



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 10, 2014

Ms. Lisa D. Mares
Counsel for the City of McKinney
Brown & Hofmeister, L.L.P.
740 East Campbell Road, Suite 800
McKinney, Texas 75081

OR2014-11933

Dear Ms. Mares:

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# 528717 (McKinney ORR# 10-10152).

The City of McKinney (the "city"), which you represent, received a request for all correspondence, including text messages and e-mail communications, between three specified individuals and a specified member of the city council. You claim the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.108, and 552.131 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, you inform us that the information in Exhibits D-1, D-2, and D-3 was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2014-08461 (2014). In that ruling, we determined (1) some of the information at issue was not responsive to the request for information because it was created after the city received the request at issue, and the ruling did not address the availability of that information; (2) the city may withhold portions of the information under sections 552.107, 552.108(a)(1), 552.108(a)(2), 552.111, and 552.131(b) of the Government Code; and (3) the city must release the remaining information. With respect to the

¹We assume 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.

information that was responsive to the previous request and addressed in the prior ruling, you do not indicate there has been any change in the law, facts, or circumstances on which the previous ruling was based. Accordingly, to the extent the information at issue in Exhibits D-1, D-2, and D-3, which we have marked, is identical to the information we determined to be responsive in the prior ruling, the city may continue to rely on Open Records Letter No. 2014-08461 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, 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). However, the information we determined was non-responsive to the previous request is responsive to the instant request.² As you raise no exceptions to disclosure for the information at issue, no portion of the information in Exhibits D-2 and D-3 we marked for release may be withheld pursuant to any discretionary exceptions. *Cf.* Open Records Decision No. 663 (1999). However, because sections 552.117(a)(1) and 552.137 are confidentiality provisions, we will address the applicability of these exceptions to the information in Exhibits D-2 and D-3 we have marked for release.³ Additionally, we will address the arguments against disclosure for the information at issue in Exhibits B, C, E and F.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *See* 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

²We note the request that formed the basis of the prior ruling sought communications involving specified individuals from February 1, 2014 to February 24, 2014. The instant request seeks communications involving specified individuals from January 1, 2014 to the time of the request. Some of the information you submitted was created in January 2014, thereby making it non-responsive to the previous request, but responsive to the instant request.

³The 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).

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 the information in Exhibit F consists of communications between city staff, city officers, and attorneys for the city. You state these communications were made in furtherance of the rendition of legal services to the city. You further state these communications were intended to be confidential and confidentiality has been maintained. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to some of the information at issue. Accordingly, except for the portions of information we marked for release, the city may withhold Exhibit F under section 552.107(1) of the Government Code. However, the information we have marked for release consists of communications involving parties you have not demonstrated are privileged. Therefore, we find you have not demonstrated the applicability of the attorney-client privilege to the information we have marked for release, and such information may not be withheld under section 552.107(1) of the Government Code.

Section 552.108(b)(2) excepts from disclosure “[a]n internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution ... if ... the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication[.]” Gov’t Code § 552.108(b)(2). A governmental body claiming section 552.108(b)(2) must demonstrate the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. *See id.* § 552.301(e)(1)(A) (governmental body must provide comments explaining why exceptions raised should apply to information requested). You state the information in Exhibit C pertains to a case that concluded in a result other than conviction or deferred adjudication. However, we find you have not demonstrated how the information in Exhibit C is an internal record or notation of a law enforcement agency or prosecutor.

Consequently, the city may not withhold Exhibit C under section 552.108(b)(2) of the Government Code.

Section 552.131 of the Government Code provides as follows:

(a) Information is excepted from [required public disclosure] if the information relates to economic development negotiations involving a governmental body and a business prospect that the governmental body seeks to have locate, stay, or expand in or near the territory of the governmental body and the information relates to:

- (1) a trade secret of the business prospect; or
- (2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained.

(b) Unless and until an agreement is made with the business prospect, information about a financial or other incentive being offered to the business prospect by the governmental body or by another person is excepted from [required public disclosure].

Gov't Code § 552.131(a), (b). Section 552.131(a) only protects the proprietary interests of third parties that have provided information to governmental bodies, not the interests of governmental bodies themselves. In this instance, there has been no demonstration by a third party that any of the information in Exhibit E constitutes a trade secret or that release of any of the information at issue would cause a third party substantial competitive harm. *See generally* Open Records Decision Nos. 661 at 5–6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm), 552 at 5 (1990) (attorney general will accept private person's claim under section 552.110(a) if person establishes *prima facie* case for trade secret exception, and no one submits argument that rebuts claim as matter of law). We therefore conclude the city may not withhold any of the information in Exhibit E under section 552.131(a) of the Government Code.

Section 552.131(b) protects information about a financial or other incentive that is being offered to a business prospect by a governmental body or another person. Upon review, we find no portion of the information in Exhibit E pertains to a financial or other incentive that is being offered to a business prospect by a governmental body or another person. Accordingly, the city may not withhold any of the information in Exhibit E under section 552.131(b) 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. Section 552.101 encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person and (2) 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 satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). 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. This office has also held common-law privacy protects the identifying information of juvenile victims of abuse or neglect. *See* Open Records Decision No. 394 (1983); *cf.* Fam. Code § 261.201. Upon review, the portions of the information we have marked satisfy the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Therefore, the city must withhold the information we have marked under section 552.101 in conjunction with common-law privacy. However, no portion of the remaining information contains information that is highly intimate or embarrassing and of no legitimate concern to the public. As such, no portion of the remaining information may be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.117 of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of current or former officials or employees of a governmental body who request this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a). 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). 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. As such, to the extent the individual at issue timely requested confidentiality under section 552.024, the city must withhold the information we have marked under section 552.117(a)(1) of the Government Code. If the individual at issue did not make a timely election under section 552.024, the city may not withhold this information under section 552.117(a)(1) of the Government Code.

Section 552.137 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 address at issue is not excluded by subsection (c). Therefore, the city must withhold the personal e-mail address we have marked under section 552.137 of the Government Code, unless the owner affirmatively consents to its public disclosure.

In summary, the city may continue to rely on Open Records Letter No. 2014-08461 as a previous determination and withhold or release the identical responsive information in accordance with that ruling. Except for the information we have marked for release, the city may withhold Exhibit F under section 552.107(1) of the Government Code. The city must withhold the information we have marked in Exhibit C under section 552.101 in conjunction with common-law privacy. To the extent the individual at issue timely requested confidentiality under section 552.024, the city must withhold the information we have marked under section 552.117(a)(1) of the Government Code. The city must withhold the personal e-mail address we have marked in under section 552.137 of the Government Code, unless the owner affirmatively consents to its 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.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 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, appearing to read "J. Behrke", written over a horizontal line.

Joseph Behrke
Assistant Attorney General
Open Records Division

JB/som

Ref: ID# 528717

Enc. Submitted documents

c: Requestor
(w/o enclosures)