



ATTORNEY GENERAL OF TEXAS
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September 15, 2014

Mr. Bruce A. Koehler
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OR2014-16259

Dear Mr. Koehler:

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# 536075.

The City of Socorro (the "city"), which you represent, received a request for all records in the requestor's personnel file, including a complaint filed by a named individual, and all e-mails during a specified time frame from a named individual to the city's council members and police officers. You state some information was released to the requestor. You claim portions of the submitted information are excepted from disclosure under sections 552.101, 552.102, 552.103, 552.107, 552.111, 552.117, 552.1175, 552.130, 552.137, and 552.147 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

Initially, you assert the information you have marked is not responsive to the request for information because it does not consist of the specified communications. Upon review, we

¹Although you raise section 552.108 of the Government Code, you make no arguments to support this exception. Therefore, we assume you have withdrawn your claim this section applies to the requested information. *See* Gov't Code §§ 552.301, .302.

²We assume 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.

agree most of the information you marked is not responsive to the request. This ruling does not address the public availability of any information that is not responsive to the request, and the city is not required to release that information in response to the request. However, we note one of the e-mails you marked was forwarded by the named individual to a city police officer. Thus, this e-mail, which we marked, is responsive to the instant request. Accordingly, we will consider your argument against the disclosure of this information.

Next, we note the submitted information contains a Texas Commission on Law Enforcement ("TCOLE") personal identification number. In Open Records Decision No. 581 (1990), this office determined certain computer information, such as source codes, documentation information, and other computer programming, that has no significance other than its use as a tool for the maintenance, manipulation, or protection of public property is not the kind of information made public under section 552.021 of the Government Code. We understand a TCOLE personal identification number is a unique computer-generated number assigned to peace officers for identification in the commissioner's electronic database and may be used as an access device number on the TCOLE website. Accordingly, TCOLE personal identification numbers do not constitute public information under section 552.002 of the Government Code. Thus, the submitted TCOLE personal identification number is not subject to the Act and need not be released to the requestor.

Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses the Medical Practice Act ("MPA"), subtitle B of title 3 of the Occupations Code, which governs release of medical records. *See* Occ. Code §§ 151.001-168.202. Section 159.002 of the MPA provides, in relevant 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.
- (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.

Id. § 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. 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 a portion of the submitted information, which we have marked, constitutes a record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that was created or maintained by a physician. Accordingly, the city must withhold the marked medical record under section 552.101 of the Government Code in conjunction with the MPA. However, we find you have not demonstrated how any of the remaining information at issue constitutes medical records or information obtained from medical records, and the city may not withhold any of the remaining information at issue under section 552.101 of the Government Code on that basis.

Section 552.103 provides, in relevant part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to that litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See Open Records Decision No. 551 at 4 (1990).*

Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See Open Records Decision No. 452 at 4 (1986).* To demonstrate litigation is reasonably anticipated, the governmental body must furnish concrete evidence litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* This office has found a pending complaint with the Equal Employment Opportunity Commission ("EEOC") indicates litigation is reasonably anticipated. *See Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982), 281 at 1 (1981).*

You state the documents in Exhibit 1 are excepted from disclosure under section 552.103 of the Government Code. You have submitted information which establishes, prior to the city's receipt of the request for information, the employee at issue filed a discrimination complaint with the EEOC against the city. We note, although the EEOC had concluded its investigation and issued a right-to-sue letter prior to the city's receipt of the request for information, the 90-day period in which the complainant has a right to sue had not expired when the city received the request. Based on your representations and our review of the information at issue, we find you have demonstrated litigation was reasonably anticipated when the city received the request for information. Our review of the information at issue also shows it is related to the anticipated litigation for purposes of section 552.103(a). Thus, section 552.103 is generally applicable to Exhibit 1.

