



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 23, 2008

Mr. Marc J. Schnall  
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San Antonio, Texas 78212-3166

OR2008-13054

Dear Mr. Schnall:

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# 322581.

The City of Selma (the "city"), which you represent, received a request for all employment information of a named individual for a specified time period and studies by a named individual. You claim that portions of the submitted information are excepted from disclosure under sections 552.101, 552.107, 552.117, 552.130, 552.136, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that a portion of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides that:

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.

Gov't Code § 552.022(a)(1). In this instance, the submitted information includes a completed investigation report made for the city. The city must release the completed investigation report under section 552.022(a)(1) of the Government Code unless it is

excepted from disclosure under section 552.108 of the Government Code or are expressly confidential under other law. Section 552.107 of the Government Code is a discretionary exception that protects a governmental body's interests and may be waived. As such, it is not other law that makes information confidential for purposes of section 552.022. See Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 676 at 10-11 (2002) (attorney-client privilege under section 552.107 may be waived). Therefore, the submitted investigation report may not be withheld on the basis of section 552.107. However, the attorney-client privilege, which you raise for the submitted investigation report, is also found in Rule 503 of the Texas Rules of Evidence. The Texas Supreme Court held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence 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 No. 676 (2002). Accordingly, we will consider your assertion of this privilege under Rule 503 with respect to the submitted investigation report.

Texas Rule of Evidence 503(b)(1) 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. 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 explain that the submitted investigation report is a communication between an individual hired by the city's legal counsel to conduct an investigation for the city and the city's legal counsel. You explain that this communication was made for the purpose of facilitating the rendition of professional legal services to the city. You also state that the communication was intended to be and has remained confidential. Based on your representations and our review, we agree that the submitted investigation report is a privileged, attorney-client communication. Therefore, the city may withhold the submitted investigation report under Rule 503.

Next, we consider your argument under section 552.107 of the Government Code for the information you have marked that is not subject to section 552.022(a)(1). Section 552.107(1) protects information coming within the attorney-client privilege. The elements of the privilege under section 552.107 are the same as those discussed for Rule 503. 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 state that the remaining information you have marked consists of communications between the city's legal counsel and its representatives and city employees or officials, and that these communications were made in furtherance of the rendition of legal services to the city. You further state that these communications were intended to be and have remained confidential. However, you have failed to explain how one of the documents that you have marked, which consists of a typed note with no letterhead or indication of the author, constitutes or documents a privileged communication made for the purpose of facilitating the rendition of professional legal services to the city. Therefore, you may not withhold this document, which we have marked, under section 552.107. We find, however, that you have demonstrated the applicability of the attorney-client privilege to the remaining information you have marked under section 552.107. Accordingly, with the exception of the document we have marked for release, the city may withhold the remaining information you have marked under section 552.107 of the Government Code.

We next note that the remaining information includes an F-5 form. 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. This section encompasses information protected by other statutes, such as section 1701.454 of the Occupations Code. Section 1701.454 provides in relevant part that "[a] report or statement submitted to the commission under this subchapter is confidential and is not subject to disclosure under

Chapter 552, Government Code, unless the person resigned or was terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses.” Occ. Code § 1701.454(a). In this instance, the submitted information indicates that the officer at issue did not resign and was not terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses. Therefore, the city must withhold the submitted F-5 form, which we have marked, pursuant to section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code.

Section 552.101 also encompasses section 550.065 of the Transportation Code. We note that the submitted information includes a copy of a ST-3 accident report completed pursuant to chapter 550 of the Transportation Code. *See* Transp. Code § 550.064 (Texas Peace Officer’s Accident Report form). Section 550.065(b) of the Transportation Code states that, except as provided by subsection (c), accident reports are privileged and confidential. Section 550.065(c)(4) provides for release of accident reports to a person who provides at least two of the following three pieces of information: (1) date of the accident; (2) specific location of the accident; and (3) name of any person involved in the accident. *Id.* § 550.065(c)(4). Under this provision, the Texas Department of Transportation or another governmental entity is required to release a copy of an accident report to a person who provides the agency with two or more pieces of information specified by the statute. *Id.* § 550.0601. In this instance, the requestor did not provide the city with two of the three requisite pieces of information. Accordingly, the city must withhold the ST-3 accident report we have marked under section 552.101 of the Government Code in conjunction with section 550.065 of the Transportation Code.

