



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

October 7, 2009

Mr. C. Corey Fickes  
Taylor, Olson, Adkins, Sralla & Elam  
6000 Western Place, Suite 200  
Fort Worth, Texas 76107-4654

OR2009-14151

Dear Mr. Fickes:

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# 357511.

The City of Haltom City (the "city"), which you represent, received a request for information pertaining to the investigation of a specified complaint. You state that the city has released some of the requested information. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.108, 552.111, 552.117, 552.130, and 552.136 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted information.

You inform us that some of the submitted information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2009-10030 (2009). In that decision, we ruled, in part, that portions of the investigative information at issue were excepted from disclosure under section 552.103 of the Government Code. However, you inform us that the investigation at issue has since been completed. Thus, we find that the circumstances have changed, and the city may not continue to rely on Open Records Letter No. 2009-10030 as a previous determination. *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

---

<sup>1</sup>Although you also raise the attorney work product privilege under section 552.101 of the Government Code in conjunction with Texas Rule of Civil Procedure 192.5, this office has concluded that section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990).

addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). Accordingly, we will address your arguments against the disclosure of the submitted information.

Next, we note section 552.022 of the Government Code is applicable to the submitted information. Section 552.022(a)(1) provides for required public disclosure of “a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[,]” unless the information is expressly confidential under other law or excepted from disclosure under section 552.108 of the Government Code. Gov’t Code § 552.022(a)(1). In this instance, the submitted information consists of documents that are part of a completed investigation and, thus, the submitted information is subject to section 552.022(a)(1). Although you seek to withhold the submitted information under sections 552.103, 552.107, and 552.111 of the Government Code, these sections are discretionary exceptions to disclosure that protect a governmental body’s interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 663 (1999) (governmental body may waive section 552.111), 677 at 10 (2002) (attorney work product privilege under section 552.111 may be waived), 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, sections 552.103, 552.107, and 552.111 are not “other law” that makes information confidential for the purposes of section 552.022. Therefore, the city may not withhold any of the submitted information under sections 552.103, 552.107, or 552.111 of the Government Code. However, the Texas Supreme Court has held that the 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, 336 (Tex. 2001). The attorney-client privilege is also found under rule 503 of the Texas Rules of Evidence, and the attorney work product privilege is also found under rule 192.5 of the Texas Rules of Civil Procedure. Accordingly, we will consider your assertion of the attorney-client privilege under Texas Rule of Evidence 503. However, the Texas Rules of Civil Procedure apply only to “actions of a civil nature.” *See* TEX. R. CIV. P. 2. You inform us that the information at issue was created in anticipation of a possible criminal prosecution. Therefore, because the submitted information relates to a possible criminal case, the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure does not apply to any of the information at issue. Because sections 552.101, 552.117, 552.130, and 552.136 are “other law” for purposes of section 552.022, we will consider the applicability of these exceptions. We will also consider your arguments under section 552.108.

Texas Rule of Evidence 503 enacts the attorney-client privilege. Rule 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(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 [14th Dist.] 1993, no writ).

You state that the information you have marked consists of or memorializes communications between the city and the city's counsel that were made for the purpose of facilitating the rendition of professional legal services. You also assert that the communications were confidential, and that their confidentiality has been maintained. Accordingly, the city may withhold the information we have marked on the basis of the attorney-client privilege under Texas Rule of Evidence 503. We note, however, that some of the remaining communications you seek to withhold under the attorney-client privilege were sent from the individual who was the subject of the investigation at issue to, among other parties, her personal attorney. In this case, you have not demonstrated how the subject of the investigation or her attorney are privileged parties for purposes of rule 503. Furthermore, we

note that while the other remaining information you have marked under the attorney-client privilege consists of documents created by an attorney representing the city, you have not demonstrated that this information either documents privileged communications or was communicated to a privileged party. Consequently, we find that you have not demonstrated how any of the remaining information constitutes privileged attorney-client communications, and it may not be withheld on the basis of rule 503.

Section 552.101 of the Government Code excepts "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. 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). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. 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 pretax 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). Further, this office has found some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (information pertaining to illness from severe emotional and job-related stress protected by common-law privacy), 455 (1987) (information pertaining to prescription drugs, specific illnesses, operations and procedures, and physical disabilities protected from disclosure). Upon review, we find that the information we have marked is highly intimate or embarrassing and not of legitimate public concern. Therefore, the city must withhold this information pursuant to section 552.101 of the Government Code in conjunction with common-law privacy.

You assert the submitted floor plan of the city's police headquarters is excepted from disclosure under section 552.108(b)(1) of the Government Code. Section 552.108(b)(1) excepts from disclosure the internal records and notations of law enforcement agencies and prosecutors when their release would interfere with law enforcement and crime prevention. Gov't Code § 552.108(b)(1); *see also* Open Records Decision No. 531 at 2 (1989) (quoting *Ex parte Pruitt*, 551 S.W.2d 706, 710 (Tex. 1977)). Section 552.108(b)(1) is intended to protect "information which, if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate the laws of this State." *City of Fort Worth v. Cornyn*, S.W.3d 320 (Tex. App.—Austin 2002, no pet.). To demonstrate the applicability of this exception, a governmental body must meet its burden of explaining how and why release of

