



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

April 3, 1997

Ms. Jacqueline Cullom
City Attorney
City of New Braunfels
P.O. Box 311747
New Braunfels, Texas 78131-1747

OR97-0697

Dear Ms. Cullom:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 34009.

The City of New Braunfels (the "city") received an open records request for a copy of an internal affairs investigation report pertaining to an alleged instance of sexual conduct occurring at a city fire station. You contend the requested information is excepted from required public disclosure pursuant to sections 552.102 and 552.108 of the Government Code.

Section 552.102(a) is designed to protect public employees' personal privacy. The scope of section 552.102(a) protection, however, is very narrow. See Open Records Decision No. 336 (1982). See also Attorney General Opinion JM-36 (1983). The test for section 552.102(a) protection is the same as that for information protected by common-law privacy under section 552.101: the information must contain highly intimate or embarrassing facts about a person's *private* affairs such that its release would be highly objectionable to a reasonable person *and* the information must be of no legitimate concern to the public. *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 550 (Tex. App.--Austin 1983, writ ref'd n.r.e.). However, employee privacy under section 552.102(a) is less broad than common-law privacy under section 552.101 because of the greater public interest in disclosure of information regarding public employees. Open Records Decision Nos. 269 (1981), 169 (1977).

The information at issue pertains to a city fireman's actions while on duty, and as such cannot be deemed to be outside the realm of public interest. *See* Open Records Decision No. 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees). On the other hand, this office has held that section 552.102(a) may be invoked when information reveals "intimate details of a highly personal nature." Open Records Decision Nos. 315 (1982), 298 (1981), 284 (1981), 269 (1981), 224 (1979), 169 (1977). Some of the information you have submitted comports with this standard. We have marked the portions of the records at issue that the city must withhold to protect the privacy rights of the fireman and another individual.

We next address your contention that section 552.108 of the Government Code protects certain portions of the records at issue. Section 552.108 excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime," and "[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." Gov't Code § 552.108; *see Holmes v. Morales*, 924 S.W.2d 920 (Tex. 1996).

In this instance, you claim that the requested records potentially involve criminal matters. You have not explained, however, nor is it clear after reviewing the records at issue that the city has referred, or intends to refer, these records to a law enforcement agency in connection with this or any related matter. *See, e.g.,* Open Records Decision Nos. 474 (1987), 372 (1983) (section 552.108 may be invoked by any proper custodian of information which relates to incident). Absent such a demonstration, we conclude that you have not met your burden under section 552.108 and thus the city may not withhold any of the requested information pursuant to this exception. *See* Open Records Decision No. 586 (1991) (need of another governmental body to withhold requested information may provide compelling reason for nondisclosure under section 552.108).

Finally, we note that a small portion of the information at issue reveals the result of a polygraph examination. Section 19A of article 4413(29cc), V.T.C.S., which governs the release of polygraph examinations, provides in pertinent part:

(c) A licensed polygraph examiner, licensed trainee, or employee of a licensed polygraph examiner may disclose information acquired from a polygraph examination to:

(1) the examinee or any other person specifically designated in writing by the examinee;

- (2) the person . . . or governmental agency that requested the examination;
 - (3) members or their agents of governmental agencies such as federal, state, county, or municipal agencies that license, supervise, or control the activities of polygraph examiners;
 - (4) other polygraph examiners in private consultation, all of whom will adhere to this section; or
 - (5) others as may be required by due process of law.
- (d) A person for whom a polygraph examination is conducted or an employee of the person may disclose information acquired from the examination to a person described by Subdivisions (1) through (5) of Subsection (c) of this section.
- (e) The board or any other governmental agency that acquires information from a polygraph examination under Subdivision (3) of Subsection (c) of this section shall keep the information confidential.

Consequently, the city is barred by statute from releasing the results of the polygraph examination to the requestor unless the examinee authorizes the disclosure. *See also* Open Records Decision No. 430 (1985). We have marked the information made confidential under section 19A that the city must withhold.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Loretta R. DeHay
Assistant Attorney General
Open Records Division

LRD/RWP/rho

Ref.: ID# 34009

Enclosures: Marked documents

cc: Mr. James Dalton
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(w/o enclosures)