



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

March 25, 2008

Ms. Amanda M. Bigbee  
Henslee & Schwartz, L.L.P.  
306 West 7<sup>th</sup> Street, Suite 1045  
Fort Worth, Texas 76102

OR2008-03893

Dear Ms. Bigbee:

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# 305396.

The Lancaster Independent School District (the "district"), which you represent, received two requests from the same individual for information regarding a specified investigation, copies of the applications for employment for two named individuals, and the application for employment, résumé, contract and job description of the person who conducted the specified investigation. You claim that the requested information is excepted from disclosure under sections 552.101, 552.102, 552.107, 552.111, 552.117, 552.1175, 552.130, 552.135, and 552.136 of the Government Code.<sup>1</sup> We have considered your arguments and reviewed the submitted information.

Initially, we note that you have not submitted any information responsive to the request for the application for employment, résumé, contract and job description of the person who conducted the specified investigation. Further, you have not indicated that such information

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<sup>1</sup>Although you raise section 552.101 of the Government Code in conjunction with section 552.107 of the Government Code, this office has concluded that section 552.101 does not encompass other exceptions found in the Act. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Although you also raise section 552.024 of the Government Code, we note that this section is not an exception to public disclosure under the Act. Rather, this section permits a current or former official or employee of a governmental body to choose whether to allow public access to certain information relating to the current or former official or employee that is held by the employing governmental body. *See* Gov't Code § 552.024.

does not exist or that you wish to withhold any such information from disclosure. Therefore, to the extent information responsive to this aspect of the request existed on the date the request was received, we assume that you have released it to the requestor. If you have not released any such information, you must release it to the requestor at this time. *See* Gov't Code §§ 552.301(a), .302.

We next note that social security numbers and driver's license numbers have been redacted from the submitted documents. 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. *See id.* § 552.147. The district is not authorized, however, to redact driver's license numbers without requesting a decision. *See id.* § 552.301(a). As we are able in this instance to discern the nature of the redacted information, we will determine whether it is excepted from public disclosure. In the future, however, the district should refrain from redacting any information that it submits to this office in seeking an open records ruling. *See id.* §§ 552.301(e)(1)(D), .302.

We further note that a portion of the submitted information is subject to required public disclosure under section 552.022 of the Government Code, which provides in relevant part:

(a) 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:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by section 552.108[.]

*Id.* § 552.022(a)(1). The submitted information includes a completed report. Pursuant to section 552.022(a)(1) of the Government Code, a completed report is expressly public unless it either is excepted under section 552.108 of the Government Code or is expressly confidential under other law. You do not claim an exception to disclosure under section 552.108 of the Government Code. Sections 552.107 and 552.111 of the Government Code are discretionary exceptions that protect a governmental body's interests and may be waived. As such, they are not other law that makes information confidential for the purposes of section 552.022. *See* Open Records Decision Nos. 677 at 8 (2002) (attorney work-product privilege under section 552.111 is not other law for purposes of section 552.022), 676 at 10-11 (2002) (attorney-client privilege under section 552.107 may be waived), 470 at 7 (1987) (statutory predecessor to Gov't Code § 552.111 subject to waiver). Therefore, this information may not be withheld on the basis of section 552.107 or 552.111.

However, the Texas Supreme Court has held that the Texas Rules of Evidence and 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 (Tex. 2001); *see also* Open Records Decision Nos. 677 (2002), 676 (2002). Accordingly, we will consider whether the district may withhold the information at issue under Texas Rule of Evidence 503 or Texas Rule of Civil Procedure 192.5. Further, because sections 552.101 and 552.135 of the Government Code are other law for purposes of section 552.022, we will address your claims under these sections.

Texas Rule of Evidence 503 encompasses the attorney-client privilege and provides as follows:

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).

Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (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. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall

within the purview of the exceptions to the privilege enumerated in rule 503(d). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App. — Houston [14<sup>th</sup> Dist.] 1993, no writ).

