ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 17, 2013

Mr. John P. Beauchamp
General Counsel
The Texas Commission on Law Enforcement Officer Standards and Education
6330 East Highway 290, Suite 200
Austin, Texas 78723-1035

OR2013-18087

Dear Mr. Beauchamp:

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# 502672.

The Texas Commission on Law Enforcement Officer Standards and Education (the "commission") received two requests from the same requestor for e-mails to and from two specified commission employees from a specified period of time, a listing of the commission's top five outside contracts, information pertaining to conflicts of interest and code of ethics, and a list of internal audits from a specified period of time. You state you have released some of the requested information to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.107, 552.108, 552.111, and 552.139 of the Government Code and privileged under rule 408 of the Texas Rules of Evidence.[1] We have considered your arguments and reviewed the submitted information.

[1]Although you also raise section 552.114 of the Government Code, you have not submitted arguments in support of that exception. Therefore, we assume you have withdrawn it. *See* Gov't Code §§ 552.301, .302. Further, although you also raise rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedure, we note sections 552.111 and 552.107 of the Government Code are the appropriate exceptions to raise for your attorney-client privilege claim and your attorney work product claim, respectively, for information not subject to section 552.022 of the Government Code. *See* Open Records Decision Nos. 677 (2002), 676 at 1-2 (2002).

Section 552.108(a) 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: (1) release of the information would interfere with the detection, investigation, or prosecution of crime[.]" Gov't Code § 552.108(a)(1). Generally, a governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). Section 552.108 is applicable only to records created by an agency, or a portion of an agency, whose primary function is to investigate crimes and enforce criminal laws. *See* Open Records Decision Nos. 493 at 2 (1988), 287 (1981). Section 552.108 generally does not apply to records created by an agency whose chief function is essentially regulatory in nature. *See* Open Records Decision No. 199 (1978). For example, an agency that employs peace officers to investigate crime and enforce criminal laws may claim that section 552.108 excepts portions of its records from required disclosure. *See* Open Records Decision No. 127 at 8 (1976) (arson investigation unit of fire department is law enforcement agency). We note the Enforcement Unit of the commission is comprised of commissioned investigators who investigate both administrative and criminal violations of law as it relates to the commission's mission. *See* Occ. Code § 1701.160 (commission may commission certified peace officers as investigators employed by commission for purpose of assisting commission in administering chapter 1701); *see also id.* §§ 1701.551-.553.

You state the commission employs peace officers with full investigative and arrest authority. Further, you state the information at issue in Enclosure 1 relates to an ongoing criminal investigation. Based on this representation, we conclude the release of the information at issue would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests that are present in active cases), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Thus, the commission may withhold the information you have marked in Enclosure 1 under section 552.108(a)(1) of the Government Code.[2]

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. ORD 676 at 6-7. First, a governmental body must demonstrate that 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

[2]As our ruling is dispositive, we need not address your remaining arguments against disclosure of the information at issue.

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 that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies to only 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 to only 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 that 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 the information in Enclosure 2 consists of communications between commission staff, the commission's general counsel, and the Office of the Attorney General, which we understand provides outside legal counsel to the commission. You state these communications were made for the purpose of facilitating the rendition of professional legal services to the commission. You also state the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find the commission may withhold the information you have marked in Exhibits F and G in Enclosure 2 under section 552.107(1) of the Government Code. However, we find you have not demonstrated how the remaining information in Enclosure 2 consists of communications made for the purpose of facilitating the rendition of professional legal services to the commission. Therefore, the commission may not withhold the remaining information at issue in Enclosure 2 under section 552.107(1).

Section 552.111 of the Government Code excepts from disclosure "[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency[.]" Gov't Code § 552.111. Section 552.111 encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City*

of San Antonio, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. ORD 615 at 5; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.). A governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. *See* Open Records Decision No. 631 at 3 (1995). However, a governmental body's policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. ORD 615 at 5-6; *see also Dallas Morning News*, 22 S.W.3d at 364 (section 552.111 not applicable to personnel-related communications that did not involve policymaking).

Further, section 552.111 does not generally except from disclosure facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 157; ORD 615 at 5. But, if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

You contend the remaining information you have marked in Enclosure 2 and the information you have marked in Enclosure 3 consist of internal communications consisting of advice, opinions, and recommendations amongst commission personnel regarding policy matters. Based on your representations and our review, we conclude the commission may withhold the information you have marked in Enclosure 3 under section 552.111. However, we find the remaining information at issue in Enclosure 2 consists of either general administrative information that does not relate to policymaking or information that is purely factual in nature. Thus, you have failed to demonstrate how this information is excepted under section 552.111, and the commission may not withhold it on this basis.

Section 552.139 of the Government Code provides, in part:

> (a) Information is excepted from [required public disclosure] if it is information that relates to computer network security, to restricted information under Section 2059.055 [of the Government Code], or to the design, operation, or defense of a computer network.