We next address your argument that a portion of the remaining information is confidential under section 552.101 in conjunction with the doctrine of common-law privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). To demonstrate the applicability of common-law privacy, both prongs of this test must be demonstrated. *Id.* at 681-82. This office has found that medical information or information indicating disabilities or specific illnesses is excepted from required public disclosure under 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). You assert that the information you have marked in the submitted information is medical information that is confidential under common-law privacy. We agree that the information you have marked is highly intimate or embarrassing and not of legitimate public interest. Accordingly, the city must withhold the marked information under section 552.101 in conjunction with common-law privacy.

We also note that a small portion of the submitted information is personal financial information. This office has found that personal financial information not related to a financial transaction between an individual and a governmental body is intimate and embarrassing. *See* Open Records Decision Nos. 600 (1992) (public employee’s withholding

allowance certificate, designation of beneficiary of employee's retirement benefits, direct deposit authorization, and employee's decisions regarding voluntary benefits programs, among others, are protected under common-law privacy), 545 (1990) (deferred compensation information, mortgage payments, assets, bills, and credit history protected under common law privacy), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law-privacy). Furthermore, we find that there is no legitimate public interest in the release of the information we have marked in this instance. Therefore, the city must also withhold the financial information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.

Next, we address your contention that the remaining records contain information that is excepted from disclosure under section 552.117(a)(2) of the Government Code. Section 552.117(a)(2) excepts 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 complies with sections 552.024 and 552.1175 of the Government Code.<sup>1</sup> Gov't Code § 552.117(a)(2). You state that the information at issue relates to a former city police officer who is a currently licensed police officer working in another municipality. Thus, the city must withhold the information you have marked, as well as the additional information we have marked in the remaining information, under section 552.117(a)(2).

Next, we address your assertion that a portion of the remaining information is subject to section 552.130 of the Government Code. Section 552.130 provides in relevant part:

(a) Information is excepted from the requirement 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;
- (2) a motor vehicle title or registration issued by an agency of this state; [.]

*Id.* § 552.130. Accordingly, the city must withhold the Texas motor vehicle information you have marked, as well as the additional information we have marked, under section 552.130 of the Government Code.

We next address your argument under section 552.136 of the Government Code, which provides as follows:

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

(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.

*Id.* § 552.136. We agree that the insurance policy numbers, credit card numbers, and credit account numbers you have marked, along with the additional information we have marked in the remaining information, are confidential and must be withheld under section 552.136 of the Government Code.

Finally, you assert that the remaining social security numbers are excepted under section 552.147 of the Government Code, which provides that "[t]he social security number of a living person is excepted from" required public disclosure under the Act. *Id.* § 552.147. The city may withhold the remaining social security numbers you have marked in the submitted information pursuant to section 552.147.

In summary, the city may withhold the submitted investigation report under Texas Rule of Evidence 503. With the exception of the document we have marked for release, the city may withhold the remaining information you have marked under section 552.107 of the Government Code. The city must withhold the information we have marked pursuant to section 552.101 of the Government Code in conjunction with sections 1701.454 of the Occupations Code and 550.065 of the Transportation Code. The city must withhold the information you have marked, as well as the additional information we have marked, under section 552.101 in conjunction with common-law privacy. The city must withhold the information you have marked, as well as the additional information we have marked, under sections 552.117(a)(2), 552.130, and 552.136 of the Government Code. The city may also withhold the information you have marked under section 552.147 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). If the governmental body does not file suit over 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).

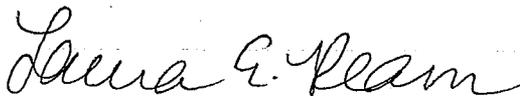
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records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



Laura E. Ream  
Assistant Attorney General  
Open Records Division

LER/jb

Ref: ID# 322581

Enc. Submitted documents

c: Ms. Anita Garza  
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(w/o enclosures)