



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 21, 2006

Ms. Julie Joe
Assistant County Attorney
Travis County
P. O. Box 1748
Austin, Texas 78767

OR2006-06519

Dear Ms. Joe:

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#252606.

The Travis County Medical Examiner's Office (the "medical examiner's office") received a request for all information in the personnel file of a named employee. You state that the medical examiner's office will make some of the requested information available to the requestor. You have marked a social security number in the submitted information that the medical examiner's office must withhold pursuant to section 552.147 of the Government Code.¹ You claim that portions of the remaining submitted information are excepted from disclosure based on sections 552.101, 552.107, 552.117, and 552.137 of the Government

¹We 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.

Code and Texas Rule of Evidence 503.² We have considered your arguments and reviewed the submitted representative sample of information.³

We begin with your privacy claim under section 552.101 of the Government Code. Section 552.101 excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision” and encompasses the common-law right of privacy. Common-law privacy protects 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. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). 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.

You seek to withhold from an employment application the named employee’s prior salary information on the basis of common-law privacy. However, this office has stated that the public interest in public employees’ prior salaries justifies disclosure, as such information bears on the employees’ past employment record and suitability for the employment position in question. *See* Open Records Decision No. 455 at 9 (1987). We therefore find that the prior salary information is not protected under common-law privacy, and it may therefore not be withheld under section 552.101 of the Government Code.

We next turn to your attorney-client privilege argument. When asserting the attorney-client privilege under section 552.107 of the Government Code, 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

²Although you also cite sections 552.108, 552.111, 552.130, and 552.136 of the Government Code in your brief to this office, you have not submitted any arguments explaining how these sections apply to the submitted information. We therefore assume the medical examiner’s office is no longer claiming these exceptions. *See* Gov’t Code §§ 552.301, 302; *see also* Open Records Decision No. 177 at 3 (1977) (statutory predecessor to section 552.108 subject to waiver), 470 at 7 (1987) (statutory predecessor to section 552.111 subject to waiver).

³We assume that 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 that those records contain substantially different types of information than that submitted to this office.

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 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 explain that the information you have marked under section 552.107 documents communications between an Assistant Travis County Attorney, her legal secretary, and a Travis County Purchasing Agent made for the purpose of facilitating the rendition of professional legal services to the medical examiner’s office. You also inform us that the confidentiality of these communications has been maintained. Based on your arguments and our review of this information, we agree that the information you have marked documents privileged attorney-client communications that the medical examiner’s office may withhold under section 552.107.⁴

Next, we address your claim under section 552.117 of the Government Code. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, 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 of the Government Code. 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)*.

⁴As we reach this conclusion, we need not address the applicability of Texas Rule of Evidence 503 to this information.

You state that the employee at issue “elected not to allow public access to some of this information.” However, you do not specify the type of information the employee elected to keep confidential nor inform us whether the employee’s election was made prior to the receipt of the instant request for information. As such, to the extent the employee at issue made a timely election for confidentiality under section 552.024 for the information you have marked, as well as the additional information we have marked, the medical examiner’s office must withhold this information under section 552.117(a)(1) of the Government Code.

Lastly, we address your claim under section 552.137 of the Government Code. This section 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 address that you have marked does not appear to be of a type specifically excluded by section 552.137(c). As such, this e-mail address must be withheld under section 552.137 unless its owner has affirmatively consented to its release. *See* Gov’t Code § 552.137(b).

In summary, we conclude as follows: (1) the medical examiner’s office may withhold under section 552.107 of the Government Code the information you have marked as attorney-client communications; (2) to the extent the employee at issue made a timely election for confidentiality under section 552.024 of the Government Code for the information you have marked, as well as the additional information we have marked, such information must be withheld under section 552.117(a)(1) of the Government Code; (3) the e-mail address you have marked must be withheld under section 552.137 of the Government Code unless its owner has affirmatively consented to its release; and (4) the remaining information at issue 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 ten 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

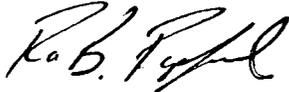
statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental 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*, 342 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 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 ten calendar days of the date of this ruling.

Sincerely,



Robert B. Rapfogel
Assistant Attorney General
Open Records Division

RBR/eb

Ref: ID# 252606

Enc. Submitted documents

c: Mr. John Fox
The Gulf Region Advocacy Center
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(w/o enclosures)