> (b) The following information is confidential:
>
> > (1) a computer network vulnerability report; and
> >
> > (2) any other assessment of the extent to which data processing operations, a computer, a computer program, network, system, or system interface, or software of a governmental body or of a contractor of a governmental body is vulnerable to unauthorized access or harm, including an assessment of the extent to which the governmental body's or contractor's electronically stored information is vulnerable to alteration, damage, erasure, or inappropriate use[.]

Gov't Code § 552.139(a), (b)(1)-(2). Section 2059.055 of the Government Code provides in pertinent part:

> (b) Network security information is confidential under this section if the information is:
>
> > (1) related to passwords, personal identification numbers, access codes, encryption, or other components of the security system of a state agency;
> >
> > (2) collected, assembled, or maintained by or for a governmental entity to prevent, detect, or investigate criminal activity; or
> >
> > (3) related to an assessment, made by or for a governmental entity or maintained by a governmental entity, of the vulnerability of a network to criminal activity.

Id. § 2059.055(b). You seek to withhold the remaining information in Enclosure 2 under section 552.139. Upon review, we find the information we have marked relates to computer network security. Accordingly, the commission must withhold the information we have marked in Enclosure 2 under section 552.139 of the Government Code. However, we find you have failed to demonstrate how any of the remaining information at issue relates to computer network security or the design, operation, or defense of a computer network or consists of a computer network vulnerability report or assessment as contemplated by section 552.139. Accordingly, none of the remaining information in Enclosure 2 may be withheld on the basis of section 552.139 of the Government Code.

Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. Section 552.101 encompasses the doctrine of 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 satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. However, information pertaining to the work product and job performance of public employees is subject to a legitimate public interest and is, therefore, generally not protected from public disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (public employee's job performance does not generally constitute employee's private affairs), 455 (1987) (public employee's job performance or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employee), 423 at 2 (1984) (scope of public employee privacy is narrow). Upon review, we find you have not demonstrated how any portion of the information in Exhibit 4 is highly intimate or embarrassing and not of legitimate public concern. Thus, no portion of the information at issue may be withheld under section 552.101 in conjunction with 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). We understand you to assert the privacy analysis under section 552.102(a) is the same as the common-law privacy test under section 552.101 of the Government Code, which is discussed 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 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 has expressly disagreed with *Hubert's* interpretation of section 552.102(a), and held the privacy standard under section 552.102(a) differs from the *Industrial Foundation* test under section 552.101. *See Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). The Supreme Court also considered the applicability of section 552.102(a) and held it excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *See id.* at 348. Having carefully reviewed the information at issue, we find no portion of the information in Exhibit 4 is subject to section 552.102(a) of the Government Code, and the commission may not withhold any of the information at issue on that basis.

Some of the information in Exhibit 4 may be subject to section 552.117 of the Government Code.[3] Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee or official of a governmental

[3]The 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).

body who requests this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(1). 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 employee or official 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. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee or official who did not timely request under section 552.024 the information be kept confidential. In this instance, we are unable to determine whether the individual whose information is at issue is a current or former commission employee who timely elected confidentiality under section 552.024. Therefore, we must rule conditionally. To the extent the individual whose information is at issue is a current or former commission employee who timely requested confidentiality under section 552.024 of the Government Code, the commission must withhold the information we have marked in Exhibit 4 under section 552.117(a)(1) of the Government Code. Conversely, to the extent the individual at issue is not a current or former commission employee or did not timely request confidentiality under section 552.024, the commission may not withhold the marked information under section 552.117(a)(1).

Section 552.137 of the Government Code provides, "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]," unless the owner of the e-mail address has affirmatively consented to its release or the e-mail address is specifically excluded by subsection (c). Gov't Code § 552.137(a)-(c). Accordingly, the commission must withhold the e-mail address we have marked in Enclosure 1 under section 552.137 of the Government Code, unless the owner of the e-mail address affirmatively consents to its release.[4]

In summary, the commission may withhold the information you have marked in Enclosure 1 under section 552.108(a)(1) of the Government Code. The commission may withhold the information you have marked in Exhibits F and G in Enclosure 2 under section 552.107(1) of the Government Code and the information you have marked in Enclosure 3 under section 552.111 of the Government Code. The commission must withhold the information we have marked in Enclosure 2 under section 552.139 of the Government Code. To the extent the individual whose information is at issue is a current or former commission employee who timely requested confidentiality under section 552.024 of the Government Code, the commission must withhold the information we have marked in Exhibit 4 under section 552.117(a)(1) of the Government Code. The commission must withhold the e-mail

[4]Open Records Decision No. 684 (2009) serves as a previous determination to all governmental bodies permitting them to withhold certain categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without requesting a decision from this office.

address we have marked in Enclosure 1 under section 552.137 of the Government Code, unless the owner of the e-mail address affirmatively consents to its release. 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.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,

Sarah Casterline
Assistant Attorney General
Open Records Division

SEC/tch

Ref: ID# 502672

Enc. Submitted documents

c: Requestor
(w/o enclosures)