



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 1, 2009

Ms. Janis Kennedy Hampton
City of Bryan
P.O. Box 1000
Bryan, Texas 77805

OR2009-12366

Dear Ms. Hampton:

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# 354074.

The City of Bryan (the "city") received a request for all reports submitted to the city by a named individual concerning a named officer and all supplemental notes and interview transcripts concerning the investigation of the named officer. You claim that portions of the submitted information are excepted from disclosure under sections 552.101, 552.107, 552.108, and 552.1175 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information, a portion of which consists of a representative sample.²

¹Although you seek to withhold this information under section 552.117 of the Government Code, we note that section 552.1175 is the applicable exception, as the information in question is not held by the department in an employment context. Unlike other exceptions to disclosure under the Act, this office will raise section 552.1175 on behalf of a governmental body, as this exception is mandatory and may not be waived. See Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3, n.4 (2001) (mandatory exceptions).

²We 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 requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Initially, we note that Exhibit D was the subject of a previous request for information in response to which this office issued Open Records Letter No. 2009-11011 (2009). As we have no indication that the law, facts, or circumstances on which this prior ruling was based have changed, the city must continue to rely on this ruling as a previous determination and withhold Exhibit D under section 552.101 of the Government Code in conjunction with section 143.089 of the Local Government Code. *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 prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). We will now address your arguments for the remaining information at issue.

Section 552.107(1) of the Government Code 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 a 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. TEX. R. EVID. 503(b)(1). 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.*, 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). We note that communications with third party consultants with which a governmental body shares a privity of interest are protected. Open Records Decision Nos. 464 (1987), 429 (1985).

You state that Exhibit B consists of a communication between an attorney hired for the purpose of conducting an investigation on behalf of the city and the city attorney. You inform us that the communication was made for the purpose of facilitating the rendition of professional legal services to the city and that the communication was intended to be and has remained confidential. Based upon your representations and our review of the information at issue, we conclude that the city may withhold Exhibit B under section 552.107(1) of the Government Code.

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 section 261.201 of the Family Code, which provides in relevant part:

(a) Except as provided by Section 261.203, the following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

- (1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and
- (2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Act of April 10, 1995, 74th Leg., R.S., ch. 20 § 1. Sec. 261.201, 1995 Tex. Gen. Laws 113, 262, *amended by* Act of June 1, 2009, 81st Leg., R.S., ch. 779, § 1, *found at* <http://www.legis.state.tx.us/tlodocs/81R/billtext/html/SB01050F.htm>. Upon review, we find that the information we have marked in Exhibit E pursuant to section 261.201 consists of records used or developed in an investigation of alleged or suspected child abuse or neglect. *See id.* § 261.001(1), (4) (defining "abuse" and "neglect" for purposes of section 261.201); *id.* § 101.003(a) (defining "child" as a person under 18 years of age). Therefore, this information falls within the scope of section 261.201. You have not indicated that the city's police department has adopted a rule governing the release of this type of information. Accordingly, we assume no such rule exists. Given that assumption, we conclude that the city must withhold the information we have marked in Exhibit E under

section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. *See* Open Records Decision No. 440 at 2 (1986) (construing statutory predecessor to section 261.201).

However, the remaining information in Exhibit E does not consist of a report of alleged or suspected child abuse or neglect made under chapter 261 and was not used or developed in an investigation under chapter 261. Thus, the city may not withhold this information under section 552.101 in conjunction with section 261.201.

Section 552.101 also encompasses section 58.007 of the Family Code, which provides in part:

(c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

(1) if maintained on paper or microfilm, kept separate from adult files and records;

(2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and

(3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapter B.

Fam. Code § 58.007(c). Section 58.007(c) is applicable to records of juvenile conduct that occurred on or after September 1, 1997. *See* Act of June 2, 1997, 75th Leg., R.S., ch. 1086, §§ 20, 55(a), 1997 Tex. Gen. Laws 4179, 4187, 4199; Open Records Decision No. 644 (1996). The juvenile must have been at least 10 years old and less than 17 years of age when the conduct occurred. *See* Fam. Code § 51.02(2) (defining “child” for purposes of title 3 of Family Code). Section 58.007(c) is not applicable to information that relates to a juvenile as a complainant, victim, witness, or other involved party and not as a suspect or offender. None of the remaining information at issue involves a juvenile suspect or offender. We therefore conclude that city may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with section 58.007 of the Family Code.

Section 552.101 of the Government Code also 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). The type 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. Upon review, we find that none of the remaining information is highly intimate or embarrassing or of legitimate public concern. Therefore, no portion of the remaining information is confidential under common-law privacy.

Section 552.108 of the Government Code 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[.]” Gov’t Code § 552.108(a)(1). A governmental body must reasonably explain how and why section 552.108 is applicable to the information at issue. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You inform us that Exhibit F is related to a pending criminal investigation of another governmental body and that its release would interfere with the investigation of the case by the governmental body. However, the governmental body at issue has informed this office that it has no objections to the release of the information. In addition, you have not provided a representation from any other governmental body that it asserts an interest in the submitted information and wants it to be withheld under section 552.108. Accordingly, the city may not withhold Exhibit F under section 552.108 of the Government Code.

Section 552.1175 of the Government Code provides in part:

(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.

Id. § 552.1175(b). You inform us that the information at issue pertains to a licensed peace officer. However, you do not inform us that the officer at issue elected to restrict access to this information before the receipt of this request. Therefore, we must rule conditionally. To the extent the officer whose information is at issue timely elected under section 552.024, the city must withhold the personal information pertaining to this officer, which we have marked

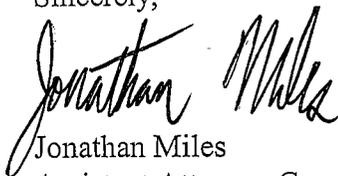
in the remaining information, under section 552.1175 of the Government Code. Otherwise, the information must be released.

In summary, the city must rely on Open Records Letter No. 2009-11011 as a previous determination and withhold Exhibit D under section 552.101 of the Government Code in conjunction with section 143.089 of the Local Government Code. The city may withhold Exhibit B under section 552.107(1) of the Government Code. The city must withhold the information we have marked in Exhibit E under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. To the extent the officer whose information is at issue timely elected under section 552.024, the city must withhold the personal information pertaining to this officer, which we have marked in the remaining information, under section 552.1175 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,



Jonathan Miles
Assistant Attorney General
Open Records Division

JM/cc

Ref: ID# 354074

Enc. Submitted documents

c: Requestor
(w/o enclosures)