



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

October 26, 2012

**Ms. Kathy Sparks**  
Legal Assistant  
Public Information Coordinator  
Texas Funeral Service Commission  
P.O. Box 12217  
Austin, Texas 78711

OR2012-17178

Dear Ms. Sparks:

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# 469065.

The Texas Funeral Service Commission (the "commission") received two requests from the same requestor for all files, notes, notices, and related correspondence for a specified cemetery. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note a portion of the submitted information, which we have marked, is not responsive to the instant request because it does not pertain to the cemetery at issue. This ruling does not address the public availability of any information that is not responsive to the request and the commission need not release any such information in response to this request.

Next, we must address the applicability of section 552.007 of the Government Code to the submitted information. Section 552.007 provides that if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential by law. *See* Gov't Code § 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983)

(governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). You inform us Attachment 3 was previously released to a member of the public. You seek to withhold Attachment 3 under section 552.103 of the Government Code. However, pursuant to section 552.007, the commission may not now withhold any previously released information unless its release is expressly prohibited by law or the information is confidential by law. Section 552.103 does not prohibit the release of information or make information confidential. *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. 665 at 2 n.5* (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Accordingly, the commission may not now withhold Attachment 3 under section 552.103. However, you claim some of the information in Attachment 3 is subject to section 552.101 of the Government Code, which applies to confidential information. Further, we note some of the information in Attachment 3 is subject to section 552.137 of the Government Code, which makes information confidential under the Act.<sup>1</sup> Accordingly, we will address whether any of the information in Attachment 3 must now be withheld pursuant to sections 552.101 and 552.137. We will address also your arguments against disclosure of the information that has not been previously released.

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 651.203 of the Occupations Code, which provides “[i]nformation in a [complaint file maintained by the commission], other than information relating to a complaint that has not reached a final disposition, is public information.” Occ. Code § 651.203(b). We conclude this language makes information relating to a complaint that has not reached a final disposition confidential. You state Attachment 2 and Attachment 7 relate to open complaints that have not reached a final disposition. Based upon your representation and our review of the information at issue, we conclude the commission must withhold Attachment 2 and Attachment 7 under section 552.101 of the Government Code in conjunction with section 651.203(b) of the Occupations Code.<sup>2</sup>

Section 552.101 also encompasses the doctrine of common-law privacy. Common-law privacy 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

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<sup>1</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).*

<sup>2</sup>As our ruling is dispositive, we do not address your remaining arguments against disclosure for this information.

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. In addition, this office has found that personal financial information not relating to the financial transaction between an individual and a governmental body is excepted from disclosure under common-law privacy. See Open Records Decision No. 600 (1992) (personal financial choices concerning insurance are generally confidential). Because privacy is a personal right that lapses at death, the common-law right to privacy does not encompass information that relates only to a deceased individual. Accordingly, information pertaining only to a deceased individual may not be withheld on common-law privacy grounds. See *Moore v. Charles B. Pierce Film Enters. Inc.*, 589 S.W.2d 489, 491 (Tex. App.—Texarkana 1979, writ ref'd n.r.e.); see also Open Records Decision No. 272 at 1 (1981) (privacy rights lapse upon death). Upon review, we find the information we have marked is highly intimate or embarrassing and of no legitimate public interest. Therefore, the commission must withhold this information under section 552.101 in conjunction with common-law privacy. However, we find none of the remaining information that pertains to living individuals is highly intimate or embarrassing. Therefore, none of the remaining information may be withheld under section 552.101 on the basis of common-law privacy.

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, orig. proceeding). 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 state Attachment 6 consists of attorney-client communications made between commission staff and lawyers working on behalf of the commission for the purpose of rendering professional legal services to the commission. You state these communications were intended to be and remain confidential. Based on these representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to Attachment 6. Therefore, the commission may withhold Attachment 6 under section 552.107(1) of the Government Code.

We note some of the remaining information is excepted from disclosure under section 552.137 of the Government Code. This section 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 respective owners have affirmatively consented to public disclosure.

In summary, the commission must withhold Attachment 2 and Attachment 7 under section 552.101 of the Government Code in conjunction with section 651.203(b) of the Occupations Code. 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 Attachment 6 under section 552.107(1) of the Government Code. The commission must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless the respective owners have affirmatively consented to public disclosure. The remaining information must be released.<sup>3</sup>

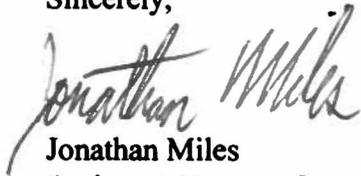
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<sup>3</sup>We note the requestor has a special right of access to some of the information being released in this instance. Gov’t Code § 552.023 (person or person’s authorized representative has special right of access to records that contain information relating to the person that are protected from public disclosure by laws intended to protect that person’s privacy interests). Because such information may be confidential with respect to the general public, if the commission receives another request for this information from a different requestor, the commission must again seek a ruling from this office.

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,



Jonathan Miles  
Assistant Attorney General  
Open Records Division

JM/bhf

Ref: ID# 469065

Enc. Submitted documents

c: Requestor  
(w/o enclosures)