



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 15, 2006

Ms. Alison Holland
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OR2006-10765

Dear Ms. Howard:

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# 259380.

The Rosenberg Police Department (the "department"), which you represent, received a request for personnel, disciplinary, and administrative records pertaining to five named department police officers since 2001. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.108, 552.117, 552.1175, 552.119, 552.122, 552.136, and 552.140 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹ We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, you inform us that some of the submitted information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2004-6023 (2004). Exhibits 6, 8, 9, 11, 12, 13, and the information we have marked in Exhibits 5, 10, and 15 are identical to the information previously requested and ruled upon

¹We 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.

by this office, and we have no indication that the law, facts, and circumstances on which the prior rulings were based have changed; therefore, the department must continue to rely on this ruling as a previous determination and withhold or release this information in accordance with Open Records Letter No. 2004-6023. See Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). We thus do not address your arguments for exception of this information.

You assert that the remaining information is excepted under section 552.103 of the Government Code, which provides in part 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.

The department 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 is 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). The department must meet both prongs of this test for information to be excepted under 552.103(a).

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. See Open Records Decision No. 452 at 4 (1986). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific

threat to sue the governmental body from an attorney for a potential opposing party.² Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be “realistically contemplated”). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982).

You assert that the submitted documents indicate that the requestor took “objective steps” toward litigation against the City of Rosenberg (the “city”) before the city received the request for information; however, upon review of your arguments and the information at issue, we find you have not demonstrated that the department reasonably anticipated litigation at the time it received the request for information. You also assert that the submitted information pertains to pending criminal litigation and that the city expects its officers to be called as witnesses in those cases; however, you have not established that the city is a party to such criminal litigation. *See* Gov’t Code § 552.103(a); Open Records Decision No. 575 at 2 (1990). In that type of situation, we require an affirmative representation from the governmental body with the litigation interest that the governmental body wants the submitted information to be withheld from disclosure under section 552.103. You have not provided us with such a representation. Accordingly, we conclude that the department may not withhold the remaining information pursuant to section 552.103.

You assert that some of the submitted information is excepted under section 552.101 of the Government Code, which excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses information deemed confidential by other statutes. You assert that Exhibit 17 is confidential under the Texas Homeland Security Act. Specifically, you assert that the information is confidential under section 418.176 of the Government Code, which provides the following:

(a) Information is confidential if the information is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, responding to, or investigating an act of terrorism or related criminal activity and:

(1) relates to staffing requirements of an emergency response provider, including law enforcement agency, a fire-fighting agency, or an emergency services agency;

²In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

- (2) relates to a tactical plan of the provider; or
- (3) consists of a list or compilation of pager or telephone numbers, including mobile and cellular telephone numbers, of the provider.

Gov't Code § 418.176(a).

The fact that information may relate to a governmental body's security concerns does not make the information per se confidential under the Texas Homeland Security Act. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provisions controls scope of its protection). Furthermore, the mere recitation by a governmental body of a statute's key terms is not sufficient to demonstrate the applicability of a claimed provision. As with any exception to disclosure, a governmental body asserting one of the confidentiality provisions of the Texas Homeland Security Act must adequately explain how the responsive records fall within the scope of the claimed provision. *See* Gov't Code § 552.301(e)(1)(A). You claim that the information at issue was exchanged between law enforcement agencies regarding homeland security and terrorism. However, you have not provided any arguments explaining how the information at issue falls within the scope of section 418.176. Therefore, you have failed to demonstrate the applicability of section 418.176 of the Government Code to Exhibit 17, and the department may not withhold any of the information at issue under section 552.101 of the Government Code on that ground.

Section 552.101 also encompasses the doctrine of common-law privacy, which protects information that (1) contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (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. Prior decisions of this office have also found that financial information relating only to an individual ordinarily satisfies the first requirement of the test for common-law privacy but that there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See* Open Records Decision Nos. 600 (1992), 545 (1990), 373 (1983). For example, information related to an individual's mortgage payments, assets, bills, and credit history is generally protected by the common-law right to privacy. *See* Open Records Decision Nos. 545, 523 (1989); *see also* Open Records Decision No. 600 (finding personal financial information to include choice of particular insurance carrier). This office has also found that common-law privacy generally protects the identifying information of juvenile offenders. *See* Open Records Decision No. 394 (1983); *cf.* Fam. Code § 58.007. A compilation of an individual's criminal history is also highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *Cf. U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (when considering prong regarding individual's privacy

interest, court recognized distinction between public records found in courthouse files and local police stations and compiled summary of information and noted that individual has significant privacy interest in compilation of one's criminal history). Furthermore, we find that a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. We have marked the information that is confidential under common-law privacy and that the department must withhold under section 552.101. But the remaining information is not highly intimate or embarrassing; therefore, the remaining information is not confidential under common-law privacy, and the department may not withhold it under section 552.101 on that ground.

You assert that Exhibit 7 is excepted from disclosure under section 552.107 of the Government Code. Section 552.107(1) excepts from disclosure information protected by 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.³ TEX. R. EVID. 503(b)(1). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives.⁴ TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body seeking to establish that a communication is protected by the attorney-client privilege must inform this office of the identity and capacity of each individual involved in the communication. Finally, the attorney-client privilege applies only to a communication that is confidential. *Id.* 503(b)(1). A confidential communication is a communication that 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).

³The privilege does not apply when an attorney or representative is acting in a 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). Because government attorneys often act in capacities other than that of professional legal counsel, including as administrators, investigators, or managers, the mere fact that a communication involves an attorney for the government does not demonstrate this element.

