



April 24, 2001

Mr. Marcus W. Norris  
City Attorney  
City of Amarillo  
P.O. Box 1971  
Amarillo, Texas 79105-1971

OR2001-1645

Dear Mr. Norris:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 146335.

The City of Amarillo (the "city") received a request for eighteen categories of information relating to the Amarillo Police Department, an individual who died while in the custody of the department, and other matters. You claim that portions of the requested information are excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We assume that the city has released all of the remaining information to which the requestor seeks access; if not, you must do so at this time. *See* Gov't Code §§ 552.301(a), .302; Open Records Decision No. 664 (2000). We have considered the exceptions you raise and have reviewed the information you submitted. We also have considered the comments that the requestor submitted to this office. *See* Gov't Code § 552.304 (permitting any person to submit comments as to why requested information should or should not be released).

We first must consider whether the city complied with section 552.301 of the Government Code in requesting this decision. Section 552.301 prescribes procedures that a governmental body must follow in asking this office to decide whether requested information may be withheld from public disclosure. Section 552.301(b) provides that "[t]he governmental body must ask for the attorney general's decision and state the exceptions that apply . . . not later than the 10<sup>th</sup> business day after the date of receiving the written request [for information]." Gov't Code § 552.301(b). Section 552.301(d) provides as follows:

(d) A governmental body that requests an attorney general decision under Subsection (a) must provide to the requestor . . . not later than the 10<sup>th</sup> business day after the date of receiving the requestor's written request [for information]:

(1) a written statement that the governmental body wishes to withhold the requested information and has asked for a decision from the attorney general about whether the information is within an exception to public disclosure; and

(2) a copy of the governmental body's written communication to the attorney general asking for the decision or, if the governmental body's written communication to the attorney general discloses the requested information, a redacted copy of that written communication.

Gov't Code § 552.301(d). Section 552.302 provides that "[i]f a governmental body does not request an attorney general decision as provided by Section 552.301 and provide the requestor with the information required by Section 552.301(d), the information requested in writing is presumed to be subject to required public disclosure and must be released unless there is a compelling reason to withhold the information." Gov't Code § 552.302.

By letter dated March 27, 2001, the requestor contends that the city did not request this decision within the 10-business-day period provided by section 552.301(b). The requestor also asserts that the city did not comply with section 552.301(d). Accordingly, under subsections (b) and (c) of section 552.303, we asked the city to provide the following additional information:

- (1) Your written statement to the requestor, under Gov't Code § 552.301(d)(1), that the city wishes to withhold requested information and has asked for an attorney general decision;
- (2) The written communication to the attorney general that you provided to the requestor under Gov't Code § 552.301(d)(2); and
- (3) Proof of the date(s) on which you provided this information to the requestor.

In response, you inform this office that you mailed an actual copy of your request for this decision to the requestor on the same day that you mailed that document to this office. You further explain that "[i]n a subsequent telephone conversation with Mr. Lenahan he indicated he had not received the copy, so it was faxed to him that same day, allowing him the opportunity to send comments to the A.G., too."

Although you state that the city mailed its request for this decision to this office on February 14, the supporting documentation that you provided reflects that the actual date of mailing was February 15. Nonetheless, we are satisfied that the city timely requested this decision under section 552.301(b). But the question of whether the city also complied with section 552.301(d) presents a fact issue. This office cannot resolve disputes of fact in the opinion process. *See* Open Records Decision Nos. 592 at 2 (1991), 552 at 4 (1990), 435 at 4 (1986). Where a fact issue cannot be resolved as a matter of law, we must rely on the facts

