



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 18, 2005

Ms. Jennifer L. Carter
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10440 North Central Expressway, Suite 1450
Dallas, Texas 75231

OR2005-06360

Dear Ms. Carter:

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# 228250.

The City of Burleson (the "city"), which you represent, received a request for (1) the full names and dates of employment for the individuals employed in four specified positions, and (2) four categories of information related to a named former city employee, including dates of employment and salary. You claim that the requested information is excepted from disclosure under sections 552.103, 552.107, 552.111, 552.117 and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that some of the submitted information is subject to section 552.022 of the Government Code, which provides in relevant 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 under this chapter unless they are expressly confidential under other law:

...

(2) the name, sex, ethnicity, salary, title, and dates of employment of each employee and officer of a governmental body;

Gov't Code § 552.022(a)(2). Therefore, as prescribed by section 552.022(a)(2), you must release the requested employee names, dates of employment, and salary information unless such information is confidential under "other law." Sections 552.103, 552.107, and 552.111 are discretionary exceptions to disclosure intended to protect the interests of a governmental body as distinct from exceptions intended to protect the interests of third parties or information deemed confidential by law. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 677 at 10 (2002) (attorney work product privilege under section 552.111 may be waived), 676 (2002) (governmental body may waive section 552.107), 665 at 2 n.5 (2000) (discretionary exceptions generally). Thus, sections 552.103, 552.107, and 552.111 do not constitute "other law" that makes information confidential for purposes of section 552.022. However, the attorney-client and attorney work product privileges are also found, respectively, at rule 503 of the Texas Rules of Evidence and at rule 192.5 of the Texas Rules of Civil Procedure. The Texas Supreme Court has held that the Texas Rules of Evidence and the Texas Rules of Civil Procedure are "other law" within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Accordingly, we will consider whether the city may withhold the information that is subject to section 552.022(a)(2) pursuant to rules 503 and 192.5.

Rule 503(b)(1) provides the following:

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).

Accordingly, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must do the following: (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. *See* Open Records Decision No. 676 (2002). 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 communication does not fall within the purview of the exceptions to the privilege enumerated in Rule 503(d). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero Energy Corp.*, 973 S.W.2d 453, 4527 (Tex. App.—Houston [14th Dist.] 1998, no pet.) (privilege attaches to complete communication, including factual information).

In this instance, you represent that the information submitted as Exhibit C-1 constitutes a confidential attorney-client communication made in the furtherance of the rendition of legal services to the city. Having considered your representations and reviewed the information at issue, we find that you have established that Exhibit C-1 constitutes a privileged attorney-client communication. Accordingly, the city may withhold the information that is subject to section 552.022(a)(2) in Exhibit C-1 pursuant to rule 503.¹

We note that Exhibit C contains W-4 forms that include section 552.022(a)(2) information but are confidential under section 552.101 of the Government Code, which is “other law” for purposes of section 552.022.² 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. This section encompasses information other statutes make confidential. Federal tax return information is confidential under section 6103(a) of title 26 of the United States Code. *See* 26 U.S.C. § 6103(a). The term “return information” includes “the nature, source, or amount of income” of a taxpayer. *See* 26 U.S.C. § 6103(b)(2). This office has specifically held that a governmental body must withhold a Form W-4 in its entirety. Open Records Decision No. 600 at 9 (1992). Therefore, the city must withhold the W-4 forms we have marked under section 552.101 of

¹As we are able to make this determination, we need not address your remaining claim against disclosure for this information.

²This office will raise mandatory exceptions to disclosure on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

the Government Code in conjunction with section 6103 of title 26 of the United States Code. With respect to the remaining information in Exhibit C that is subject to section 552.022(a)(2), as this information is not otherwise confidential by law, it must be released.

We now turn to your arguments regarding the remaining submitted information that is not subject to section 552.022(a)(2). Section 552.103 of the Government Code provides as follows:

(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 to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You inform us and provide documentation showing that, prior to the city's receipt of the request for information, the former city employee named in the request filed suit against the city. We therefore agree that litigation was pending on the date the city received the request. Furthermore, having reviewed your arguments and representations, we find that the remaining submitted information is related to the pending proceedings for purposes of section 552.103.

We note, however, that some of the submitted documents at issue in Exhibit C reflect on their face that they were obtained from or provided to the individual who filed suit against the city. This individual is also apparently the only opposing party in the pending litigation. Once information has been obtained by all parties to the litigation, no section 552.103(a)

interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). Therefore, to the extent that the remaining submitted information has either been obtained from or provided to the opposing party to the litigation at issue, it is not excepted from disclosure under section 552.103(a). However, to the extent that the remaining submitted information has not been obtained from or provided to the opposing party, it may be withheld under section 552.103(a).³ Furthermore, the applicability of this exception under section 552.103 ends when the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

We note that portions of the information at issue not excepted from disclosure under section 552.103(a) are confidential under section 552.117 of the Government Code. Section 552.117(a)(1) excepts from disclosure the home address and telephone number, social security number, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Gov't Code § 552.117(a)(1). We note that section 552.117 also encompasses a personal mobile telephone number, provided that the mobile telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (Gov't Code § 552.117 not applicable to mobile telephone numbers paid for by governmental body and intended for official use). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). You state, and provide supporting documentation showing, that the employee at issue elected to keep her home address and telephone number, social security number, and family member information confidential before the city received the request for information; therefore, the city must withhold the information we have marked under section 552.117(a)(1).

We note that the remaining information includes an account number subject to section 552.136 of the Government Code. Section 552.136(b) states that “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov't Code § 552.136. Accordingly, the city must withhold the account number we have marked under section 552.136.

In summary, the information in Exhibit C-1 that is subject to section 552.022(a)(2) may be withheld under rule 503 of the Texas Rules of Evidence. The marked W-4 forms in Exhibit C must be withheld under section 552.101 of the Government Code in conjunction with section 6103 of title 26 of the United States Code; however, the remaining information in Exhibit C that is subject to section 552.022(a)(2) must be released. To the extent that the remaining submitted information has not been obtained from or provided to the opposing party, it may be withheld under section 552.103 of the Government Code. The marked

³As we are able to make this determination, we need not address your remaining arguments against disclosure for this information.

personal information of the former employee must be withheld under section 552.117(a)(1) of the Government Code. The marked account number must be withheld under section 552.136 of the Government Code. The remaining submitted information 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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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).

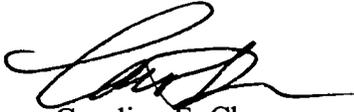
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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,



Caroline E. Cho
Assistant Attorney General
Open Records Division

CEC/sdk

Ref: ID# 228250

Enc. Submitted documents

c: Mr. Lowell Brown
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(w/o enclosures)