You state that the submitted report consists of privileged attorney-client communications that were made in furtherance of the rendition of professional legal services to the district. You have identified the parties to the communications. You also state that the communications were intended to be and remain confidential. Based on your representations and our review, we find you have established that the information at issue is protected under the attorney-client privilege and may be withheld pursuant to rule 503 of the Texas Rules of Evidence.<sup>2</sup> See also *Harlandale Indep. Sch. Dist. v. Cornyn*, 25 S.W.3d 328 (Tex. App.—Austin 2000, pet. denied) (attorney's entire investigative report was protected by attorney-client privilege where attorney was retained to conduct investigation in her capacity as attorney for purpose of providing legal services and advice).

You claim that portions of the remaining submitted information are excepted 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 of the Government Code.<sup>3</sup> We will therefore consider your claims regarding section 552.101 and 552.102 together.

Common law privacy protects information if it (1) contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person and (2) is not of a legitimate concern to the public. 540 S.W.2d at 685. To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* At 682-82. 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. *Id.* at 683. This office has also determined that some personal financial information is highly intimate or embarrassing and thus meets the first part of the *Industrial Foundation* test. See Open Records Decision Nos. 600 (1992) (Employee's Withholding Allowance Certificate;

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<sup>2</sup>As our ruling is dispositive, we need not address your remaining arguments for this information.

<sup>3</sup>Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101.

designation of beneficiary of employee's retirement benefits; direct deposit authorization; and forms allowing employee to allocate pretax compensation to group insurance, health care or dependent care), 545 (1990) (deferred compensation information, mortgage payments, assets, bills, and credit history), 523 (1989). We have marked the personal financial information that the district must withhold under section 552.101 and common-law privacy.

Section 552.117(a)(2) of the Government Code exempts from public disclosure a peace officer's home address and telephone number, social security number, and family member information, regardless of whether the peace officer made an election under section 552.024 of the Government Code. Gov't Code § 552.117(a)(2). Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. Accordingly, we have marked information in the applications that the district must withhold under section 552.117(a)(2) of the Government Code. We note that section 552.117(a)(2) is applicable to a peace officer's cellular telephone and pager numbers, if the cellular phone or pager service is paid for by the officer with his or her own funds. *See* Open Records Decision No. 670 at 6 (2001). You have not informed us whether or not the police officers' cellular telephone numbers listed in the application are paid for by the officers. Thus, to the extent the cellular telephone numbers we have marked are paid for by the officers to whom they belong, the district must withhold this information under section 552.117(a)(2). If the officers did not pay for these numbers, then the numbers must be released.

You state that portions of the submitted information may be excepted from disclosure under section 552.1175 of the Government Code. Section 552.1175 provides in part as follows:

(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(a), (b). The district must withhold the personal information we have marked under section 552.1175 to the extent that the information relates to a currently licensed peace officer who elects to restrict access to this information in accordance with section 552.1175(b). If the district does not receive the appropriate election, the information we have marked regarding these peace officers must be released.

Section 552.130 of the Government Code excepts from disclosure information that “relates to... a motor vehicle operator’s or driver’s license or permit issued by an agency of this state [or] a motor vehicle title or registration issued by an agency of this state.” *Id.* § 552.130(a)(1), (2). The district must withhold the information we have marked under section 552.130 of the Government Code.

Section 552.136 of the Government Code 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.” *Id.* § 552.136. Upon review, the district may not withhold any of the remaining information under section 552.136 of the Government Code.

In summary, the district may withhold the report under Texas Rule of Evidence 503. The district must withhold the information that we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The district must withhold the personal information we have marked under section 552.117(a)(2) of the Government Code, including the cellular telephone numbers, if they are paid for by the officers. The district must withhold the personal information we have marked under section 552.1175 of the Government Code to the extent that the information relates to a currently licensed peace officer who elects to restrict access to this information in accordance with section 552.1175(b). Finally, the district must withhold the information we have marked under section 552.130 of the Government Code. The remaining 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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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 challenge 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. 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, consisting of a stylized capital letter 'B' with a horizontal line extending to the right, all enclosed within a circular scribble.

Benjamin A. Diener  
Assistant Attorney General  
Open Records Division

BAD/jb

Ref: ID# 305396

Enc. Submitted documents