



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 23, 2009

Ms. Patricia Fleming
Assistant General Counsel
Office of the General Counsel
Texas Department of Criminal Justice
P.O. Box 4004
Huntsville, Texas 77342

OR2009-08572

Dear Ms. Fleming:

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# 346802.

The Texas Department of Criminal Justice (the "department") received a request for the following three categories of information: (1) investigative reports and disciplinary documentation pertaining to a specified former department employee; (2) information pertaining to the use of specified language by a specified current department employee; and (3) information pertaining to a recently filled department position. You state some responsive information has been released to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.122, 552.137, and 552.140 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that the submitted essay question answers and employment applications include the personal information of applicants for the Manager II position with the department. The applications also include Texas motor vehicle record information. In Open Records Letter No. 2005-01067 (2005), we issued a previous determination that authorizes the department to withhold the personal information of a current or former employee of the department under section 552.117(a)(3) of the Government Code without the necessity of again requesting an attorney general decision with regard to the applicability of this exception. *See* Gov't Code § 552.301(a); Open Records Decision No. 673 at 7-8 (2001) (delineating elements of second type of previous determination under section 552.301(a)).

Therefore, to the extent the applicants are current or former employees of the department, the department must withhold the personal information we have marked in accordance with Open Records Letter No. 2005-01067.¹ Open Records Letter No. 2005-01067 also authorizes the department to withhold certain Texas motor vehicle record information subject to section 552.130 of the Government Code without the necessity of requesting an attorney general decision with regard to the applicability of this exception. Thus, the department must withhold the motor vehicle record information we have marked in accordance with this previous determination.

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 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.

In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), the court addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. The investigation files in *Ellen* contained individual witness statements, an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. *Id.* at 525. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the public's interest was sufficiently served by the disclosure of such documents. *Id.* In concluding, the *Ellen* court held that "the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.* Thus, if there is an adequate summary of an investigation of alleged sexual harassment, the investigation summary must be released under *Ellen*, but the identities of the victims and witnesses of the alleged sexual harassment must be redacted, and their detailed statements must be withheld from disclosure. See Open Records Decision Nos. 393 (1983), 339 (1982). However, common-law privacy does not protect information about a public employee's alleged misconduct on the job or complaints made about a public employee's job performance. See Open Records Decision Nos. 438 (1986), 405 (1983), 230 (1979), 219 (1978).

¹In the event that the social security numbers we have marked are not those of current or former department employees, we 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. See Gov't Code § 552.147.

The submitted sexual harassment investigation file contains an adequate summary of the investigation and a statement by the person who was accused of sexual harassment. You acknowledge the summary and statement are not confidential; however, information within the investigation summary identifying the victims and witnesses, which we have marked, is confidential under common-law privacy and must be withheld pursuant to section 552.101 of the Government Code. *See Ellen*, 840 S.W.2d at 525. The department must release the remaining information in the summary and statement to the requestor. *See id.* The remaining information in the investigation file, which we marked, must also be withheld under section 552.101 in conjunction with common-law privacy. *See id.*

We next turn to your argument against disclosure of the information you marked as excepted from disclosure under section 552.107(1), which protects information coming 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. 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 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 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, lawyer representatives, and lawyers representing another party in a pending action concerning a matter of common interest therein. 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 have marked the documents within the submitted information you assert are subject to section 552.107. You state that these documents are communications between the department's general counsel, assistant general counsel, and employees that were made in furtherance of the rendition of legal services to the department. You further state that these communications were made in confidence, intended for the sole use of the department and its attorneys, and that they have not been shared or distributed to others. Based on your representations and our review, we find that you have demonstrated the applicability of the attorney-client privilege to the marked information. Accordingly, this information may be withheld under section 552.107(1).

You next assert the submitted interview and essay questions and their corresponding answers are excepted from disclosure under section 552.122. This section excepts from disclosure "a test item developed by a ... governmental body[.]" Gov't Code § 552.122(b). In Open Records Decision No. 626 (1994), this office determined that the term "test item" includes any standard means by which an individual's or group's knowledge or ability in a particular area is evaluated, but does not encompass evaluations of an employee's overall job performance or suitability. Whether information falls within the section 552.122 exception must be determined on a case-by-case basis. *Id.* at 6. Section 552.122 also protects the answers to test questions when the answers might reveal the questions themselves. *See* Attorney General Opinion JM-640 at 3 (1987); Open Records Decision No. 626 at 8 (1994).

You state the questions and answers are "intended to display the technical expertise of the applicant" and "measure the knowledge or ability of an applicant in the particular area of EEO Manager II" such that their release "might compromise the effectiveness of future evaluations." Upon review of the submitted information, we agree that the essay questions and most of the interview questions evaluate the applicants' specific knowledge or ability in a particular area. We also find that the answers to these questions would reveal the questions themselves. Accordingly, the department may withhold these questions and corresponding answers, which we marked, under section 552.122(b). However, we find that the remaining interview questions evaluate an applicant's individual abilities, personal opinions, and subjective ability to respond to particular situations, but do not test any specific knowledge of an applicant. *See* Open Records Decision No. 626 at 6 (1994). We conclude these remaining interview questions and answers do not constitute test items for purposes of section 552.122, and may not be withheld from disclosure on that basis.

The submitted employment applications contain personal e-mail addresses that are subject to section 552.137 of the Government Code. Section 552.137 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 addresses at issue are not a type specifically excluded by section 552.137(c). Accordingly, the department must withhold the e-mail addresses we marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their disclosure.

You assert that the submitted DD-214 form is excepted from disclosure 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 indicate that the submitted DD-214 form came into the possession of the department after September 1, 2003. Accordingly, this form must be withheld in its entirety under section 552.140.

In summary, the department must withhold the information we have marked pursuant to section 552.117(a)(3) of the Government Code and Open Records Letter No. 2005-01067, to the extent it applies to current or former employees of the department. The department must also withhold the Texas motor vehicle record information we have marked pursuant to section 552.130 of the Government Code and Open Records Letter No. 2005-01067 and the information we marked under section 552.101 in conjunction with common-law privacy. The department may withhold the documents you marked as privileged attorney-client communication under section 552.107(a)(1) and the submitted interview and essay questions and their corresponding answers that we marked under section 552.122(b). Unless their owners consented to their release, the department must withhold the e-mail addresses we marked under section 552.137. The submitted DD-214 form must be withheld under section 552.140. 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,



Bob Davis
Assistant Attorney General
Open Records Division

RSD/cc

Ref: ID# 346802

Enc. Submitted documents

cc: Requestor
(w/o enclosures)