alleged to us by the governmental body requesting our opinion, or upon those facts that are discernible from the documents submitted for our inspection. *See* Open Records Decision No. 552 at 4 (1990). Therefore, based on your representation that you mailed an actual copy of your request for this decision to the requestor on the same day that you mailed that document to this office, we conclude that the city complied with section 552.301(d) in asking for this decision. Accordingly, we will consider the city's exceptions to the disclosure of the submitted information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception encompasses information that is made confidential by other statutes. You assert that the submitted documents contain criminal history record information ("CHRI") that is confidential under federal law and subchapter F of chapter 411 of the Government Code. Federal regulations prohibit the release of CHRI maintained in state and local CHRI systems to the general public. *See* 28 C.F.R. § 20.21(c)(1) ("Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given.") and (c)(2) ("No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself."). Section 411.083 of the Government Code provides that any CHRI maintained by the Department of Public Safety (the "DPS") is confidential. Gov't Code § 411.083(a). Similarly, CHRI obtained from the DPS pursuant to statute also is confidential and may be disclosed only in very limited instances. *Id.* § 411.084; *see also id.* § 411.087 (restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies). Criminal history record information obtained from the NCIC and TCIC must be withheld from the requestor under section 552.101 in conjunction with federal law and subchapter F of chapter 411 of the Government Code. We have marked the criminal history record information that the city must withhold.

The submitted documents also include juvenile law enforcement records that are confidential under former section 51.14(d) of the Family Code. Prior to its repeal by the Seventy-fourth Legislature, section 51.14(d) of the Family Code provided for the confidentiality of juvenile law enforcement records. Law enforcement records pertaining to conduct occurring before January 1, 1996 are governed by the former section 51.14(d), which was continued in effect for that purpose. *See* Act of May 27, 1995, 74th Leg., R.S., ch. 262, § 100, 1995 Tex. Gen. Laws 2517, 2591. We have marked records that concern juvenile conduct that occurred prior to January 1, 1996. Those records are confidential under former section 51.14(d) of the Family Code and must be withheld from disclosure under section 552.101 of the Government Code.

You also raise section 552.101 in conjunction with the Medical Practice Act (the "MPA"), as codified at subtitle B of title 3 of the Occupations Code. *See* Occ. Code § 151.001. The MPA governs the disclosure of medical records. Section 159.002 of the MPA provides in relevant part:

(b) 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.

(c) A person who receives information from a confidential communication or record as described by this chapter . . . may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(b), (c). The Medical Practice Act includes provisions that govern the disclosure of information that it encompasses. *See* Occ. Code §§ 159.003, .004, .005, .006. This office has determined that in governing access to a specific subset of information, the MPA prevails over the more general provisions of the Public Information Act.<sup>1</sup> We have marked medical records that the city must withhold from the requestor unless the Medical Practice Act permits their release.

Chapter 1701 of the Occupations Code governs the Texas Commission on Law Enforcement Officer Standards and Education. Section 1701.306 provides in relevant part:<sup>2</sup>

(a) The commission may not issue a license to a person as an officer or county jailer unless the person is examined by:

(1) a licensed psychologist or by a psychiatrist who declares in writing that the person is in satisfactory psychological and emotional health to serve as the type of officer for which a license is sought; and

(2) a licensed physician who declares in writing that the person does not show any trace of drug dependency or illegal drug use after a physical examination, blood test, or other medical test.

(b) An agency hiring a person for whom a license as an officer or county jailer is sought shall select the examining physician and the examining psychologist or psychiatrist. The agency shall prepare a report of each declaration required by Subsection (a) and shall maintain a copy of the report on file in a format readily accessible to the commission. *A declaration is not public information.*

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<sup>1</sup>*See* Open Records Decision No. 598 (1991). The Seventy-sixth Legislature repealed the predecessor statute, article 4495b of Vernon's Texas Civil Statutes, in enacting the Occupations Code. *See* Act of May 13, 1999, 76<sup>th</sup> Leg., R.S., ch. 388, §§ 6, 7, 1999 Tex. Gen. Laws 1431, 2439-40. The legislation was a non-substantive codification.

<sup>2</sup>The Seventy-sixth Legislature enacted section 1701.306 of the Occupations Code and repealed section 415.057 of the Government Code without substantive change.

Occ. Code § 1701.306(a), (b) (emphasis added). We have marked records that the city must withhold under section 1701.306 of the Occupations Code.

