Sean Nottingham
Assistant Attorney General
Open Records Division

SN/tch

Ref: ID# 494680

Enc. Submitted documents

c: Requestor
(w/o enclosures)