



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 3, 2003

Mr. John Feldt
Assistant District Attorney
Denton County District Attorney
P.O. Box 2850
Denton, Texas 76202

OR2003-6137

Dear Mr. Feldt:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 186954.

Denton County (the "county") received a request for certain correspondence during a specified period of time, any vacation and comp time requests submitted by the requestor to a named individual during a specified period of time, and any documentation involving certain named individuals in relation to the alleged misconduct and exoneration of another named individual for a certain period of time. You claim that responsive information is excepted from disclosure under sections 552.101, 552.102, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information.

We first note that you have designated portions of the submitted information as non-responsive to the request for information. However, we find that some of this information is in fact responsive to the request. As you do not claim any exceptions to disclosure of this information, we conclude that it must be released. We have marked this information.

We now turn to your claim under section 552.107 of the Government Code. Section 552.107(1) 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 Texas 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, 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 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, no writ). 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 advise that portions of Exhibits C and E consist of communications between an Assistant District Attorney and county personnel and officials that were made in furtherance of the rendition of legal services to the county. You state that the communications have been kept confidential. Upon review of your arguments and the information at issue, we agree that all of this information in Exhibit C and the communications that we have marked in Exhibit E are protected by the attorney-client privilege, and thus, may be withheld under section 552.107. Therefore, we do not address your claim under section 552.111 in relation to this information. None of the remaining communications in Exhibit E for which you claim section 552.107 constitute attorney-client communications, and therefore, they may not be withheld under section 552.107.

We now turn to your argument under section 552.111 of the Government Code in relation to the remaining information in Exhibit E for which you claim this exception. Section 552.111 excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations,

opinions, and other material reflecting the policymaking processes of the governmental body. Open Records Decision No. 615 at 5-6 (1993). An agency's policymaking functions, however, do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 at 5-6 (1993). Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 160; Open Records Decision No. 615 at 4-5.

Upon careful review of your arguments and the information at issue, we determine that the information relates solely to personnel and administrative matters and does not contain advice, recommendations or opinions reflecting the policymaking processes of the county. We therefore determine that the county may not withhold any of the remaining information at issue in Exhibit E under section 552.111 of the Government Code.

You also claim that this information in Exhibit E is excepted under sections 552.101 and 552.102. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by common-law and constitutional privacy and excepts from disclosure private facts about an individual. *See Industrial Foundation of the South v. Texas Industrial Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). Section 552.102 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). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the Government Code. Accordingly, we address your section 552.101 and section 552.102 claims together.

Information must be withheld from the public under common-law privacy when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *See Industrial Found.*, 540 S.W.2d at 685; *see also* Open Records Decision No. 611 at 1 (1992). The types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. This office has also found that the following types of information are excepted from required public disclosure under common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses; *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), and personal financial information pertaining

to voluntary financial decisions and financial transactions that do not involve public funds, *see* Open Records Decision Nos. 600 (1992), 545 (1990).

Further, constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common-law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)).

On the other hand, a public employee's job performance does not generally constitute his or her private affairs. Open Records Decision No. 470 (1987); *see* Open Records Decision Nos. 329 at 2 (1982) (information relating to complaints against public employees and discipline resulting therefrom is not protected under former section 552.101 or 552.102), 208 at 2 (1978) (information relating to complaint against public employee and disposition of complaint is not protected under either constitutional or common-law right of privacy). *See also* Open Records Decision No. 444 at 5-6 (1986) (public has genuine interest in information concerning public employee's job performance and reasons for dismissal, demotion or promotion). Upon review of the information at issue, we find that none of it is protected by common-law or constitutional privacy rights. Therefore, the county may not withhold any of this information under section 552.101 or section 552.102.

In summary, the county must release the unclaimed responsive information that we have marked. The county may withhold all of the claimed information in Exhibit C and the information in Exhibit E that we have marked pursuant to section 552.107. Exhibit D and the remaining information in Exhibit E that you claim is excepted from disclosure must be released.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the

governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

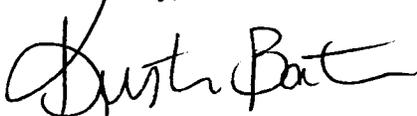
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Kristen Bates
Assistant Attorney General
Open Records Division

KAB/lmt

Ref: ID# 186954

Enc. Submitted documents

c: Ms. Sylvia Benavides
P.O. Box 50234
Denton, Texas 76206-0234
(w/o enclosures)