



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 2, 2006

Ms. Cara Leahy White
Taylor Olson Adkins Sralla Elam
6000 Western Place, Suite 200
Forth Worth, Texas 76107-4654

OR2006-05791

Dear Ms. White:

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# 250670.

The City of Corinth (the "city"), which you represent, received a request for the personnel records of a former employee. You state that you will release some of the requested information. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.107, 552.117, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

The city claims that the information in Attachment B is excepted from disclosure pursuant to section 552.107(1), which protects information that is encompassed by the attorney-client privilege. *See* Gov't Code § 552.107(1). When asserting the attorney-client privilege under section 552.107, 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 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).

In this instance, you inform us that the information at issue consists of privileged communications between the city’s former attorney and city employees made in the furtherance of the rendition of professional legal services. You assert that the confidentiality of these communications has been maintained. Based on your representations and our review, we agree that the information in Attachment B may be withheld under section 552.107.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision,” and encompasses criminal history record information (“CHRI”) generated by the National Crime Information Center or by the Texas Crime Information Center. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI that the Texas Department of Public Safety (“DPS”) maintains, except that the DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See Gov’t Code* § 411.083. Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090 - .127. Thus, to the extent that the remaining information contains any CHRI that is confidential under federal law or

subchapter F of chapter 411 of the Government Code, such information may only be released in accordance with those provisions.

Section 552.101 also encompasses section 1324a of title 8 of the United States Code, which provides that an Employment Eligibility Verification Form I-9 “may not be used for purposes other than for enforcement of this chapter” and for enforcement of other federal statutes governing crime and criminal investigations. *See* 8 U.S.C. § 1324a(b)(5); *see also* 8 C.F.R. § 274a.2(b)(4). In this instance, release of the Form I-9 and its attachment, which we have marked, would be “for purposes other than for enforcement” of the referenced federal statutes. Accordingly, we conclude that the Form I-9 and its attachment are confidential and may only be released in compliance with the federal laws and regulations governing the employment verification system.

Section 552.101 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* Attorney General Op. MW-372 (1981); Open Records Decision No. 600 (1992). 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-4 forms are tax return information and must be withheld pursuant to section 552.101 of the Government Code in conjunction with section 6103(a) of Title 26 of the United States Code.

The remaining information includes a form F-5 (Report of Separation of License Holder), which is made confidential by section 1701.454 of the Occupations Code. Section 1701.454 provides in relevant part:

(a) A report or statement submitted to the commission under this subchapter is confidential and is not subject to disclosure under Chapter 552 of the Government Code.

Occ. Code § 1701.454(a). Therefore, the city must withhold the F-5 form pursuant to section 552.101 in conjunction with section 1701.454 of the Occupations Code. However, the remaining info at issue, which includes L-1 and F-6 forms, is not a report or statement required to be filed with the commission under subchapter J of the chapter 1701 and may not be withheld on this basis.

You claim that a portion of the remaining information is excepted from disclosure under section 552.102 of the Government Code. 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 v. Texas Industrial Accident Board, 540 S.W.2d 668 (Tex. 1976) for information claimed to be protected under the doctrine of common law privacy as incorporated by section 552.101. Accordingly, we will consider the section 552.101 and section 552.102 claims together.

Section 552.101 of the Government Code encompasses the doctrine of common law right of privacy, which excepts from disclosure information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person and (2) not of legitimate concern to the public. *Indus. Found.*, 540 S.W.2d at 685. This office has found 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 No. 600 (1992) (designation of beneficiary of employee's retirement benefits and optional insurance coverage). However, there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. See, e.g., Open Record Decision 545 at 4 (1990) (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). We have marked the information that is confidential under common law privacy and excepted from release under section 552.101 on that ground. None of the remaining information at issue is confidential under common law privacy, and therefore this information may not be withheld under section 552.101 on that ground.

