OFFICE OF THE ATTORNEY GENERAL · STATE OF TEXAS
JOHN CORNYN

February 29, 2000

Mr. Lee Shapleigh
Assistant County Attorney
County of El Paso
500 East San Antonio, Room 203
El Paso, Texas 79901

OR2000-0780

Dear Mr. Shapleigh:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 132663.

The El Paso County Sheriff's Department (the "department") received a request for information from an attorney who is representing three department employees, as follows:

> (1) All information pertaining to any and all training of recruits to and members of the [department] Special Response Team ("SRT") at the El Paso County Detention Facility from January 1, 1997 through [December 13, 1999].
>
> (2) All information pertaining to any and all injuries received by any recruits to or members of the SRT during any training from January 1, 1997 through [December 13, 1999].
>
> (3) All information pertaining to any reports, analysis, evaluations or investigations regarding any allegations of hazing, initiations, or excessive use of force in connection with the training of any recruits or members of the SRT from January 1, 1997 through [December 13, 1999], including, but not limited to, any investigation conducted by the Internal Affairs Section of the El Paso Sheriff's Department pertaining to any such allegations.
>
> (4) All videos of any SRT training exercises.
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> (5) Any documents, books, pamphlets, videos, printed material in any form,

> tapes, CDRoms, in the possession of the [department] that discuss or refer to the training or functions of officers assigned to such special duty teams such as the SRT or SWAT teams.
>
> (6) All written policies and procedures that pertain to the training, functions and duties of the SRT and the SWAT teams and the members and recruits of the SRT and SWAT teams.
>
> (7) All documents showing the membership of the SRT, the names of the [department] officers who are members of the SRT, the beginning and ending date of each officer's SRT membership, and the names and ranks of all supervisory officers of the SRT from January 1, 1997 through [December 13, 1999].

You assert that the requested information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.108, 552.111, 552.117, 552.119 and 552.122 of the Government Code. We have considered the exceptions you assert and reviewed the submitted information.

We note at the outset that you assert the information responsive to item "5" contains copyrighted material. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). However, a governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving a public information request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. Gov't Code § 552.301(e).

The department failed to provide this office with copies or representative samples of the responsive information until January 20, 2000.[1] You advise the department received the

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[1]The responsive information was received by this office on January 20, 2000. The information is indicated to have been sent to this office via "UPS Next Day Air."

request for information on December 13, 1999. The department thus failed to comply with the above-stated item (4).

Pursuant to section 552.302 of the Government Code, a governmental body's failure to timely submit to this office the information required in section 552.301(e) results in the legal presumption that the information is public and must be released. Gov't Code § 552.302. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). A demonstration that the requested information is deemed confidential by law or implicates a third party's interest is a compelling interest sufficient to negate this presumption. *See* Open Records Decision No. 150 (1977). Because the department failed to comply with section 552.301(e), the department has waived its section 552.103, 552.108, 552.111, and 552.122 assertions. *See, e.g.,* Open Records Decision No. 470 at 2 (1987) (except for information made confidential by law or that could impair the rights of third parties, the exceptions under the Public Information Act are generally permissive). Because sections 552.101, 552.102, 552.117, and 552.119 can operate to except from disclosure information made confidential by law or that could impair the rights of third parties, we shall address these assertions.

Section 552.101 excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. This section encompasses information made confidential by other statutes. We note at the outset that the release of some of the responsive documents is governed by the Medical Practice Act, found at Subtitle B of Title 3 of the Occupations Code. Section 159.002(b) states:

> A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

See Occ. Code § 159.002(b). We have marked with a red flag the documents that are subject to this provision. Sections 159.003 and 159.004 provide for exceptions to this confidentiality provision, which generally do not appear to apply here. However, a client of the requestor is indicated to be the patient in some of the information made confidential by this provision. Section 159.004(5) excepts information otherwise subject to this provision where the department has obtained written consent from the patient or the patient's authorized representative. *See* Occ. Code §§ 159.004(5), 159.005. Thus, unless the department receives proper written consent to release the information to the requestor, we determine you must withhold in their entirety those documents that are marked with a red flag.

Section 552.101 also encompasses the common law right to privacy and the constitutional right to privacy. Section 552.102 of the Government Code protects "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The protection of section 552.102 is the same as that of the common law right to privacy under section 552.101. *Hubert v. Harte-Hanks Tex. Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.). Information may be withheld from the public under the common law right to privacy when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities and (2) there is no legitimate public interest in its disclosure. *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977); Open Records Decision No. 611 at 1 (1992). The constitutional right to privacy protects two interests: the interest in independence in making certain important decisions related to the "zones of privacy" recognized by the United States Supreme Court, and the interest in avoiding disclosure of personal matters Open Records Decision No. 600 (1992) at 4 (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986)). Only information concerning the "most intimate aspects of human affairs" is within the scope of constitutional privacy. *See* Open Records Decision No. 455 (1987) at 5 (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490, 492 (5th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986)). Constitutional privacy doctrine is thus far narrower than its common law counterpart.

