



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

April 28, 2011

Ms. Marivi Gambini
Paralegal
City of Irving
825 West Irving Boulevard
Irving, Texas 75060

OR2011-05852

Dear Ms. Gambini:

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# 415831.

The City of Irving (the "city") received a request for all documents and audio recordings related to the investigation, administrative leave, and termination of a named city fire department employee. You state some information will be released. You claim the submitted information is excepted from disclosure pursuant to sections 552.101, 552.103, 552.107, and 552.111 of the Government Code, as well as privileged under rule 503 of the Texas Rules of Evidence.¹ We have considered the submitted arguments and reviewed the submitted representative sample of information.²

The submitted information consists of a completed investigation made by the city's fire department, and is subject to section 552.022(a)(1) of the Government Code.

¹Although you also raise section 552.102 of the Government Code, you make no arguments to support this exception. Therefore, we assume you have withdrawn your claim that this section applies to the submitted information.

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

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.” Gov’t Code § 552.022(a)(1). You claim the submitted information is excepted from disclosure under sections 552.103, 552.107(1), and 552.111 of the Government Code. However, these sections are discretionary exceptions that protect a governmental body’s interests and are, therefore, not “other law” for purposes of section 552.022(a)(1). *See id.* § 552.007; *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. 677 at 8 (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). Therefore, the city may not withhold any of the submitted information under section 552.103, section 552.107(1), or section 552.111 of the Government Code. We note, however, the Texas Supreme Court has held the Texas Rules of Evidence and Texas Rules of Civil Procedure are “other law” within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Thus, we will address the applicability of the attorney-client privilege under rule 503 of the Texas Rules of Evidence and the attorney work product privilege under rule 192.5 of the Texas Rules of Civil Procedure. In addition, you raise section 552.101 of the Government Code, and we note some of the submitted information may be subject to sections 552.117 and 552.137 of the Government Code. Sections 552.101, 552.117, and 552.137 are also other laws for the purposes of section 552.022. Accordingly, we will also address the applicability of sections 552.101, 552.117, and 552.137 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. This exception encompasses information other statutes make confidential, such as section 143.089 of the Government Code. We understand the city is a civil service city under chapter 143 of the Local Government Code. Section 143.089 provides for the maintenance of two different types of personnel files for each fire fighter employed by a civil service city: one that must be maintained as part of the fire fighter’s civil service file and another that the fire department may maintain for its own internal use. *See* Local Gov’t Code § 143.089(a), (g). The fire fighter’s civil service file must contain certain specified items, including commendations, periodic evaluations by the fire fighter’s supervisor, and documents relating to any misconduct in any instance in which the department took disciplinary action against the firefighter under chapter 143 of the Local Government Code. *Id.* § 143.089(a)(1)-(3). Chapter 143 prescribes the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. *Id.* § 143.051 *et seq.* In cases in which a fire department investigates a fire fighter’s misconduct and takes

³The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

disciplinary action against a fire fighter, it is required by section 143.089(a)(2) to place all investigatory records relating to the investigation and disciplinary action, including background documents such as complaints, witness statements, and documents of like nature from individuals who were not in a supervisory capacity, in the fire fighter's civil service file maintained under section 143.089(a). *See Abbott v. Corpus Christi*, 109 S.W.3d 113, 122 (Tex. App.—Austin 2003, no pet.). All investigatory materials in a case resulting in disciplinary action are “from the employing department” when they are held by or are in the possession of the department because of its investigation into a fire fighter's misconduct, and the department must forward them to the civil service commission for placement in the civil service personnel file. *Id.* Such records may not be withheld under section 552.101 of the Government Code in conjunction with section 143.089 of the Local Government Code. *See* Local Gov't Code § 143.089(f); Open Records Decision No. 562 at 6 (1990). Information relating to alleged misconduct or disciplinary action taken must be removed from the fire fighter's civil service file if the fire department determines there is insufficient evidence to sustain the charge of misconduct or the disciplinary action was taken without just cause. *See* Local Gov't Code § 143.089(b)-(c).

Section 143.089(g) authorizes a fire department to maintain, for its own use, a separate and independent internal personnel file relating to a fire fighter. *See id.* § 143.089(g). Section 143.089(g) provides as follows:

A fire or police department may maintain a personnel file on a fire fighter or police officer employed by the department for the department's use, but the department may not release any information contained in the department file to any agency or person requesting information relating to a fire fighter or police officer. The department shall refer to the director or the director's designee a person or agency that requests information that is maintained in the fire fighter's or police officer's personnel file.

Id. § 143.089(g). The information in a file maintained by a fire department pursuant to section 143.089(g) is confidential. *Id.*; *see also City of San Antonio v. San Antonio Express-News*, 47 S.W.3d 556 (Tex. App.—San Antonio 2000, no pet.) (restricting confidentiality under Local Gov't Code § 143.089(g) to “information reasonably related to a police officer's or fire fighter's employment relationship”); Attorney General Opinion JC-0257 at 6-7 (2000) (addressing functions of Local Gov't Code § 143.089(a) and (g) files).