⁴Specifically, the privilege applies only to confidential communications between the client or a representative of the client and the client's lawyer or a representative of the lawyer; between the lawyer and the lawyer's representative; by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein; between representatives of the client or between the client and a representative of the client; or among lawyers and their representatives representing the same client. *See* TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E); *see also id.* 503(a)(2), (a)(4) (defining "representative of the client," "representative of the lawyer.")

Whether a communication meets the definition of a confidential communication 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) of the Government Code 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 state, and the documents reflect, that the information in Exhibit 7 consists of communications between an attorney for the city and city officials or employees made in furtherance of the rendition of legal services. You also indicate that the communications were intended to be confidential and that the confidentiality has been maintained. Based on your representations and our review, we find that Exhibit 7 is protected by the attorney-client privilege and may be withheld under section 552.107.

You assert that information in Exhibits 3, 4, and 16 is excepted under section 552.108 of the Government Code. A governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See Gov't Code* §§ 552.108(a)(1), (b)(1), 552.301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). Section 552.108(a)(1) excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime [if] release of the information would interfere with the detection, investigation, or prosecution of crime.” A governmental body claiming subsection 552.108(a)(2) or 552.108(b)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. However, section 552.108 generally is not applicable to an internal administrative investigation involving a law enforcement officer that did not result in a criminal investigation or prosecution. *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App. 2002, no pet.); Open Records Decision No. 562 at 10 (1990); *Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. Civ. App.—El Paso 1992, writ denied) (statutory predecessor not applicable to internal investigation that did not result in criminal investigation or prosecution); Open Records Decision No. 350 at 3-4 (1982). Exhibits 3 and 4 consist of information pertaining to internal administrative investigations of city officers. You do not inform us that these internal affairs investigations have resulted in criminal investigation by the police department or a criminal prosecution. Accordingly, we conclude you have not established that Exhibit 3 or 4 pertains to a criminal investigation involving these individuals. We therefore conclude that the department may not withhold Exhibit 3 or 4 under section 552.108.

Section 552.108(b) is intended to protect “information which, if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate the laws of this State.” *City of Ft. Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin, 2002, no pet.). This

office has determined that the statutory predecessor to section 552.108(b) excepts from disclosure “the cellular mobile phone numbers assigned to county officials and employees with specific law enforcement responsibilities.” Open Records Decision No. 506 at 2 (1988). In that decision, we noted that the purpose of the cellular telephones is to ensure immediate access to individuals with specific law enforcement responsibilities and that public access to these numbers could interfere with that purpose. *Id.* at 2. Exhibit 16 contains officer mobile and pager numbers. We agree that the department may withhold this information, which we have marked, pursuant to section 552.108(b). However, after review of your arguments and the submitted information, we find you failed to establish that release of the remaining information would interfere with law enforcement or crime prevention. *See* Gov’t Code § 552.108(b)(1); Open Records Decision No. 508 at 4 (1988) (governmental body must demonstrate how release of particular information at issue would interfere with law enforcement efforts, unless information does so on its face). Therefore, the department may not withhold any of the remaining information under section 552.108.

You assert that some of the submitted information is excepted under section 552.117 of the Government Code. Section 552.117(a)(2) excepts the home addresses and telephone numbers, social security numbers, and family member information of a peace officer as defined by Article 2.12 of the Code of Criminal Procedure, regardless of whether the officer made an election under section 552.024. Gov’t Code § 552.117(a)(2); *see* Open Records Decision No. 622 (1994). Accordingly, the department must withhold the information we have marked under section 552.117(a)(2).

You assert that some of the remaining information is excepted under section 552.130 of the Government Code, which provides that information relating to a motor vehicle operator’s license, driver’s license, motor vehicle title, or registration issued by a Texas agency is excepted from public release. Gov’t Code § 552.130(a)(1), (2). The department must withhold the Texas motor vehicle record information we have marked under section 552.130.

You assert that some of the remaining information is excepted under 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.” The department must withhold the account numbers we have marked under section 552.136.

Finally, you assert that the DD-214 form is excepted under section 552.140 of the Government Code. Section 552.140 provides that a military veteran’s DD-214 form or other military discharge record that is first recorded with or that otherwise first comes into the possession of a governmental body on or after September 1, 2003 is confidential for a period of seventy-five years and may only be disclosed in accordance with section 552.140 or in accordance with a court order. *See* Gov’t Code § 552.140(a), (b). You do not inform us when the department came into possession of the submitted DD-214 form. Therefore, if the DD-214 form came into the possession of the department on or after September 1, 2003, the department must withhold this form in its entirety under section 552.140. If the form was

received by the department before September 1, 2003, the department may not withhold it pursuant to section 552.140.

To conclude, the department must withhold or release Exhibits 6, 8, 9, 11, 12, 13, and the information we have marked in Exhibits 5, 10, and 15 in accordance with Open Records Letter No. 2004-6023. The department must withhold the information marked under section 552.117 of the Government Code, section 552.130 of the Government Code, section 552.136 of the Government Code, and section 552.140 of the Government Code if the DD-214 form at issue came into the possession of the department on or after September 1, 2003. The department may withhold Exhibit 7 under section 552.107 and the information we have marked in Exhibit 16 under section 552.108. The department must release the remaining information. As our ruling is dispositive, we do not address your additional arguments for exception of this information.

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).

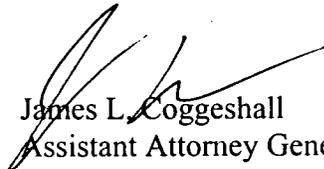
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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 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. 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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Assistant Attorney General
Open Records Division

JLC/eb

Ref: ID# 259380

Enc. Submitted documents

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(w/o enclosures)