



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 29, 2013

Mr. Mark G. Daniel
Counsel for the City of Watauga
Evans, Daniel, Moore, Evans & Lazarus
115 West Second Street, Suite 202
Fort Worth, Texas 76102

OR2013-07017

Dear Mr. Daniel:

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# 485634 (Open Records Request 13-41).

The City of Watauga (the "city"), which you represent, received a request for e-mails between specified city officials and a named former employee pertaining to the resignation of the named former employee during a specified time period, a specified resignation letter, and a specified settlement agreement.¹ You state the city has released some of the requested information. You claim some of the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.117, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note portions of the submitted information, which we have marked, are not responsive to the instant request because they were created outside the time period specified in the request. The city need not release nonresponsive information in response to this request, and this ruling will not address that information.

¹We note the city received clarification regarding this request. See Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information); see *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

Next, you inform us some of the information submitted as Exhibit D was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2013-03982 (2013). In that ruling, we concluded, among other things, that with the exception of certain information we marked for release, the city may withhold certain information under section 552.107(1) of the Government Code. As we have no indication the law, facts, and circumstances on which the prior ruling was based have changed, the city may continue to rely on Open Records Letter No. 2013-03982 as a previous determination and withhold or release the previously ruled upon information in accordance with that ruling. *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 addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

Section 552.022(a)(3) of the Government Code provides for the required public disclosure of “information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body” unless it is “made confidential under [the Act] or other law[.]” Gov’t Code § 552.022(a)(3). Part one of Exhibit E (“Exhibit E-1”) contains an executed contract between the city and American Traffic Solutions, Inc., which is subject to section 552.022(a)(3). This information must be released unless it is confidential under the Act or other law. Although you assert this information is excepted from disclosure under section 552.107 of the Government Code, this section is discretionary and does not make information confidential under the Act. *See* Open Records Decision Nos. 676 at 6 (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 the information subject to section 552.022(a)(3) under section 552.107. However, 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 the contract in Exhibit E-1 that is subject to section 552.022(a)(3).

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, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

We note the contract subject to section 552.022(a)(3) is an attachment to an e-mail in Exhibit E-1. You state the information in Exhibit E-1 consists of communications between city attorneys and city officials and employees that were made for the purpose of facilitating the rendition of professional legal services to the city. You also state the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the attached contract in Exhibit E-1. Accordingly, the city may withhold this information under Texas Rule of Evidence 503.

Section 552.101 of the Government Code excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 of the Government Code encompasses information protected by other statutes. As part of the Texas Homeland Security Act, sections 418.176 through 418.182 were added to chapter 418 of the Government Code. These provisions make confidential certain information related to terrorism. Section 418.177 provides:

Information is confidential if the information:

(1) is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, or investigating an act of terrorism or related criminal activity; and

(2) relates to an assessment by or for a governmental entity, or an assessment that is maintained by a governmental entity, of the risk or vulnerability of persons or property, including critical infrastructure, to an act of terrorism or related criminal activity.

Id. § 418.177. The fact that information may relate to a governmental body's security concerns does not make the information *per se* confidential under the Texas Homeland Security Act. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). Furthermore, the mere recitation by a governmental body of a statute's key terms is not sufficient to demonstrate the applicability of a claimed provision. As with any exception to disclosure, a governmental body asserting one of the confidentiality provisions of the Texas Homeland Security Act must adequately explain how the responsive records fall within the scope of the claimed provision. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

You state Exhibit C, which consists of an e-mail from the city's police department, assesses the vulnerability of the Birdville Independent School District's buildings to a terrorist attack. You assert release of Exhibit C "would provide a person planning a terroristic attack with information on the vulnerabilities of the [buildings] and potential means to circumvent security measures and law enforcement response." Based on your representations and our review, we conclude Exhibit C was collected, assembled, or maintained by or for the city for the purpose of preventing, detecting, or investigating an act of terrorism or related criminal activity and relates to an assessment of the risk or vulnerability of persons or property to an act of terrorism or related criminal activity. *See id.* § 418.177. Accordingly, the city must withhold Exhibit C under section 552.101 of the Government Code in conjunction with section 418.177 of the Government Code.²

Section 552.101 of the Government Code also 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). 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.

²As our ruling on Exhibit C is dispositive, we need not address your remaining argument against its disclosure.

Generally, however, the public has a legitimate interest in information that relates to public employment and public employees. *See* Open Records Decision No. 562 at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs, but in fact touches on matters of legitimate public concern). Information pertaining to the work conduct and job performance of public employees is subject to a legitimate public interest and, therefore, generally not protected from disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (public employee's job performance does not generally constitute employee's private affairs), 455 (1987) (public employee's job performance or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employee), 423 at 2 (1984) (scope of public employee privacy is narrow).

This office has also found that some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* ORDs 470 (illness from severe emotional and job-related stress), 455 (prescription drugs, illnesses, operations, and physical handicaps). We note that the fact that a public employee is sick is public information, but specific information about illnesses is excepted from disclosure. *See* ORD 470 at 4.