You state the submitted information relates to an investigation of the named fire fighter and is maintained in the city's fire department's files pursuant to section 143.089(g). We note the investigation of the named fire fighter resulted in his suspension. You contend, because this individual has appealed his suspension, the submitted information is confidential pursuant to section 143.089(g) until the appeal process is concluded. We note a fire fighter's civil service file must contain documents relating to any misconduct in those cases where the fire department took disciplinary action against the fire fighter. *See* Local Gov't Code

§ 143.089(a)(2). We note section 143.089(c) provides information that must be placed in a civil service file under section 143.089(a)(2) may be removed if the civil service commission determines (1) the disciplinary action was taken without just cause or (2) the charge of misconduct was not supported by sufficient evidence. *See id.* § 143.089(c). Section 143.089(c) therefore signifies that complaint files resulting in disciplinary action must be placed in the civil service file during the pendency of the appeal. The information at issue relates to conduct that resulted in suspension, and this suspension has not been overturned on appeal. *See id.* §§ 143.051-.052 (suspension is “disciplinary action” for purposes of section 143.089(a)(2)). Therefore, despite your assertions, we find the submitted information is related to disciplinary action taken against the named fire fighter. Thus, this information must be maintained in the civil service file pursuant to section 143.089(a)(2), and it may not be withheld under section 552.101 in conjunction with section 143.089(g) of the Local Government Code.

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 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 the communication is confidential by explaining it was not intended to be disclosed to third persons and 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 the information in Exhibits B, C, and D reveals communications between employees of the city's fire department and the fire department's attorneys. You state the communications were intended to be, and have remained, confidential. Accordingly, the city may withhold the information in Exhibits B, C, and D on the basis of the attorney-client privilege under Texas Rule of Evidence 503.⁴

Section 552.101 of the Government Code also encompasses the informer's privilege, which has long been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). The informer's privilege protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority. Open Records Decision No. 515 at 3 (1988). The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 279 at 2 (1981) (citing 8 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW, § 2374, at 767 (McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. *See* Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5. However, the informer's privilege does not apply where the informant's identity is known to the individual who is the subject of the complaint. *See* Open Records Decision No. 208 at 1-2 (1978).

You assert the remaining information should be withheld under section 552.101 of the Government Code in conjunction with the common-law informer's privilege. You state this information relates to an age discrimination investigation and tends to reveal the identity of informers. However, we note the information itself reveals the subject of the complaint knows the identity of the complainant. *See id.* In addition, we note a witness who provides information in the course of an investigation, but does not make the initial report of a violation, is not an informant for purposes of the common-law informer's privilege. We

⁴As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

therefore conclude the city has failed to demonstrate the applicability of the common-law informer's privilege in this instance. Thus, the city may not withhold any of the information under section 552.101 of the Government Code in conjunction with the informer's privilege.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (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 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. *See id.* at 683. You argue the identifying information of witnesses and victims in the investigation is confidential under section 552.101 of the Government Code in conjunction with *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied). In *Ellen*, the court addressed the applicability of the common-law privacy doctrine to files of an investigation of sexual harassment. Here, however, the information at issue does not relate to an investigation of sexual harassment. Because the information does not concern sexual harassment, we find *Ellen* is not applicable in this instance. Consequently, the city may not withhold any of the submitted information under section 552.101 in conjunction with common-law privacy on the basis of *Ellen*.

This office has also found the 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) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). However, information pertaining to the work conduct and job performance of public employees is subject to a legitimate public interest and, therefore, is generally not protected from disclosure under common-law privacy. *See* Open Records Decision Nos. 405 at 2-3 (1983) (public has interest in manner in which public employee performs job); 329 at 2 (1982) (information relating to complaints against public employees and discipline resulting therefrom is not protected under former section 552.101), 208 at 2 (information relating to complaint against public employee and disposition of the complaint is not protected under common-law right of privacy); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow). Upon review, we find a portion of the remaining information, which we have marked, is highly intimate or embarrassing and of no legitimate public interest. Thus, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, the remaining information is not highly intimate or embarrassing or is of legitimate public interest. Therefore, we conclude the city may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.117(a)(1) of the Government Code exempts from disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that these types of information be kept confidential under section 552.024 of the Government Code. *See Gov't Code* §§ 552.117, .024. Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See Open Records Decision No. 530 at 5 (1989)*. Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 of the Government Code prior to the date of the governmental body's receipt of the request for the information. We have marked information that may be subject to section 552.117(a)(1) of the Government Code. To the extent the employees whose information is at issue timely requested confidentiality under section 552.024, the city must withhold the personal information we have marked, including the information we have indicated on the submitted recording, under section 552.117(a)(1) of the Government Code. To the extent the employees concerned did not make timely elections, the city may not withhold the information we have marked under section 552.117(a)(1).

Section 552.137 of the Government Code provides that "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]," unless the owner of the e-mail address has affirmatively consented to its public disclosure or the e-mail address falls within the scope of section 552.137(c). *Gov't Code* § 552.137(a)-(c). We have marked a personal e-mail address in the remaining information that does not appear to fall within the scope of section 552.137(c). The marked e-mail address must be withheld under section 552.137, unless the owner has affirmatively consented to its public disclosure.⁵

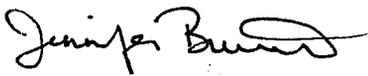
In summary, the city may withhold the information we have marked under Texas Rule of Evidence 503. The city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. To the extent the employees concerned timely requested confidentiality under section 552.024 of the Government Code, the city must withhold the personal information we have marked, including the information we have indicated on the submitted recording, under section 552.117(a)(1) of the Government Code. The marked e-mail address must be withheld under section 552.137, unless the owner has affirmatively consented to its public disclosure. The remaining information must be released.

⁵This office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

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

Sincerely,



Jennifer Burnett
Assistant Attorney General
Open Records Division

JB/bs

Ref: ID# 415831

Enc. Submitted documents

c: Requestor
(w/o enclosures)