You state that responsive information "regarding injuries to recruits or member [sic] of [the] SRT during training is confidential by constitutional privacy law." We have examined the information and do not agree that the responsive documents contain any information that implicates constitutional privacy rights. However, we believe the documents do contain some information regarding injury or illness incidents where the information implicates the common law privacy of the subject. The documents which contain information implicated under the common law right to privacy are marked with blue flags, and we have marked the specific information on the documents that is excepted from disclosure. You must redact this information from the documents prior to their release, unless the individual who is the subject of the information is a client of the requestor *and* the requestor or client provides the department with a written release. *See* Gov't Code § 552.023 (granting a person or a person's authorized representative a special right of access to information that relates to the person where the information is otherwise excepted from disclosure in order to protect the person's privacy). *See also* Gov't Code § 552.229 (consent for release of information subject to section 552.023 must be in writing and signed by the person or the person's authorized representative). However, we believe most of the information, including the information regarding injuries, is not intimate or embarrassing and is thereby not excepted from required disclosure by common law privacy. *See, e.g.*, Open Records Decision No. 635 at 9 (1995) (discussing the types of injury or illness information that implicates common law privacy interests).

Section 552.117 of the Government Code excepts from required public disclosure information relating to the home address, home telephone number, and social security number of a current or former government employee or official, as well as information that reveals whether that employee or official has family members. Section 552.117 requires you to withhold this information for an official, employee, or former employee who requested that this information be kept confidential under section 552.024. *See* Open Records Decision Nos. 622 (1994), 455 (1987). You may not, however, withhold this information if the individual had not made a request for confidentiality under section 552.024 at the time the request at issue was made. Whether a particular piece of information is public must be determined at the time the request for it is made. Open Records Decision No. 530 at 5 (1989). However, such information of peace officers and certain other designated individuals must be withheld under this provision irrespective of whether the peace officer or designated individual made a confidentiality election under section 552.024. *See* Gov't Code § 552.117. We have marked the information in the submitted documents that is implicated by this provision.[2] It appears the subjects of the information are peace officers. Except as otherwise noted herein, you must therefore redact this marked information from the documents prior to their release.[3]

Section 552.119 excepts from public disclosure a photograph of a peace officer,[4] that, if released, would endanger the life or physical safety of the officer unless one of three exceptions applies. The three exceptions are: (1) the officer is under indictment or charged with an offense by information; (2) the officer is a party in a fire or police civil service hearing or a case in arbitration; or (3) the photograph is introduced as evidence in a judicial proceeding. This section also provides that a photograph exempt from disclosure under this section may be made public only if the peace officer gives written consent to the disclosure.

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[2]We note that the documents which you indicate are responsive to item "7" contain phone numbers, some of which may be excepted from disclosure under section 552.117. In Open Records Decision No. 506 at 5 (1988), this office stated that one purpose of section 552.117 is to protect public officials and employees from being harassed while at home. We thus concluded that *pager numbers* of peace officers, where the pager was purchased and privately owned by the peace officer, may be withheld from disclosure under section 552.117. However, section 552.117 does not except from disclosure *cellular mobile* phone numbers paid for by the governmental body and intended for use at *work* for business purposes. *See* Open Records Decision No. 506 at 5-6 (1988) (such cellular mobile phone numbers may be excepted by section 552.108 of the Government Code). As stated above, the department has waived its section 552.108 assertion. Because the documents at issue do not indicate the type of telephone number, we have not marked for redaction any of these phone numbers. However, if any of the phone numbers in these documents are home telephone numbers of peace officers, or are pager numbers for peace officers in which the pager is privately owned, you must redact this information prior to release of the documents, except as otherwise noted herein.

[3]If the peace officer who is the subject of the section 552.117 information is a client of the requestor, and the officer or that officer's authorized representative provides the department with a written consent to release the information, the department must release that information notwithstanding section 552.117. *See* above the discussion of Gov't Code §§ 552.023, 552.229.

[4]"Peace officer" as that term is defined by article 2.12 of the Code of Criminal Procedure.

This office has determined that this provision excepts such photographs from disclosure without the need for any specific showing that release of the photograph would endanger the life or safety of the officer. Open Records Decision No. 502 (1988). We find no photographs or images of peace officers in the responsive documents. We note, however, that portions of the responsive videotapes may depict peace officers whose images are excepted from disclosure by this provision, and it does not appear that any of the above-stated exceptions are applicable.[5] Therefore, unless the officer consents to the release, we agree that you may withhold the portions of the responsive videotapes that depict a peace officer under section 552.119, but only to the extent that the peace officer is depicted in a manner that he or she could be identified. Except as otherwise noted herein, you must release the responsive information to the requestor.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report

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[5]The videotapes appear to consist of educational presentations for training purposes. You do not advise this office whether any of the individuals appearing in the videotapes are Texas peace officers as defined by article 2.12 of the Code of Criminal Procedure. We note that some of the individuals are affirmatively indicated to be peace officers in other states. We believe section 552.119 of the Government Code operates to except from disclosure the images of only those individuals who are Texas peace officers as that term is defined in article 2.12 of the Code of Criminal Procedure. Moreover, section 552.119 does not except from disclosure the image of a Texas peace officer who is deceased. *See* Open Records Decision No. 536 (1989).

that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.–Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

Michael Garbarino
Assistant Attorney General
Open Records Division

MG/jc

Ref: ID# 132663

Encl. Submitted documents

cc: Ms. Mannie Kalman
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(w/o enclosures)