



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

July 8, 2015

Ms. Elaine Nicholson
Assistant City Attorney
City of Austin
P.O. Box 1088
Austin, Texas 78767-1088

OR2015-13850

Dear Ms. Nicholson:

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# 570542.

The Austin Emergency Medical Services Department (the "department") received two requests from the same requestor for e-mails between named individuals during specified periods of time. You claim portions of the submitted information are excepted from disclosure under sections 552.101 and 552.107 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

Initially, we note you have marked a portion of the submitted information as not responsive to the instant request for information. This ruling does not address the public availability of non-responsive information, and the department need not release non-responsive information to the requestor.

¹We note the department did not comply with section 552.301 of the Government Code in requesting this decision for a portion of the submitted information. *See* Gov't Code § 552.301(e). Nonetheless, because section 552.101 of the Government Code can provide a compelling reason to overcome the presumption of openness, we will consider the applicability of this section to the submitted information. *See id.* §§ 552.007, .302, .352.

²We 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 those records contain substantially different types of information than that submitted to this office.

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 information made confidential by other statutes, such as section 773.095 of the Health and Safety Code, which provides in relevant part:

(a) The proceedings and records of organized committees of hospitals, medical societies, emergency medical services providers, emergency medical services and trauma care systems, or first responder organizations relating to the review, evaluation, or improvement of an emergency medical services provider, a first responder organization, an emergency services and trauma care system, or emergency medical services personnel are confidential and not subject to disclosure by court subpoena or otherwise.

...

(c) This section does not apply to records made or maintained in the regular course of business by an emergency medical services provider, a first responder organization, or emergency medical services personnel.

Health & Safety Code § 773.095(a), (c). You indicate portions of the responsive information consist of records of the System Performance Improvement Program, which we understand is a committee of the department. You indicate the information at issue does not consist of records made or maintained in the regular course of business. Based on your representations and our review, we agree the information at issue constitutes records relating to the review, evaluation, or improvement of a first responder organization or its personnel. Thus, we conclude this information is confidential under section 773.095 of the Health and Safety Code and must be withheld under section 552.101 of the Government Code on that basis.

Section 552.101 of the Government Code also encompasses section 143.089 of the Local Government Code. You state the department is a civil service organization under chapter 143 of the Local Government Code. *See* Local Gov’t Code §§ 143.401, .403(c) (each provision of chapter 143 applies to emergency medical services personnel covered by subchapter K). Section 143.089 requires a civil service organization to maintain two different types of personnel files relating to emergency medical services personnel (“EMS personnel”): a civil service file that the civil service director is required to maintain, and an internal file that the department may maintain for its own use. *Id.* § 143.089(a), (g). Information that reasonably relates to an EMS personnel’s employment relationship with the department is maintained in the department’s internal file pursuant to section 143.089(g) and is confidential and must not be released. *See id.* § 143.089(g); *see also City of San Antonio v. San Antonio Express-News*, 47 S.W.3d 556 (Tex. App.—San Antonio 2000, pet. denied); *City of San Antonio v. Texas Attorney General*, 851 S.W.2d 946, 949 (Tex. App.—Austin 1993, writ denied).

You state the information you have marked is maintained by the department in a confidential internal file for the EMS personnel in question pursuant to section 143.089(g). Thus, the information at issue is confidential under section 143.089(g) of the Local Government Code and must be withheld under section 552.101 of the Government Code.

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 “to facilitate 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)(A), (B), (C), (D), (E). 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.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those: (A) to whom disclosure is made to further the rendition of professional legal services to the client; or (B) reasonably necessary to transmit 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 you have marked consists of confidential communications between department employees and members of the law department, office of the medical director, and fire department. You state these communications were made in furtherance of the rendition of professional legal services to the department. You state the confidentiality of these communications 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 you have marked. Accordingly, the department may withhold the information you have marked under section 552.107(1) of the Government Code.

You state you will redact the information you have marked under section 552.117(a)(1) of the Government Code pursuant to section 552.024(c)(2) of the Government Code.³ However, we note the remaining information contains additional information subject to section 552.117(a)(1). Section 552.117(a)(1) of the Government Code excepts from disclosure the current and former home addresses and telephone numbers, emergency contact information, social security numbers, 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 information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). The department may only withhold information under section 552.117(a)(1) on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Therefore, if the individuals whose information is at issue timely requested confidentiality under section 552.024, the department must withhold the information you have marked, and the additional information we have marked, under section 552.117(a)(1) of the Government Code. Conversely, if the individuals at issue did not timely request confidentiality under section 552.024, the department may not withhold the marked and highlighted information under section 552.117(a)(1) of the Government Code.

Section 552.101 also 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). Upon review, we find the information you have marked and we have marked satisfy the standard articulated by the Texas Supreme Court in *Industrial Foundation*. However, we note the information at issue pertains to individuals who may be de-identified under section 552.117 of the Government Code if the employees at issue elected to withhold their personal information under section 552.117 of the Government Code. In that event, the department may not withhold the information pertaining to the de-identified individuals under section 552.101 in conjunction with common-law privacy. However, if the employees at issue did not elect to withhold their personal information under section 552.117, the department must withhold the information at issue under section 552.101 in conjunction with common-law privacy.

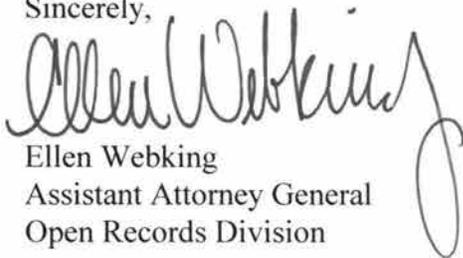
³Section 552.024(c)(2) of the Government Code authorizes a governmental body to redact information protected by section 552.117(a) of the Government Code without the necessity of requesting a decision under the Act if the current or former employee or official to whom the information pertains timely chooses not to allow public access to the information. *See* Gov't Code § 552.024(c)(2).

In summary, the department must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 773.095 of the Health and Safety Code. The department must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code. The department may withhold the information you have marked under section 552.107(1) of the Government Code. If the individuals whose information is at issue timely requested confidentiality under section 552.024, the department must withhold the information you have marked, and the additional information we have marked, under section 552.117(a)(1) of the Government Code. If the employees at issue did not elect to withhold their personal information under section 552.117, the department must withhold the information you have marked and we have marked under section 552.101 in conjunction with common-law privacy. 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,



Ellen Webking
Assistant Attorney General
Open Records Division

EW/akg

Ref: ID# 570542

Enc. Submitted documents

c: Requestor
(w/o enclosures)