We note, however, the potential opposing party has seen or had access to some of the information at issue. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to the litigation to obtain such information through discovery procedures. *See* ORD 551 at 4-5. Thus, once the potential opposing party in anticipated litigation has seen or had access to information that is related to the anticipated litigation, there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Accordingly, the city may withhold the information we have marked under section 552.103 of the Government Code.³ We note the applicability of section 552.103 ends once the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

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 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 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 only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1). Thus, a governmental body

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

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.* 503(b)(1), 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 documents in Exhibit 2 are excepted from disclosure under section 552.107 of the Government Code. You state the e-mails and attachment you marked consist of attorney-client privileged communications among the city’s attorney and city representatives for the purpose of facilitating the rendition of professional legal services to the city. We understand 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 city may withhold Exhibit 2 under section 552.107(1) of the Government Code.⁴

Section 552.101 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. 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. Common-law privacy protects information pertaining to the identities of victims of sexual assault and victims of and witnesses to sexual harassment. *See* Open Records Decision No. 339 (1982); *see also Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied) (identity of witnesses to and victims of sexual harassment was highly intimate or embarrassing information and public did not have a legitimate interest in such information). 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 disclosure under common-law privacy. *See* Open Records Decision Nos. 600 (1992) (public employee’s withholding allowance certificate, designation of beneficiary of employee’s retirement benefits, direct deposit authorization, and employee’s decisions regarding voluntary benefits

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

programs, among others, protected under common-law privacy), 523 (1989) (common-law privacy protects credit reports, financial statements, and other personal financial information), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). Upon review, we find the information we marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. We note some of the remaining information you seek to withhold pertains to a worker's compensation claim; we find, there is a legitimate public interest in this information. *See* Open Records Decision Nos. 545 at 4 (attorney general has found kinds of financial information not excepted from public disclosure by common-law privacy to generally be those regarding receipt of governmental funds or debts owed to governmental entities), 423 at 2 (1984) (scope of public employee privacy is narrow). Further, you have failed to demonstrate the remaining information at issue is highly intimate or embarrassing and of no legitimate public interest. Thus, the remaining information at issue may not be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

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. This exception 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. *See* ORD 615 at 5. 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. *Id.*; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). 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).

Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist.*

v. Tex. Attorney Gen., 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); *see* 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).

This office has also concluded a preliminary draft of a document that is intended for public release in its final form necessarily represents the drafter's advice, opinion, and recommendation with regard to the form and content of the final document, so as to be excepted from disclosure under section 552.111. *See* Open Records Decision No. 559 at 2 (1990) (applying statutory predecessor). Section 552.111 protects factual information in the draft that also will be included in the final version of the document. *See id.* at 2-3. Thus, section 552.111 encompasses the entire contents, including comments, underlining, deletions, and proofreading marks, of a preliminary draft of a policymaking document that will be released to the public in its final form. *See id.* at 2.

You state the documents in Exhibit 5 are excepted from disclosure under section 552.111 of the Government Code and consist of advice, opinion, and recommendations related to the city's policymaking. Additionally, you state a portion of the information consists of a draft document. However, you do not state whether the draft document will be released to the public in its final form. Thus, to the extent the draft document we marked will be released to the public in its final form, the city may withhold the information we marked in its entirety under section 552.111 of the Government Code. If the draft document will not be released to the public in final form, then the city may not withhold it in its entirety under section 552.111 of the Government Code. Upon review, however, we find some of the remaining information at issue consists of advice, opinions, and recommendations pertaining to policymaking matters of the city. Accordingly, the city may withhold the information we have marked under section 552.111 of the Government Code. However, we find the remaining information at issue consists of general administrative and purely factual information. Thus, we find you have not demonstrated how this information consists of advice, opinions, or recommendations pertaining to the policymaking matters of the city. Accordingly, the city may not withhold the remaining information at issue under section 552.111 of the Government Code.

Section 552.117(a)(2) of the Government Code excepts from public disclosure a peace officer's home address and telephone number, social security number, emergency contact information, and family member information regardless of whether the peace officer made an election under section 552.024 of the Government Code. Gov't Code § 552.117(a)(2). Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. You state some of the information at issue consists of the personal information of individuals currently or formerly employed by the city. In this instance, however, it is unclear whether the individuals at issue are currently licensed peace officers as defined by article 2.12 of the Code of Criminal Procedure. Therefore, if the information we marked pertains to individuals who are currently licensed peace officers as defined by article 2.12, the city must withhold the information we have marked under

section 552.117(a)(2) of the Government Code. If the individuals at issue are not licensed peace officers as defined by article 2.12, the city may not withhold the marked information under section 552.117(a)(2) of the Government Code.

