



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 10, 2013

Ms. Elizabeth Hanshaw Winn
Assistant County Attorney
Transactions Division
County of Travis
P.O. Box 1748
Austin, Texas 78767-1748

OR2013-11692

Dear Ms. Winn:

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# 492751.

The Travis County District Attorney's Office (the "district attorney's office") received a request for all correspondence and records of employees and public officials of the district attorney's office that mention a named individual's arrest, prosecution, or conviction for driving while intoxicated. You state you have released some information to the requestor. You claim some of the submitted information is excepted from disclosure under sections 552.101 and 552.111 of the Government Code. We have considered your claims and reviewed the submitted information.¹

Initially, you claim some of the submitted information is not responsive to the present request. Upon review, we find the information we have marked is not responsive to the

¹We assume that the "representative sample" of records 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 that those records contain substantially different types of information than that submitted to this office.

request because it does not mention the named individual's arrest, prosecution, or conviction for driving while intoxicated or was created after the date the district attorney's office received the request for information. This ruling does not address the public availability of any information that is not responsive to the request and the district attorney's office is not required to release such information in response to this request. However, the remaining information at issue consists of e-mails mentioning the named individual's arrest, prosecution, or conviction for driving while intoxicated. Thus, we find the information at issue is responsive to the present request, and we will address your arguments against its disclosure.

Next, we note some of the responsive information may have been the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2013-11530 (2013). In that ruling, we determined the district attorney's office (1) may withhold the information we marked under section 552.111 of the Government Code; (2) must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy; (3) must withhold the information we marked under section 552.117(a)(1) of the Government Code, if the employees at issue timely elected confidentiality under section 552.024; (4) must withhold the e-mail addresses we marked under section 552.137 of the Government Code, unless their owners affirmatively consent to their disclosure; and (5) must release the remaining information at issue. We have no indication there has been any change in the law, facts, or circumstances on which the previous ruling was based. Accordingly, to the extent the responsive information is identical to the information previously requested and ruled upon by this office, we conclude the district attorney's office must rely on Open Records Letter No. 2013-11530 as a previous determination and withhold or release the identical 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). To the extent the responsive information was not previously ruled on, we will address your submitted arguments.

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 the common-law right of privacy, which 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 elements of this test must be established. *Id.* at 681-82. 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. This office has found 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) (information pertaining to prescription drugs, illnesses, operations, and physical disabilities protected from disclosure). We note, however, the public generally has a legitimate interest in information that relates to public employment and public employees. *See* Open Records Decision Nos. 542 (1990), 470 at 4 (public has legitimate interest in job qualifications and performance of public employees), 444 at 5-6 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation or public employees), 432 at 2 (1984) (scope of public employee privacy is narrow).

Upon review, we find the information we have marked is highly intimate or embarrassing and not of legitimate public concern; thus, the district attorney's office must withhold this information under section 552.101 in conjunction with common-law privacy. However, we find you have not demonstrated how any of the remaining information is highly intimate or embarrassing and not of legitimate public concern. Thus, none of the remaining information may be withheld under section 552.101 in conjunction with common-law privacy.

You have also marked information you seek to withhold under section 552.111 of the Government Code. Section 552.111 of the Government Code excepts from disclosure "[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency[.]" Gov't Code § 552.111. Section 552.111 encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines work product as

(1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or

(2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5. A governmental body seeking to withhold information under this exception bears the burden of demonstrating the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. TEX. R. CIV. P. 192.5; ORD 677 at 6-8. In order for this office to conclude the information was made or developed in anticipation of litigation, we must be satisfied

a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

Nat'l Tank Co. v. Brotherton, 851 S.W.2d 193, 207 (Tex. 1993). A “substantial chance” of litigation does not mean a statistical probability, but rather “that litigation is more than merely an abstract possibility or unwarranted fear.” *Id.* at 204; ORD 677 at 7.

You argue the marked information constitutes the protected work product of attorneys in the district attorney’s office. Upon review, we find you have demonstrated the work product privilege applies to some of the information at issue, which we have marked, under section 552.111. However, we note other portions of the information at issue have been communicated with individuals you have not established are privileged parties. Therefore, because these parties have had access to this information, the work product privilege under section 552.111 has been waived. *See* TEX. R. EVID. 511 (discovery privilege waived if privileged information disclosed voluntarily); *Axelson, Inc. v. McIlhaney*, 798 S.W.2d 550, 554 (Tex. 1990); Accordingly, the district attorney’s office may only withhold the information we marked under section 552.111 of the Government Code.

Section 552.117(a)(1) excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code.² *See* Gov’t Code § 552.117(a)(1). Section 552.117 encompasses personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (statutory predecessor to Gov’t Code § 552.117 not applicable to numbers for cellular mobile telephones installed in county officials’ and employees’ private vehicles and intended for official business). 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 be withheld under section 552.117(a)(1) only on behalf of a current or former 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. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee who did not timely request under section 552.024 the information be kept confidential. Therefore, to the extent the individuals at issue timely requested confidentiality under section 552.024 of the

²The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Government Code, the district attorney's office must withhold the information we have marked under section 552.117(a)(1) of the Government Code, including the personal cellular telephone number if the individual pays for the cellular telephone service with personal funds. Conversely, to the extent the individuals at issue did not timely request confidentiality under section 552.024, the district attorney's office may not withhold the marked information 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). The e-mail addresses at issue are not excluded by subsection (c). Therefore, the district attorney's office must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure.³

In summary, the district attorney's office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The district attorney's office may withhold the information we have marked under section 552.111 of the Government Code. To the extent the individuals at issue timely requested confidentiality under section 552.024 of the Government Code, the district attorney's office must withhold the information we have marked under section 552.117(a)(1) of the Government Code, including the personal cellular telephone number if the individual pays for the cellular telephone service with personal funds. The district attorney's office must also withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure. The district attorney's office must release the remaining responsive information.

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for

³Open 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.

providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink that reads "Paige Lay". The signature is written in a cursive, flowing style.

Paige Lay
Assistant Attorney General
Open Records Division

PL/bhf

Ref: ID# 492751

Enc. Submitted documents

c: Requestor
(w/o enclosures)