Upon review, we find the information we have marked is highly intimate or embarrassing and not of legitimate public concern. Therefore, the city must withhold the information we have marked pursuant to section 552.101 of the Government Code in conjunction with common-law privacy. The city has failed to demonstrate, however, how the remaining information it has marked is highly intimate or embarrassing and not of legitimate public interest. Therefore, the city may not withhold any portion of the remaining information it has marked under section 552.101 in conjunction with common-law privacy.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. Gov't Code § 552.107(1). The elements of the privilege under section 552.107(1) are the same as those discussed 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).

You state the remaining information in Exhibit D, the information you have marked in Exhibit E-1, parts two and three of Exhibit E ("Exhibit E-2" and "Exhibit E-3," respectively), and the information you have marked in part four of Exhibit E ("Exhibit E-4 ") consist of communications between city attorneys and city officials and employees that were made for the purpose of facilitating the rendition of professional legal services to the city. You also state the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find the information we have marked in

Exhibit D, the information you have marked in Exhibits E-1 and E-4, and the entirety of Exhibits E-2 and E-3 document or consist of privileged attorney-client communications. Accordingly, the city may withhold the information we have marked in Exhibit D, the information you have marked in Exhibits E-1 and E-4, and the entirety of Exhibits E-2 and E-3 under section 552.107(1) of the Government Code. However, the remaining information in Exhibit D does not document or consist of a privileged attorney-client communication, and it may not be withheld on the basis of section 552.107(1).

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, social security number, emergency contact information, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code §§ 552.117, .024. We note section 552.117(a)(1) encompasses a personal cellular telephone and pager numbers if the employee personally pays for the cellular or pager service. *See* Open Records Decision No. 670 at 6 (2001); *see also* Open Records Decision No. 506 at 5-6 (1998) (Gov't Code § 552.117 not applicable to cellular mobile telephone numbers paid for by governmental body and intended for official use). 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 prior to the date of the governmental body's receipt of the request for the information.

You inform us, and provide documentation showing, that the former employee at issue timely elected confidentiality under section 552.024. Therefore, the city must withhold the information you have marked under section 552.117(a)(1) of the Government Code. Further, the city must withhold under section 552.117(a)(1) the former employee's cellular telephone number, which we have marked, if the associated cellular telephone service was not paid for by a government body. We note some of the remaining information, which we have marked, pertains to a city official, and, thus, may be subject to section 552.117(a)(1). Accordingly, if the official whose information is at issue made a timely election under section 552.024 to keep his personal information confidential, the city must withhold the information we have marked under section 552.117(a)(1); however, the city may only withhold the marked cellular telephone number under section 552.117(a)(1) if a governmental body did not pay for associated the cellular telephone service. If the official at issue did not make a timely election under section 552.024, this information may not be withheld under section 552.117(a)(1).

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). Section 552.137 is not applicable to an institutional e-mail address, an

Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. We note some of the e-mail addresses you marked, which we have marked for release, are maintained by governmental bodies for their employees. Thus, the e-mail addresses we have marked for release may not be withheld under section 552.137. However, the remaining e-mail addresses you have marked and the additional e-mail addresses we have marked are not a type specifically excluded by section 552.137(c). Accordingly, with the exception of the e-mail addresses we have marked for release, the city must withhold the e-mail addresses you have marked and the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their disclosure.

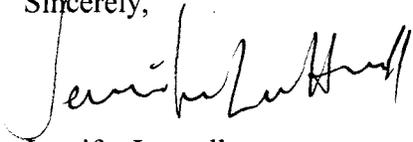
In summary, the city may continue to rely on Open Records Letter No. 2013-03982 as a previous determination and withhold or release the previously ruled upon information in accordance with that ruling. The city may withhold the attached contract in Exhibit E-1 under Texas Rule of Evidence 503. The city must withhold Exhibit C under section 552.101 of the Government Code in conjunction with section 418.177 of the Government Code. The city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The city may withhold the information we have marked in Exhibit D, the information you have marked in Exhibits E-1 and E-4, and the entirety of Exhibits E-2 and E-3 under section 552.107(1) of the Government Code. The city must withhold the information you have marked under section 552.117(a)(1) of the Government Code. The city must withhold under section 552.117(a)(1) the former employee's cellular telephone number, which we have marked, if the associated cellular telephone service was not paid for by a government body. If the official whose information is at issue made a timely election 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; however, the city may only withhold the marked cellular telephone number under section 552.117(a)(1) if a governmental body did not pay for associated the cellular telephone service. Except for the e-mail addresses we have marked for release, the city must withhold the e-mail addresses you have marked and the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their disclosure. The remaining responsive 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, 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,

A handwritten signature in black ink, appearing to read "Jennifer Luttrall". The signature is written in a cursive style with a large initial "J".

Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/som

Ref: ID# 485634

Enc. Submitted documents

c: Requestor
(w/o enclosures)