If the individuals whose information is at issue are currently not licensed peace officers, then the marked personal information may be subject to section 552.117(a)(1) of the Government Code. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, emergency contact information, and family member information of current or former officials or employees of a governmental body who request this information be kept confidential under section 552.024 of the Government Code. *Id.* § 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 only be withheld under section 552.117(a)(1) 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. You inform us, and provide documentation showing, some of the individuals at issue timely elected confidentiality of the information at issue under section 552.024. Therefore, the city must withhold this information under section 552.117(a)(1) of the Government Code. However, we are unable to determine whether the remaining individuals at issue timely elected confidentiality for their information under section 552.024. Thus, we must rule conditionally. Therefore, to the extent the remaining individuals whose information is at issue timely requested confidentiality under section 552.024 of the Government Code, the city must withhold the information we marked under section 552.117(a)(1) of the Government Code. Conversely, to the extent the individuals at issue did not timely request confidentiality under section 552.024, the city may not withhold the marked information under section 552.117(a)(1).

Section 552.1175 of the Government Code excepts from public disclosure the home addresses and telephone numbers, social security numbers, dates of birth, emergency contact information, and family member information of specified categories of governmental body employees or officials, including peace officers as defined by article 2.12 of the Code of Criminal Procedure. *See* Gov't Code § 552.1175(a)-(b). A portion of the remaining information contains the home telephone number of an individual who may be a peace officer of another law enforcement agency. However, we are unable to determine from the information provided if the individual at issue is a currently licensed peace officer. Thus, we must rule conditionally. Accordingly, to the extent the home telephone number we have marked belongs to an individual who is currently licensed as a peace officer and who elects to restrict access to the information in accordance with section 552.1175(b), the city must withhold the information we marked under section 552.1175 of the Government Code. Conversely, if the individual whose telephone number is at issue is not currently licensed as a peace officer or does not elect to restrict access to his information in accordance with section 552.1175(b), the telephone number at issue may not be withheld under section 552.1175.

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, or personal identification document issued by an agency of this state or another state or country is excepted from public release. *Id.* § 552.130. Accordingly, the city must withhold the motor vehicle record information you have marked under section 552.130 of the Government Code.⁵

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). Gov't Code § 552.137(a)-(c). You state the submitted information contains personal e-mail addresses that are not a type excluded by subsection (c), and such members of the public have not affirmatively consented to their disclosure. Based on your representations and our review, we find the city must withhold the marked personal e-mail addresses under section 552.137 of the Government Code.

Section 552.147 of the Government Code provides "[t]he social security number of a living person is excepted from" required public disclosure under the Act. *Id.* § 552.147(a). Therefore, to the extent the employees at issue are not licensed peace officers and did not timely elect confidentiality under section 552.024, the city may withhold the partial social security numbers you have marked under section 552.147(a) of the Government Code.

In summary, the TCOLE personal identification number is not subject to the Act and need not be released. The city must withhold the marked medical record under section 552.101 of the Government Code in conjunction with the MPA. The city may withhold the information we have marked under section 552.103(a). The city may withhold Exhibit 2 under section 552.107(1) of the Government Code. The city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. To the extent the draft document we have marked will be released in its final form, the city may withhold it under section 552.111 of the Government Code. The city may also withhold the information we have marked under section 552.111 of the Government Code. The city must withhold the marked information under section 552.117(a)(2) of the Government Code, if the individuals are licensed peace officers. For those individuals who elected, the city must withhold the marked information under section 552.117(a)(1) of the Government Code, to the extent the individuals are not licensed peace officers. To the extent the remaining individuals whose information is at issue timely requested confidentiality under section 552.024 of the Government Code, the city must withhold the information we marked under section 552.117(a)(1) of the Government Code. To the extent the home telephone number we have marked belongs to an individual who is currently licensed as a peace officer and who elects to restrict access to the information in

⁵As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

accordance with section 552.1175(b), the city must withhold the information we marked under section 552.1175 of the Government Code. The city must withhold the motor vehicle record information you have marked under section 552.130 of the Government Code. The city must withhold the marked personal e-mail addresses under section 552.137 of the Government Code. To the extent the employees at issue are not licensed peace officers, or did not timely elect confidentiality under section 552.024, the city may withhold the partial social security numbers you have marked under section 552.147(a). 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,



Lauren Dahlstein
Assistant Attorney General
Open Records Division

LMD/bhf

Ref: ID# 536075

Enc. Submitted documents

c: Requestor
(w/o enclosures)