



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

February 10, 2016

Ms. Elaine Nicholson  
Assistant City Attorney  
City of Austin  
P.O. Box 1088  
Austin, Texas 78767-8828

OR2016-03271

Dear Ms. Nicholson:

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# 597866 (PIR No. 821124).

The City of Austin (the "city") received a request for all information related to the random job satisfaction survey and exit interviews completed by Emergency Medical Services ("EMS") personnel including certain legal opinions.<sup>1</sup> The same requestor made a second request for the resumes on file for individuals in chief positions at Austin Travis County EMS, including the EMS Chief, Chief of Staff, assistant chiefs, and division chiefs. You claim the submitted information is excepted from disclosure under sections 552.101

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<sup>1</sup>You state the city sought and received clarification of the information requested for the first request. See Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); see also *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

and 552.107 of the Government Code.<sup>2</sup> We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>3</sup>

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. Section 552.101 encompasses section 143.089 of the Local Government Code. You state the city is a civil service city under chapter 143 of the Local Government Code. *See* Local Gov’t Code §§ 143.401, .403(c) (each provision of chapter 143 applies to emergency medical services personnel covered by subchapter K). Section 143.089 requires a civil service city to maintain two different types of personnel files relating to EMS personnel: a civil service file that the civil service director is required to maintain and an internal file that the department may maintain for its own use. *Id.* § 143.089(a), (g). Information that reasonably relates to an EMS personnel’s employment relationship with the department is maintained in the department’s internal file pursuant to section 143.089(g) and is confidential and must not be released. *See id.* § 143.089(g); *see also City of San Antonio v. San Antonio Express-News*, 47 S.W.3d 556 (Tex. App.—San Antonio 2000, pet. denied); *City of San Antonio v. Texas Attorney General*, 851 S.W.2d 946, 949 (Tex. App.—Austin 1993, writ denied).

You seek to withhold information you state is maintained by the EMS department in a confidential internal file pursuant to section 143.089(g). We find a portion of the submitted information, which we marked, is confidential under section 143.089(g) of the Local Government Code. Therefore, the city must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code. We note, however, section 143.021(b) of the Local Government Code provides that “[e]xcept for the department head and a person the department head appoints in accordance with Section 143.014 or 143.102, each fire fighter and police officer is classified as prescribed by this subchapter and has civil service protection.” Local Gov’t Code § 143.021(b). Section 143.003 of the Local Government Code defines “department head” as “the chief or head of a fire or police department or that person’s equivalent, regardless of the name or title used.” *Id.* § 143.003(2); *see id.* § 143.403(c). Thus, information maintained by the EMS department pertaining to the department head as defined

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<sup>2</sup>We note, and the city acknowledges, the city did not comply with section 552.301 of the Government Code in requesting this decision for the portion of the submitted information that is responsive to the second request. *See* Gov’t Code § 552.301(e). Nonetheless, because section 552.101 of the Government Code can provide a compelling reason to overcome the presumption of openness, we will consider the applicability of this section to the submitted information that is responsive to the second request. *See id.* §§ 552.007, .302, .352.

<sup>3</sup>We 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 those records contain substantially different types of information than that submitted to this office.

by section 143.003 and a person the department head appoints in accordance with section 143.014 or section 143.102 is not confidential under section 143.089(g) of the Local Government Code. The remaining information contains the resumes of EMS personnel; however, we are unable to tell whether the individuals at issue are department heads as defined by section 143.003 or persons the department head appointed in accordance with section 143.014 or section 143.102. Thus, we must rule conditionally. If the resumes of the EMS personnel at issue belong to individuals who are not department heads as defined by section 143.003 and are not persons the department head appointed in accordance with section 143.014 or section 143.102, then the information at issue is confidential under section 143.089(g) of the Local Government Code. In this instance, the city must withhold the information at issue under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code. Conversely, if the resumes of the EMS personnel at issue belong to individuals who are department heads as defined by section 143.003 or are persons the department head appointed in accordance with section 143.014 or section 143.102 of the Local Government Code, then the information at issue is not confidential under section 143.089(g) of the Local Government Code. In this instance, the city may not withhold the information at issue under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code.

If the resumes of the EMS personnel are not confidential under section 552.101 in conjunction with section 143.089(g), then some of the remaining information may be subject to sections 552.117 and 552.137 of the Government Code.<sup>4</sup> 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 body who requests this information be kept confidential under section 552.024 of the Government Code. *See Gov't Code* § 552.117(a)(1). 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). 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. Therefore, to the

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<sup>4</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987)*.

extent the remaining information contains the home address, home telephone number, or cellular telephone number of individuals whom timely requested confidentiality under section 552.024 of the Government Code, the city must withhold the information at issue under section 552.117(a)(1) of the Government Code; in this instance, the cellular telephone numbers may be withheld only if a governmental body does not pay for the cellular telephone service. Conversely, to the extent the individuals at issue did not timely request confidentiality under section 552.024, the city may not withhold the information at issue under section 552.117(a)(1).

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). See Gov’t Code § 552.137(a)-(c). The e-mail addresses at issue are not excluded by subsection (c). Therefore, the city must withhold personal e-mail addresses under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure.

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 “to facilitate 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)(A), (B), (C), (D), (E). 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.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those: (A) to whom disclosure is made to further the rendition of professional legal services to the client; or (B) reasonably necessary to transmit 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 you marked consists of confidential communications between employees and attorneys of the city's law department. You state these communications were made in furtherance of the rendition of professional legal services to the city. You state the confidentiality of these communications has been maintained. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information you marked. Accordingly, the city may withhold the information you marked under section 552.107(1) of the Government Code.

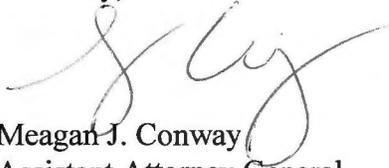
In summary, the city must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code. If the resumes of the EMS personnel at issue belong to individuals who are not department heads as defined by section 143.003 of the Local Government Code and are not persons the department head appointed in accordance with section 143.014 or section 143.102 of the Local Government Code, then the information at issue is confidential under section 143.089(g) of the Local Government Code, and the city must withhold the information at issue under section 552.101 of the Government Code. To the extent the resumes of EMS personnel are not withheld under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code, the city must (1) withhold the home address, home telephone number, or cellular telephone number of individuals whom timely requested confidentiality under section 552.024 of the Government Code under section 552.117(a)(1) of the Government Code; however, the cellular telephone numbers may be withheld only if a governmental body does not pay for the cellular telephone service, and (2) the city must withhold the personal e-mail addresses under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure. The city may withhold the information you marked under section 552.107(1) of the Government Code. The city must release any 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,



Meagan J. Conway  
Assistant Attorney General  
Open Records Division

MJC/akg

Ref: ID# 597866

Enc. Submitted documents

c: Requestor  
(w/o enclosures)