



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 30, 2014

Mr. Michael Bostic
Assistant City Attorney
Office of the City Attorney
City of Dallas
1500 Manila Street, 7DN
Dallas, Texas 75201

OR2014-11161

Dear Mr. Bostic:

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# 528466.

The City of Dallas (the "city") received a request for four categories of information pertaining to the city's Fair Housing Office and the Oaks on Montfort Condominium Association. We understand the city will redact information pursuant to section 552.130(c) of the Government Code.¹ You claim that portions of the submitted information are excepted from disclosure under sections 552.101, 552.107, and 552.137 of the Government Code and privileged under rule 503 of the Texas Rules of Evidence. We have considered your arguments and reviewed the submitted representative sample of information.²

¹Section 552.130(c) of the Government Code allows a governmental body to redact the information described in subsection 552.130(a) without the necessity of seeking a decision from the attorney general. *See* Gov't Code § 552.130(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). *See id.* § 552.130(d), (e).

²We 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.

Initially, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides in part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

(1) 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). The submitted information includes completed reports subject to section 552.022(a)(1). Although you seek to withhold some of this information under section 552.107 of the Government Code, this section is a discretionary exception to disclosure that does not make information confidential under the Act. *See* Open Records Decision No. 676 at 6 (2002) (attorney-client privilege under section 552.107 may be waived); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Thus, the city may not withhold the information at issue under section 552.107 of the Government Code. However, the Texas Supreme Court has held the Texas Rules of Evidence are "other law" that make information expressly confidential for the purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will consider your assertion of the attorney-client privilege under Texas Rule of Evidence 503. Section 552.101 of the Government Code also makes information confidential under the Act. Therefore, we will address the applicability of this section to the information subject to section 552.022. Additionally, we will consider your arguments against disclosure of the information not subject to section 552.022.

Texas Rule of Evidence 503 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;

(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. *Id.* Upon a demonstration of all three factors, the entire communication is 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). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You state the information you have marked consists of confidential communications made between city attorneys and city staff for the purpose of rendering professional legal services to the city. You further state these communications have not been released to third parties. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Therefore, we find the city may withhold the information you have marked under Texas Rule of Evidence 503.

Next, we address your argument section 20A-10(g) of the Dallas City Code prohibits the release of a conciliation agreement when the aggrieved person and the respondent request nondisclosure of such agreement. 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. We note a governmental body may not promulgate a rule that designates information as being confidential, so as to bring the information within the scope of section 552.101, unless the governmental body has been given specific statutory authority to do so. *See* Open Records Decision Nos. 594 at 2-3 (1991) (city ordinance cannot operate to make information confidential when not excepted by Act), 263 (1981) (city ordinance may not conflict with Act); *see also Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976) (agency rule may not make information confidential in circumvention of Act). You have not directed our attention to any law, nor are we aware of any, that authorizes the city to make information confidential for purposes of the Act. Consequently, we conclude the city may

not withhold any portion of the remaining information under section 552.101 of the Government Code on the basis of section 20A-10(g) of the Dallas City Code.

Section 552.101 of the Government Code encompasses information protected by federal and state law. You assert some of the submitted information is confidential under section 103.330 of title 24 of the Code of Federal Regulations, section 3610 of title 42 of the United States Code, and section 301.085 of the Property Code. *See* 24 C.F.R. § 103.330; 42 U.S.C. § 3610(b); Prop. Code § 301.085. Part 103 of the Code of Federal Regulations applies to complaints alleging discriminatory housing practices because of race, color, religion, sex or national origin, and complaints alleging discriminatory housing practices on account of handicap or familial status occurring on or after March 12, 1989. 24 C.F.R. § 103.1(b). Upon the filing of a complaint, both federal and state law mirror each other in language and encourage conciliation to the extent feasible. Section 103.330(b) provides the following:

(b) Conciliation agreements shall be made public, unless the aggrieved person and respondent request nondisclosure and the Assistant Secretary determines that disclosure is not required to further the purposes of the Fair Housing Act. Notwithstanding a determination that disclosure of a conciliation agreement is not required, the Assistant Secretary may publish tabulated descriptions of the results of all conciliation efforts.

Id. § 103.330(b); *see id.* § 103.9 (defining conciliation for purposes of part 103). Section 3610 of title 42 of the United States Code provides in pertinent part:

(d) Prohibitions and requirements with respect to disclosure of information

(1) Nothing said or done in the course of conciliation under this subchapter may be made public or used as evidence in a subsequent proceeding under this subchapter without the written consent of the persons concerned.

