



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 22, 2005

Mr. Robert H. Arthur  
General Counsel  
Houston Police Officers' Pension System  
602 Sawyer, Suite 300  
Houston, Texas 77007

OR2005-07585

Dear Mr. Arthur:

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# 230730.

The Houston Police Officers' Pension System (the "system") received a request for (1) all information related to the requestor's retirement pension, including correspondence, e-mails, legal opinions, and taped meetings, and (2) the "Meet and Confer" agreement between the City of Houston and the system. You state that you have released most of the requested information. We understand you to claim, however, that some of the submitted information is exempted from disclosure under sections 552.107 and 552.111 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that some of the submitted information is subject to the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. Section 552.101 of the Government Code exempts from disclosure "information considered to be confidential by

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<sup>1</sup>Although you raise rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedure, we note that, in this instance, the proper exceptions to raise when asserting the attorney-client and attorney work product privileges are sections 552.107 and 552.111 of the Government Code, respectively. See Open Records Decision Nos. 677 (2002), 676 at 6 (2002). Accordingly, we will consider your arguments under those exceptions. Additionally, although you also raise section 552.022 of the Government Code as an exception to disclosure, we note that this section is not an exception to disclosure, but is instead an illustrative list of types of information that generally cannot be withheld unless confidential by law. See Gov't Code § 552.022.

law, either constitutional, statutory, or by judicial decision.”<sup>2</sup> Gov’t Code § 552.101. This section encompasses information made confidential by other statutes. Section 159.002 of the MPA provides in pertinent part as follows:

(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(b), (c). Information that is subject to section 159.002 confidentiality includes both medical records and information obtained from those medical records. *See* Occ. Code §§ 159.002, .004; Open Records Decision No. 598 (1991). Medical records must be released upon a patient’s signed, written consent, provided that the consent specifies (1) the information to be covered by the release; (2) reasons or purposes for the release; and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). We have marked the medical records that are subject to the MPA.

Next, we note that the submitted documents include an ST-3 accident report. Section 552.101 also encompasses section 550.065(b) of the Transportation Code, which states that except as provided by subsection (c), accident reports are privileged and confidential. Section 550.065(c)(4) provides for the release of accident reports to a person who provides two of the following three pieces of information: (1) date of the accident; (2) name of any person involved in the accident; and (3) specific location of the accident. Transp. Code § 550.065(c)(4). Under this provision, the Department of Public Safety or another governmental body is required to release a copy of an accident report to a person who provides the governmental body with two or more pieces of information specified by the statute. *Id.* In this case, the requestor has not provided the system with the required pieces of information. Accordingly, the marked ST-3 accident report must be withheld under section 552.101 of the Government Code in conjunction with section 550.065(b) of the Transportation Code.

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<sup>2</sup>This 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).

We further note that the submitted information includes a W-4P form. Section 552.101 of the Government Code also encompasses section 6103(a) of title 26 of the United States Code, which provides that tax return information is confidential. *See* 26 U.S.C. § 6103(a)(2), (b)(2)(A), (p)(8); *see also* Open Records Decision No. 600 (1992); Attorney General Op. MW-372 (1981). Tax return information is defined as data furnished to or collected by the Internal Revenue Service with respect to the determination of possible existence of liability of any person under title 26 of the United States Code for any tax. *See* 26 U.S.C. § 6103(b). The submitted W-4P form constitutes tax return information that must be withheld under section 552.101 of the Government Code in conjunction with federal law.

You assert that some of the submitted information is excepted under section 552.107 of the Government Code. 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 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 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 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 indicate that the information you seek to withhold consists of confidential communications among attorneys for the system or between those attorneys and system employees made for the purpose of rendering professional legal advice. Based on this representation and our review of the information at issue, we have marked the information that the system may withhold under section 552.107(1).<sup>3</sup> We note, however, that the remaining documents you seek to withhold under section 552.107(1) reflect on their face that they were not communicated between privileged parties, but rather between an attorney for the system and an attorney for the requestor; therefore, none of these documents may be withheld under section 552.107(1). *See* Open Records Decision No. 676 at 6-11 (2002) (delineating demonstration required of governmental body that claims attorney-client privilege under section 552.107(1)).

We note that a portion of the remaining submitted information must be withheld under section 552.101 of the Government Code in conjunction with common law privacy. Information is protected from disclosure under common law privacy when (1) it is highly intimate or 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 Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type 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. 540 S.W.2d at 683. This office has also found that some kinds of medical information or information indicating disabilities or specific illnesses is excepted from public disclosure by common law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). We have marked the information that is confidential under common law privacy and must be withheld under section 552.101 of the Government Code on that basis.

The remaining information includes Texas motor vehicle record information that must be withheld under section 552.130 of the Government Code. Section 552.130 provides in relevant part the following:

(a) Information is excepted from the requirements of Section 552.021 if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]

(2) a motor vehicle title or registration issued by an agency of this state[.]

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<sup>3</sup>As we are able to make this determination, we need not address your claim of the attorney work product privilege under section 552.111.

Gov't Code § 552.130. Accordingly, the system must withhold the Texas motor vehicle record information we have marked under section 552.130 of the Government Code.

We further note that the remaining information includes e-mail addresses that are subject to section 552.137 of the Government Code. Section 552.137 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). Section 552.137 does not apply to a government employee's work e-mail address because such an address is not that of the employee as a "member of the public," but is instead the address of the individual as a government employee. The e-mail addresses at issue do not appear to be of a type specifically excluded by section 552.137(c). You do not inform us that a member of the public has affirmatively consented to the release of any of the e-mail addresses at issue. Therefore, the system must withhold the e-mail addresses we have marked under section 552.137 of the Government Code.

In summary, the medical records we have marked may only be released in accordance with the MPA. The marked ST-3 accident report must be withheld under section 552.101 of the Government Code in conjunction with section 550.065(b) of the Transportation Code. The marked W-4P form must be withheld under section 552.101 of the Government Code in conjunction with section 6103(a) of Title 26 of the United States Code. The documents we have marked may be withheld under section 552.107(1) of the Government Code. The marked information must be withheld under section 552.101 of the Government Code in conjunction with common law privacy. The marked Texas motor vehicle record information must be withheld under section 552.130 of the Government Code. The marked e-mail addresses must be withheld under section 552.137 of the Government Code. The remaining information must be released to the requestor.<sup>4</sup>

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.

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<sup>4</sup>Some of the documents marked for release contain or consist of confidential information that is not subject to release to the general public. See Gov't Code § 552.352. However, the requestor in this instance has a special right of access to the information. Gov't Code § 552.023. Because some of the information is confidential with respect to the general public, if the system receives a future request for this information from an individual other than the requestor or the requestor's authorized representative, the system should again seek our decision.

*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,



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Open Records Division

CEC/sdk

Ref: ID# 230730

Enc. Submitted documents

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(w/o enclosures)