



OFFICE of the ATTORNEY GENERAL  
GREG ABBOTT

April 22, 2003

Ms. Rebecca Brewer  
Abernathy, Roeder, Boyd, & Joplin, P.c.  
P.o. Box 1210  
McKinney, Texas 75070-1210

OR2003-2689

Dear Ms. Brewer:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 179834.

The City of Wylie (the "city"), which you represent, received a request for statements used in the requestor's dismissal and information relating to a polygraph test taken by the requestor. You claim that the requested information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.<sup>1</sup>

We begin by noting that the requested records include information obtained during the course of a polygraph examination. 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 section encompasses information made confidential by statutes outside of the Public Information Act (the "Act"). Section 1703.306 of the Occupations Code governs information obtained during the course of a polygraph examination and provides in pertinent part:

(a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:

(1) the examinee or any other person specifically designated in writing by the examinee[.]

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<sup>1</sup>In addition to the responsive information, you have submitted a document that was created after this request for information was received. Because this document, which we have marked, is not encompassed by this request, we do not address it in this ruling.

Occ. Code § 1703.306(a)(1). Here, the requestor is the examinee. Access to polygraph information is governed by section 1703.306 of the Occupations Code. *See* Occ. Code § 1703.306. Section 1703.306(a)(1) expressly provides the examinee with access to the information. Accordingly, the city must release to the requestor his polygraph information, including the videotape made of the examination, without redactions.

We turn now to the remaining submitted information. You assert that all of this information is confidential under section 261.201 of the Family Code. Section 261.201, which is also incorporated into the Act by section 552.101 of the Government Code, provides in part as follows:

(a) The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a). You inform us that three of the requested witness statements were reviewed by the Wylie Police Department, which conducted an investigation into suspected abuse. Based on your representation, we conclude that these statements constitute “working papers used or developed” in an investigation under chapter 261 and are therefore subject to section 261.201. You have not informed us whether the police department has adopted a rule governing release of this type of information. We therefore assume no such rule exists. Based on this assumption, we conclude that these three statements are confidential in their entirety under section 261.201, and they must be withheld under section 552.101. However, because you inform us that the remaining submitted information was not forwarded to the police department, we find that it does not constitute “working papers” of an investigation conducted under chapter 261, is not made confidential under section 261.201, and may not be withheld under section 552.101 on that basis.

You also argue that the submitted information is protected by the common law right of privacy. Section 552.101 of the Government Code also encompasses the common law right of privacy, which protects information if it (1) contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person and (2) is not of legitimate concern to the public. *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668, 685 (Tex. 1976). The types of information considered intimate and

embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. Generally only the information that either identifies or tends to identify a victim of sexual assault or other sex-related offense may be withheld under common law privacy. However, a governmental body is required to withhold an entire report when identifying information is inextricably intertwined with other releasable information or when the requestor knows the identity of the alleged victim. *See* Open Records Decisions Nos. 393 (1983), 339 (1982); *see also Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.-El Paso 1992, *writ denied*) (identity of witnesses to and victims of sexual harassment was highly intimate or embarrassing information and public did not have legitimate interest in such information); Open Records Decision No. 440 (1986) (detailed descriptions of serious sexual offenses must be withheld). In this instance, the requestor knows the identity of the victim of alleged sexual misconduct; thus, withholding only the identifying information from the requestor would not preserve the victim's common law right to privacy. We therefore conclude that the city must withhold any written statement or document as well as any statement contained in the submitted videotape, aside from the polygraph examination, that refers to this individual. To the extent the submitted information contains documents or videotaped statements that do not refer to this alleged sexual misconduct victim, we find that such documents and statements are not protected by common law privacy, and they may not be withheld under section 552.101 on that basis..

We note, however, that the submitted records include personal information relating to current and former city employees. Section 552.117(1) of the Government Code excepts from public disclosure the present and former home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who timely request that this information be kept confidential under section 552.024. Therefore, the city must withhold the listed information of any employee who elected, prior to the city's receipt of this request, to keep such information confidential. *See* Open Records Decision No. 530 at 5 (1989) (whether particular information is protected by predecessor to section 552.117(1) must be determined at time request for it is made).<sup>2</sup> Because information is excepted under section 552.117 only to protect the privacy interests of employees and their families, the requestor has a special right of access to information concerning him. *See* Gov't Code § 552.023 (governmental body may not deny access to information to person to whom information relates on grounds that information is considered confidential solely on the basis of privacy).

Finally, social security numbers contained in the requested information may also be excepted from disclosure under section 552.101. The 1990 amendments to the federal Social Security

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<sup>2</sup>As to the videotaped statements that do not refer to the sexual misconduct victim, if such statements contain personal information relating to individuals who made timely elections under section 552.024 and the city lacks the technology necessary to remove references to such information, then the city must withhold those videotaped statements in their entirety.

Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 (1994). We have no basis for concluding that the social security numbers are confidential under section 405(c)(2)(C)(viii)(I) and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Public Information Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security numbers, the city should ensure that such numbers are not obtained or maintained pursuant to any provision of law enacted on or after October 1, 1990. However, because the laws regarding the confidentiality of social security numbers are intended to protect individuals' privacy, the requestor has a special right of access to his own social security number. *See* Gov't Code § 552.023(b).

In summary, the city must release the polygraph information, including the videotape of the examination, in accordance with section 1703.306 of the Occupations Code. Pursuant to sections 552.101 and 261.201, the city must withhold the witness statements that were used in the police department's investigation of suspected abuse under chapter 261. To the extent the remaining submitted information contains videotaped or written statements or documents that refer to the victim of the alleged sexual misconduct, such records must be withheld under section 552.101 in conjunction with common law privacy. To the extent the submitted information includes documents or statements that do not refer to this victim, such records are not protected by common law privacy and may not be withheld on that basis. With respect to such records, the city must withhold the present and former home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees, other than the requestor, who timely requested that this information be kept confidential under section 552.024. Social security numbers other than the requestor's must be withheld if obtained or maintained pursuant to a provision of law enacted on or after October 1, 1990. All other submitted information must be released to this 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 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 Dep't of Pub. 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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Denis C. McElroy  
Assistant Attorney General  
Open Records Division

DCM/lmt

Ref: ID# 179834

Enc. Submitted documents

c: Mr. Alan Gibson  
5216 Stoney Trail  
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(w/o enclosures)