42 U.S.C. § 3610(d)(1). Section 301.085 of the Property Code provides in pertinent part:

(d) A conciliation agreement is public information unless:

(1) the complainant and respondent agree that it is not; and

(2) the commission determines that disclosure is not necessary to further the purposes of this chapter.

Prop. Code § 301.085(d). You contend the information you have marked is excepted pursuant to section 103.330(b) of title 24 of the Code of Federal Regulations, section 3610 of title 42 of the United States Code, and section 301.085(d) of the Property Code. You state the parties to

the agreement have requested nondisclosure. Additionally, you inform us the city's Fair Housing Office administrator has determined that a public purpose would not be furthered by disclosure. Accordingly, we find the city must withhold the submitted conciliation agreement, which we have marked, under section 552.101 of the Government Code in conjunction with federal law.³ Although you contend the remaining information at issue concerning efforts at conciliation is also protected under the federal law and state law, this information does not consist of a conciliation agreement. Further, we find the information consists of neither things said nor done in the course of conciliation. Accordingly, we find the city may not withhold the remaining information at issue under section 552.101 of the Government Code in conjunction with section 103.330 of title 24 of the Code of Federal Regulations, section 3610 of title 42 of the United States Code, or section 301.085(e) of the Property Code.

Section 552.101 of the Government Code also encompasses section 154.073 of the Civil Practice and Remedies Code, which provides in part:

- (a) Except as provided by Subsections (c), (d), (e), and (f), a communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure, whether before or after the institution of formal judicial proceedings, is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding.

Civ. Prac. & Rem. Code § 154.073(a). You contend the remaining information at issue is excepted pursuant to section 154.073(a) of the Civil Practices and Remedies Code. However, you have not demonstrated this information consists of a communication relating to the subject matter of the dispute made by a participant in an alternative dispute resolution procedure or a record made at such a procedure. Thus, the remaining information is not confidential under section 154.073 of the of the Civil Practice and Remedies Code, and may not be withheld under section 552.101 of the Government Code on that ground.

Section 552.101 of the Government Code also encompasses the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code, which governs access to medical records. Section 159.002 of the MPA provides, in part:

- (a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.

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

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(a)-(c). Information subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004; Open Records Decision No. 598 (1991). This office has concluded the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). Upon review, we find some of the remaining information constitutes medical records and information obtained from medical records. Accordingly, the city must withhold the information you have marked, and the additional information we have marked, under section 552.101 of the Government Code in conjunction with the MPA.⁴

Section 552.101 of the Government Code also 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.*, 540 S.W.2d at 685. To demonstrate the applicability of common-law privacy, both prongs of this test must be demonstrated. *See id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). This office has also found that personal financial information not related to a financial transaction between an individual and a governmental body is highly intimate or embarrassing and of no legitimate public interest. *See* Open Records Decision Nos. 600 (1992), 545 (1990), 373 (1983). Furthermore, this office has concluded the amounts paid by a housing authority on behalf of eligible tenants are not protected from disclosure under privacy interests. *See* Open Records Decision No. 268 (1981); *see also* Open Records Decision Nos. 600 at 9-10 (1992), 545 (1990), 489 (1987), 480 (1987). Upon review, we find you have not demonstrated how any of the remaining information is highly intimate or embarrassing and not of legitimate public concern. Thus, the remaining information may not be withheld under section 552.101 in conjunction with common-law privacy.

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

Section 552.137 of the Government Code states that “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 public disclosure. Gov’t Code § 552.137(a)-(b). The types of e-mail addresses listed in section 552.137(c) may not be withheld under this exception. *See id.* § 552.137(c). You state you will redact the e-mail addresses you have marked under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009). Upon review, we find the city must withhold the e-mail address you have marked under section 552.137 of the Government Code, unless the owner affirmatively consents to its public disclosure. However, we find none of the remaining information you have marked consists of e-mail addresses. Accordingly, the city may not withhold any of the remaining information at issue, which we have marked for release, under section 552.137 of the Government Code.

In summary, the city may withhold the information you have marked under Texas Rule of Evidence 503. The city must withhold the agreement we have marked under section 552.101 of the Government Code in conjunction with federal law. The city must withhold the information you have marked, and the additional information we have marked, under section 552.101 of the Government Code in conjunction with the MPA. The city must withhold the e-mail address you have marked under section 552.137 of the Government Code, unless the owner affirmatively consents to its public disclosure. 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,

A handwritten signature in black ink, appearing to read 'Sarah Casterline', followed by a large, stylized circular flourish or scribble.

Sarah Casterline
Assistant Attorney General
Open Records Division

SEC/bhf

Mr. Michael Bostic - Page 8

Ref: ID# 528466

Enc. Submitted documents

c: Requestor
(w/o enclosures)