



**ATTORNEY GENERAL OF TEXAS**  
**GREG ABBOTT**

September 7, 2012

Ms. Leigh M. Tomlin  
PIA Officer  
Texas Forensic Science Commission  
1700 North Congress Avenue, Suite 445  
Austin, Texas 78701

OR2012-14200

Dear Ms. Tomlin:

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# 464208.

The Texas Forensic Science Commission (the "commission") received a request for the case file pertaining to the complaint filed by a named individual in the year 2011. You state you have released some of the requested information. You state you will redact social security numbers under section 552.147(b) of the Government Code.<sup>1</sup> You claim that portions of the submitted information are excepted from disclosure under sections 552.101, 552.107, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note the submitted information includes court documents. Section 552.022(a)(17) of the Government Code provides for required public disclosure of "information that is also contained in a public court record," unless the information is expressly confidential under the Act or other law. Gov't Code § 552.022(a)(17). You raise section 552.101 of the Government Code for the court documents, which makes information made confidential under the Act. We note, however, that while you raise section 552.101

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<sup>1</sup>Section 552.147(b) 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. Gov't Code § 552.147(b).

in conjunction with common-law privacy, information that has been filed with a court is not protected by common-law privacy. *See Star-Telegram v. Walker*, 834 S.W.2d 54 (Tex. 1992) (common-law privacy not applicable to court-filed document). Accordingly, the commission may not withhold the court documents based on section 552.101 of the Government Code in conjunction with common-law privacy. You also raise section 552.107(2) of the Government Code for this information. Section 552.107(2) allows a governmental body to withhold information if “a court by order has prohibited disclosure of the information.” Gov’t Code § 552.107(2). However, section 552.022(b) provides that a court may not order a governmental body to withhold from public inspection any category of information described by section (a) unless the category of information is expressly made confidential under the Act or other law. *Id.* § 552.022(b). Because section 552.022(b) prohibits a court from ordering the withholding of documents subject to section 552.022, we conclude the commission may not withhold the information at issue under section 552.107(2). However, we will address your arguments under section 552.101 in conjunction with constitutional privacy for the court documents, as well as your arguments for the remaining information at issue.

You raise common-law and constitutional privacy for some of the information at issue. 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 section encompasses the doctrines of common-law and constitutional privacy. The doctrine of common-law privacy protects information if it (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 established. *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. This office has also recognized that individuals may have a privacy interest in their drug test results. *See Open Records Decision Nos. 594* (1991) (suggesting identification of individual as having tested positive for use of illegal drug may raise privacy issues), 455 at 5 (1987) (citing *Shoemaker v. Handel*, 619 F. Supp. 1089 (D.N.J. 1985), *aff’d*, 795 F.2d. 1136 (3rd Cir. 1986)).

Constitutional privacy consists of two inter-related types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual’s interest in avoiding disclosure of personal matters. *See Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); *Open Records Decision Nos. 600* at 3-5 (1992), 478 at 4 (1987), 455 at 3-7. The first type protects an individual’s autonomy within “zones of privacy,” which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *ORD 455* at 4. The second type of constitutional privacy requires a balancing between the individual’s privacy interests and the public’s need to know information of public concern.

*Id.* at 7. The scope of information protected by constitutional privacy is narrower than that under common-law privacy; constitutional privacy under section 552.101 is reserved for “the most intimate aspects of human affairs.” *Id.* at 5 (quoting *Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985)).

Upon review, we find portions of the information we have marked in the documents not subject to section 552.022(a)(17) are highly intimate or embarrassing and of no legitimate public interest. Thus, the commission must withhold this information under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find you have not demonstrated that any of the remaining information not subject to section 552.022(a)(17) is highly intimate or embarrassing and not a matter of legitimate public interest. Furthermore, you have failed to demonstrate how any of the submitted information, including the documents subject to section 552.022(a)(17) falls within the zones of privacy or implicates an individual’s privacy interests for purposes of constitutional privacy. Therefore, the commission may not withhold any of the remaining information under section 552.101 in conjunction with common-law or constitutional privacy.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. Gov’t Code § 552.107(1). 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, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *See* 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, orig. proceeding). 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 the e-mail you have marked was sent from the commission's general counsel to certain members of the commission in order to gather information relating to the complaint at issue and to provide legal advice. We understand this communication was intended to be confidential and has remained confidential. Based on your representations and our review, we agree the information you have marked is protected by the attorney-client privilege, and the commission may withhold it under section 552.107(1) of the Government Code.

We now turn to your arguments under section 552.107(2) of the Government Code for the information not subject to section 552.022. You assert that the commission is prohibited from releasing the information at issue pursuant to a court order. As noted above, section 552.107(2) excepts information from disclosure if "a court by order has prohibited disclosure of the information." Gov't Code § 552.107(2). You have submitted a copy of an interim protective order, which you state is still in effect, signed by an associate judge for the District Court of the 302th Judicial District, Dallas County, Texas, in the case styled *In the Interest of Dinah Marjorie Devening A Child*, No. DF-10-4297. The court order provides, in pertinent part, that the transcripts and audio and video recordings made at two specified depositions shall not be shared with the public. You state the deposition video at issue is subject to this order. Accordingly, based on your representations and our review, we conclude that the commission must withhold the submitted deposition video under section 552.107(2) 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 Gov't Code § 552.137(a)-(c). The e-mail addresses at issue are not excluded by subsection (c). Therefore, the commission must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners have affirmatively consented to their public disclosure.<sup>2</sup> However, the remaining information you have marked does not consist of e-mail addresses and may not be withheld under section 552.137 of the Government Code.

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<sup>2</sup>We note Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

In summary, the commission must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The commission may withhold the information you have marked under section 552.107(1) of the Government Code. The commission must withhold the submitted deposition video under section 552.107(2) of the Government Code and the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners have affirmatively consented to their public disclosure. 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](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,



Sarah Casterline  
Assistant Attorney General  
Open Records Division

SEC/som

Ref: ID# 464208

Enc. Submitted documents

c: Requestor  
(w/o enclosures)