Section 552.101 also protects information that is encompassed by the common law right to privacy. Information must be withheld from disclosure under section 552.101 in conjunction with common law 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. *See Industrial Found. v. Texas Ind. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The matters considered to be intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* include sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimacy, psychiatric treatment, attempted suicide, and injuries to reproductive organs. *Id.* at 683; *see also* Open Records Decision No. 659 at 5 (1999). We have marked information that the city must withhold under section 552.101 in conjunction with common law privacy.

You also raise section 552.108 of the Government Code, the “law enforcement exception,” which 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 . . . release of the internal record or notation would interfere with law enforcement or prosecution[.]” Gov’t Code § 552.108(b)(1); *see also* Open Records Decision No. 531 at 2 (1989) (stating that statutory predecessor protected records held by a law enforcement agency if their release would interfere with law enforcement and crime prevention). On previous occasions, this office has concluded that section 552.108 protects certain kinds of law enforcement information, the disclosure of which might compromise the security or operations of a law enforcement agency. *See, e.g.*, Open Records Decision Nos. 531 (1989) (detailed guidelines regarding a police department’s use of force policy), 508 (1988) (information relating to future transfers of prisoners could be protected), 413 (1984) (sketch showing security measures for forthcoming execution), 211 (1978) (information relating to undercover narcotics investigations), 143 (1977) (log revealing use of electronic eavesdropping equipment), 127 (1976) (list of persons who entered or left Governor’s Mansion).

You argue that the release of information relating to use-of-force policy, tactics, techniques, and training “would place individuals at an advantage in confrontation with police officers – both by being able to predict the officer’s actions and, by knowing how far to ‘push [sic] an officer before the officer will resort to greater force.” You assert that the disclosure of such information would “clearly interfere[] with the law enforcement functions of the [police] department and, jeopardize[] the lives and safety of police officers.” Having considered your arguments and reviewed the information in question, we have marked information that the city may withhold under section 552.108(b)(1).

Section 552.117(2) of the Government Code excepts from disclosure the home address, home telephone number, and social security number of a peace officer, as defined by article 2.12 of the Code of Criminal Procedure, and information that reveals whether a peace officer has family members, regardless of whether the peace officer complies with section 552.024 of the Government Code. We have marked information that the city must withhold under section 552.117(2).

Lastly, section 552.130 of the Government Code excepts from disclosure information relating to motor vehicle records, including information that relates to “a motor vehicle operator’s or driver’s license or permit issued by an agency of this state[.]” Gov’t Code § 552.130(a)(1). We have marked information that the city must withhold under section 552.130.

In summary, portions of the submitted records are confidential under section 552.101 of the Government Code in conjunction with federal law and subchapter F of chapter 411 of the Government Code, former section 51.14(d) of the Family Code, section 1701.306 of the Occupations Code, and common law privacy. Medical records must be withheld under the Medical Practice Act unless the MPA permits their release. The city may withhold the requested records relating to use-of-force policy, tactics, techniques, and training under section 552.108. The city must withhold personal information relating to peace officers under section 552.117(2) and information relating to motor vehicle records under section 552.130. The remaining information is not excepted from disclosure and must be released.

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

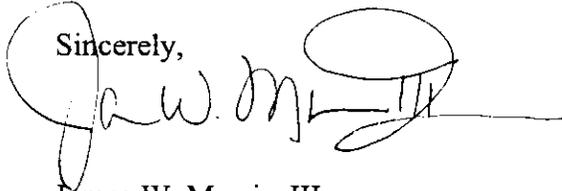
records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report 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).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

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,

A handwritten signature in black ink, appearing to read "J.W. Morris, III", with a large, stylized flourish at the end.

James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/tr

Ref: ID# 146335

Encl: Marked documents

cc: Mr. Marc Lenahan  
8111 LBJ Freeway, Suite 1065  
Dallas, Texas 75251-1313  
(w/o enclosures)