



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 26, 2013

Ms. Danielle R. Folsom
Assistant City Attorney
City of Houston
P.O. Box 368
Houston, Texas 77001-0368

OR2013-03270

Dear Ms. Folsom:

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# 479810 (Houston GC No. 20191).

The City of Houston (the "city") received a request for any and all disciplinary actions and investigations pertaining to a specified employee. You state the city will release some of the information to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.108 of the Government Code and privileged under rule 503 of the Texas Rules of Evidence. We have considered your arguments and reviewed the submitted information.

We note, and you acknowledge, a portion of the submitted information is subject to section 552.022 of the Government Code. 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," unless it is excepted by section 552.108 of the Government Code or "made confidential under [the Act] or other law[.]" Gov't Code § 552.022(a)(1). You state Exhibit 2 and Exhibit 5 consist of completed investigations made by the Office of the Inspector General that are subject to section 552.022(a)(1). As such, these exhibits must be released unless they are either excepted under section 552.108 of the Government Code or confidential under the Act or other law. We note you raise section 552.108 for portions of Exhibit 5. Additionally, the Texas Supreme Court has held the Texas Rules of Evidence are "other law" that make information expressly confidential for the purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will consider your

argument under Texas Rule of Evidence 503 for Exhibit 2. We will address your argument under section 552.108 for portions of Exhibit 5. We will also address your arguments against disclosure for the remaining information.

Texas Rule of Evidence 503(b)(1) provides:

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 it is 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). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 426-27 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You state pursuant to City of Houston Executive Order 1-39 (Revised), the Office of the Inspector General (the "OIG") is a division of the Office of the City Attorney and acts under that office's supervision. You inform us the information contained in Exhibit 2 consists of communications between employees of the OIG in their capacities as attorneys and attorney representatives, and employees of the city in their capacities as clients and client representatives. You explain this information was created in furtherance of the rendition of professional legal services to the city. You further state the information at issue was not intended for release to third parties, and the confidentiality has been maintained. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information contained in Exhibit 2. *See Harlandale Indep. Sch. Dist. v. Cornyn*, 25 S.W.3d 328 (Tex. App.—Austin 2000, pet. denied) (concluding attorney's entire investigative report was protected by attorney-client privilege where attorney was retained to conduct investigation in her capacity as attorney for purpose of providing legal services and advice). Accordingly, the city may withhold Exhibit 2 under rule 503 of the Texas Rules of Evidence.

We next address your claim under section 552.108 of the Government Code. Section 552.108(a)(2) of the Government Code exempts from disclosure information concerning an investigation that concluded in a result other than conviction or deferred adjudication. Gov't Code § 552.108(a)(2). A governmental body claiming section 552.108(a)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. We note section 552.108 is not applicable to records of an investigation that is purely administrative in nature and did not involve the investigation or prosecution of crime. *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no pet.) (section 552.108 not applicable to information police department holds as employer); *Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. Civ. App.—El Paso 1992, writ denied) (statutory predecessor to section 552.108 not applicable to internal investigation that did not result in criminal investigation or prosecution). You argue portions of the information in Exhibit 5 are subject to section 552.108. In this case, you inform us the information at issue pertains to an internal administrative investigation conducted by the OIG. You do not provide any arguments explaining how the internal investigation resulted in a criminal investigation or prosecution. Accordingly, we find you have failed to demonstrate section 552.108 is applicable to any of the information at issue. Thus, the city may not withhold any portion of Exhibit 5 under section 552.108 of the Government Code.

We note portions of Exhibit 5 are subject to section 552.117.¹ Section 552.117 of the Government Code exempts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of

¹The 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).*

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). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the city may only withhold the information under section 552.117 on behalf of current or former employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. To the extent the employee whose information is at issue timely elected to keep such information confidential under section 552.024, the city must withhold the information we have marked in Exhibit 5 under section 552.117 of the Government Code. However, if the employee did not make a timely election, the city may not withhold the marked information on this basis.

Next, we will address your arguments against disclosure of the remaining information not subject to section 552.022 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 section encompasses information protected by other statutes. Access to medical records is governed by the Medical Practice Act (the "MPA"), Occ. Code §§ 151.001-168.202. Section 159.002 of the MPA provides:

(a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Id. § 159.002. Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004. Upon review, we find the information in Exhibit 3 consists of a record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that was created by a physician or someone under the supervision of a physician. Therefore, this information is confidential

under the MPA and must be withheld under section 552.101 of the Government Code on that basis.²

Section 552.107(1) protects information that comes within the attorney-client privilege. The elements of the privilege under section 552.107 are the same as those discussed above for rule 503. 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. *See* ORD 676 at 6-7. 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).

As previously noted, you state pursuant to City of Houston Executive Order 1-39 (Revised), the OIG is a division of the Office of the City Attorney and acts under that office's supervision. You inform us the information contained in Exhibit 4 consists of communications between employees of the OIG in their capacities as attorneys and attorney representatives, and employees of the city in their capacities as clients and client representatives. You explain this information was created in furtherance of the rendition of professional legal services to the city. You further state the information at issue was not intended for release to third parties, and the confidentiality has been maintained. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information contained in Exhibit 4. Accordingly, the city may withhold Exhibit 4 under section 552.107(1) of the Government Code.

In summary, the city may withhold Exhibit 2 under rule 503 of the Texas Rules of Evidence. The city must withhold the information we have marked in Exhibit 5 under section 552.117 of the Government Code if the individual whose information is at issue timely requested confidentiality. The city must withhold Exhibit 3 under section 552.101 of the Government Code in conjunction with the MPA. The city may withhold Exhibit 4 under section 552.107(1) of the Government Code. The remaining information must be released.

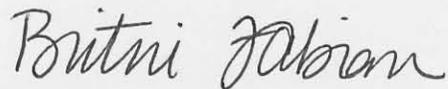
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

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,

²As our ruling is dispositive for this information, we need not address your argument against its disclosure.

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,



Britni Fabian
Assistant Attorney General
Open Records Division

BF/dls

Ref: ID# 479810

Enc. Submitted documents

c: Requestor
(w/o enclosures)

