



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 21, 2009

Ms. Elizabeth Y. Brite
Texas Military Forces
Joint Force Headquarters
Adjutant General's Department
P.O. Box 5218
Austin, Texas 78763-5218

OR2009-06962

Dear Ms. Brite:

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# 342395.

The Adjutant General's Department (the "department") received a request for seven categories of information regarding emergency leave practices for a specified time period.¹ You indicate you have released some of the requested information to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.111, 552.116, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note you have marked some of the submitted information as not responsive to the request. Further, the requestor has excluded social security numbers from his request. Additionally, some of the submitted information was created after the date the request was received. This ruling does not address the public availability of non-responsive information, and the department is not required to release non-responsive information in response to this

¹We understand that the department received clarification from the requestor regarding part of the request. See Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

request. Accordingly, we will address your arguments with regard to the submitted responsive information.

Next, we must address the department's obligations under the Act. Section 552.301 describes the procedural obligations placed on a governmental body that receives a written request for information it wishes to withhold. Pursuant to section 552.301(b), the governmental body must ask for the attorney general's decision and state the exceptions that apply within ten business days after receiving the request. *See* Gov't Code § 552.301(a), (b). You claim some of the submitted information is confidential under section 552.101 of the Government Code. You did not, however, claim this exception by the ten business-day deadline. Thus, we find the department failed to comply with the requirements of section 552.301 with respect to its claim under section 552.101. Generally, a governmental body's failure to comply with section 552.301 results in the waiver of its claim under the exception at issue. However, because section 552.101 is a mandatory exception to disclosure, we will consider the applicability of this exception, along with your timely-raised claims under sections 552.107, 552.111, 552.116, and 552.137, to the submitted information.

Next, we note the submitted information includes a completed audit, which is subject to section 552.022(a)(1) of the Government Code. Section 552.022(a)(1) provides for the required public disclosure of "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). Although you seek to withhold the completed audit under section 552.111 of the Government Code, this section is a discretionary exception to disclosure that protects the governmental body's interests and may be waived. *See* Open Records Decision Nos. 470 at 7 (1987) (statutory predecessor to section 552.111 may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.111 is not other law that makes information confidential for the purposes of section 552.022. Therefore, the department may not withhold the completed audit, which we have marked, under section 552.111. As you raise no further exceptions to disclosure of this information, the completed audit must be released.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses 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). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. The types of information considered intimate or 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. In addition, this office has found that personal financial information not relating

to a financial transaction between an individual and a governmental body is generally protected by common-law privacy. *See* Open Records Decision Nos. 600 (1992) (employee's designation of retirement beneficiary, choice of insurance carrier, election of optional coverages, direct deposit authorization, forms allowing employee to allocate pre-tax compensation to group insurance, health care or dependent care), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). We have marked personal financial information that is protected by common-law privacy. The department must withhold this information under section 552.101 of the Government Code.

You raise section 552.107 for a submitted letter. Section 552.107(1) of the Government Code protects information that comes within 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. *See* 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. *See* 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. *See 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 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. *See* TEX. R. EVID. 503(b)(1)(A)-(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. *See 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 state that the submitted letter documents a communication between a department attorney and a department staff member that was made in connection with the rendition of professional legal services to the department. You state that this communication was made in confidence and the department has maintained its confidentiality. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the letter we have marked. Accordingly, the department may withhold this information under section 552.107 of the Government Code.

You assert section 552.111 of the Government Code for a portion of the remaining information. The purpose of section 552.111 is to protect advice, opinion, and recommendations in the decisional process and to encourage open and frank discussion in the deliberative process. See *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990). In Open Records Decision No. 615 (1993), this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined that section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. See ORD 615 at 5. A governmental body's policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; see also *City of Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. See Open Records Decision No. 631 at 3 (1995). Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); ORD 615 at 4-5.

You state that some of the remaining information consists of the advice, opinions, and recommendations of department employees. You state that these opinions involve policymaking matters relating to the department. Upon review of your representations and the information at issue, we agree that some of the information, which we have marked, consists of the advice, opinions, or recommendations of department employees regarding policymaking matters. However, you have failed to establish that the remaining information, which consists of general factual information, consists of advice, opinions, or recommendations for purposes of section 552.111. Therefore, section 552.111 is not applicable to any of the remaining information. Accordingly, the department may only withhold the information we have marked under section 552.111 of the Government Code.

We understand you to assert that some of the remaining information is protected under section 552.116 of the Government Code. You have not, however, submitted any arguments

explaining how this exception applies to the information at issue. *See* Gov't Code §§ 552.116, .301(e)(1)(A). Thus, we find you have not demonstrated the applicability of section 552.116. Accordingly, we conclude the department may not withhold any information under section 552.116 of the Government Code.

Section 552.137 of the Government Code 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 id.* § 552.137(a)-(c). The e-mail addresses within the remaining information are not of a type specifically excluded by section 552.137(c). We have marked the e-mail addresses that the department must withhold under section 552.137 of the Government Code, unless the owners of the e-mail addresses have affirmatively consented to their disclosure.

In summary, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The department may withhold the letter we have marked under section 552.107 of the Government Code. The department may withhold the information we have marked under section 552.111 of the Government Code. The e-mail addresses we have marked must be withheld under section 552.137 of the Government Code. The remaining information must be released.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Christina Alvarado
Assistant Attorney General
Open Records Division

CA/rl

Ref: ID# 342395

Enc. Submitted documents

cc: Requestor
(w/o enclosures)