the requested information would interfere with law enforcement and crime prevention. Open Records Decision No. 562 at 10 (1990). This office has concluded section 552.108(b) excepts from public disclosure information relating to the security or operation of a law enforcement agency. *See, e.g.*, Open Records Decision Nos. 531 (release of detailed use of force guidelines would unduly interfere with law enforcement), 252 (1980) (Gov't Code § 552.108 is designed to protect investigative techniques and procedures used in law enforcement), 143 (1976) (disclosure of specific operations or specialized equipment directly related to investigation or detection of crime may be excepted). Section 552.108(b)(1) is not applicable, however, to generally known policies and procedures. *See, e.g.*, ORD 531 at 2-3 (Penal Code provisions, common law rules, and constitutional limitations on use of force not protected), 252 at 3 (governmental body failed to indicate why investigative procedures and techniques requested were any different from those commonly known).

You state that release of the submitted floor plan of the city's police headquarters would "permit private citizens to anticipate weaknesses in the police department and jeopardize the safety of the [c]ity's police department." Based on your representation and our review, we find that release of the submitted floor plan, which we have marked, would interfere with law enforcement. Accordingly, the city may withhold this information under section 552.108(b)(1) of the Government Code.

Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). Section 552.117(a)(2) excepts from disclosure the home address, home telephone number, social security number, and the family member information of a peace officer as defined by article 2.12 of the Code of Criminal Procedure. *Id.* § 552.117(a)(2). You have submitted documentation showing that one of the employees at issue elected to keep her personal information confidential pursuant to section 552.024; therefore, the city must withhold the information we have marked concerning that individual under section 552.117(a)(1) of the Government Code. We have marked in the submitted documents and indicated in the submitted audio recording other information that may be excepted from disclosure by section 552.117 of the Government Code. However, we are unable to determine from the information provided whether some of the employees at issue are licensed peace officers. If the employees at issue are licensed peace officers, the city must withhold the marked and indicated information under section 552.117(a)(2). If the employees are not licensed peace officers, but they elected to keep their personal information confidential pursuant to section 552.024 prior to the date the city received the present request, then the city must withhold the marked and indicated information under section 552.117(a)(1). If, however, the employees are not licensed peace officers and did not make a timely election pursuant to section 552.024, then the city may not withhold this information under section 552.117. Furthermore, the remaining information you have marked under section 552.117 does not reveal the home address, telephone number, social security number, or family information

of a current or former official or employee. Therefore no portion of the remaining information may be withheld under section 552.117 of the Government Code. We note that if the city lacks the technical capability to redact the information subject to section 552.117 in the submitted audio recording, the city must withhold the recording in its entirety. *See* Open Records Decision No. 364 (1983).

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. Although you claim the remaining information contains driver’s license and motor vehicle record information, the information at issue contains no such information. Therefore, the city may not withhold any of the remaining information under section 552.130 of the Government Code.

Section 552.136 states “[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(b). An access device number is one that 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, and includes an account number. *Id.* § 552.136(a). Accordingly, the city must withhold the cellular telephone account numbers and partial credit card number, which we have marked, under section 552.136 of the Government Code.

We note the remaining information contains e-mail addresses subject to section 552.137 of the Government Code, which 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).<sup>2</sup> *See* Gov’t Code § 552.137(a), (b). The e-mail addresses at issue are not of a type specifically excluded by section 552.137(c). *See* Act of May 15, 2001, 77th Leg., R.S., ch. 356, § 1, 2001 Tex. Gen. Laws 651, 651–52, *amended by* Act of May 27, 2009, 81st Leg., R.S., ch. 962, § 7, 2009 Tex. Sess. Law Serv. 2555, 2557 (Vernon) (to be codified as an amendment to section 552.137(c)). Therefore, unless the owners of the e-mail addresses at issue consent to their release, the city must withhold the e-mail addresses we have marked under section 552.137 of the Government Code.

In summary, (1) the city may withhold the information we have marked under Texas Rule of Evidence 503; (2) the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy; (3) the city may withhold the marked floor plan under section 552.108(b)(1) of the Government

---

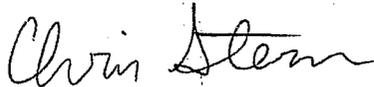
<sup>2</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Code; (4) in regard to the information concerning the individual who has elected confidentiality under section 552.024 of the Government Code, the city must withhold the information we have marked under section 552.117(a)(1) of the Government Code. To the extent the remaining employees at issue are licensed peace officers, the city must withhold the information we have marked and indicated under section 552.117(a)(2) of the Government Code. If the remaining employees are not licensed peace officers, but they elected to keep their personal information confidential prior to the date the city received the present request, then the city must withhold the marked and indicated information under section 552.117(a)(1) of the Government Code; (5) the city must withhold the information we have marked under section 552.136 of the Government Code; and (6) unless the owners of the e-mail addresses at issue consent to their release, the city must withhold the e-mail addresses we have marked under section 552.137 of the Government Code. The remaining information must be released to the requestor.

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](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, toll free, at (888) 672-6787.

Sincerely,



Christopher D. Sterner  
Assistant Attorney General  
Open Records Division

CDSA/eeg

Ref: ID# 357511

Enc. Submitted documents

c: Requestor  
(w/o enclosures)