Next, you claim that some of the remaining information is excepted from disclosure under section 552.117(a)(2) of the Government Code. Section 552.117(a)(2) excepts from disclosure the current and former home addresses and telephone numbers, social security numbers, and family member information regarding a peace officer regardless of whether the officer requested confidentiality under section 552.024 or 552.1175 of the Government Code.¹ We note that section 552.117 also encompasses a personal cellular telephone number, provided that the cellular phone 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 mobile phone numbers paid for by governmental body and intended for official use). However, an individual's personal post office box number is not a "home address" for purposes of section 552.117, and therefore may not be withheld under section 552.117. See Open Records Decision No. 622 at 4 (1994) (purpose of section 552.117 is to protect public employees from being harassed at home). If the former employee at issue was a licensed peace officer at the time of the city's receipt of the request, the city must withhold the information we have marked pursuant to section 552.117(a)(2). Pursuant to section 552.117(a)(1), the city must withhold the same information for this former employee if he was not a licensed peace officer at the time of the city's receipt of the request, but elected, prior to the city's receipt of the request, to keep such information confidential. To the extent the information we have marked pertains to peace officers currently employed by

¹"Peace officer" is defined by Article 2.12 of the Texas Code of Criminal Procedure.

the city, this information must be withheld under section 552.117(a)(2). If this information does not pertain to peace officers employed by the city, then it may not be withheld under this section.

We note that some of the submitted information may be excepted under section 552.1175 of the Government Code, which provides, in relevant part:

(b) Information that relates to the home address, home telephone number, or social security number of [a peace officer as defined by article 2.12 of the Code of Criminal Procedure], or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

- (1) chooses to restrict public access to the information; and
- (2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Gov't Code § 552.1175(b).² The submitted information also contains the home telephone numbers and home addresses of peace officers who do not work for the city. If these individuals are currently licensed peace officers who elect to restrict access to this information in accordance with section 552.1175(b), the city must withhold the information we have marked under section 552.1175. If the city does not receive the appropriate elections, this information must be released.

Next, 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.³ Therefore, if the social security numbers in the submitted information are not protected under section 552.117 of the Government Code, they must be withheld under section 552.147 of the Government Code.

Section 552.130 of the Government Code provides in relevant part:

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

²The Office of the Attorney General will raise a mandatory exception like section 552.1175 on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987)

³We note that section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

- (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[.]

Therefore, the city must withhold the information we have marked under section 552.130.

We next address information made confidential by section 552.136 of the Government Code. Section 552.136 provides as follows:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

- (1) obtain money, goods, services, or another thing of value; or
- (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding 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. We have marked the information that the city must withhold under section 552.136.

In summary, the city may withhold Attachment B under section 552.107 of the Government Code. To the extent that the remaining information contains any CHRI that is confidential under federal law or subchapter F of chapter 411 of the Government Code, such information may only be released in accordance with those provisions. The city must withhold the marked I-9 form and its attachment under section 552.101 in conjunction with 1324a of title 8 of the United States Code. The submitted W-4 forms must be withheld under section 552.101 in conjunction with section 6103(a) of title 26 of the United States Code. The city must withhold the F-5 form pursuant to section 552.101 in conjunction with section 1701.454 of the Occupations Code. The city must withhold the information we have marked under section 552.101 in conjunction with common law privacy. If the former employee was a licensed peace officer at the time of the city's receipt of the request, the information we have marked must be withheld under section 552.117(a)(2) of the Government Code. If the former employee was not a licensed peace officer at the time of the city's receipt of the request, the information we have marked must be withheld under section 552.117(a)(1) if the former employee made a timely election to withhold such

information. To the extent the information we marked pertains to police officers currently employed by the city, this information must be withheld under section 552.117(a)(2) of the Government Code. The city must withhold the marked information under section 552.1175 of the Government Code if it pertains to licensed peace officers who elect to restrict access to this information in accordance with section 552.1175(b). Even if the social security numbers in the submitted information are not protected under section 552.117 of the Government Code, they must be withheld under section 552.147 of the Government Code. The city must withhold the information we have marked under section 552.130 and section 552.136 of the Government Code. The remaining submitted information must be released to the requestor.

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); *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 Schluss at the Office of the Attorney General 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. 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,

A handwritten signature in black ink that reads "Tamara L. Harswick". The signature is written in a cursive, flowing style.

Tamara L. Harswick
Assistant Attorney General
Open Records Division

TLH/eb

Ref: ID# 250670

Enc. Submitted documents

c: Lt. Clint Pullin
Hood County Sheriff's Office
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(w/o enclosures)