



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

July 24, 2003

Ms. Julie B. Ross
Karger Key Barnes & Lynn
1320 South University Drive, Suite 720
Fort Worth, Texas 76107

OR2003-5117

Dear Ms. Ross:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 184800.

The City of Mineola Police Department (the "department"), which you represent, received a request for any and all investigations of a named individual, including internal affairs investigations, records of disciplinary action taken, and copies of the named individual's resignation. You state that you have released some responsive information to the requestor. You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.108, and 552.1175 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.²

You argue that one page of Exhibit 3, the video tapes in Exhibit 3, and all of Exhibit 4 are excepted by section 552.108 of the Government Code. Section 552.108(a) excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime." Generally, a governmental body claiming section 552.108 must reasonably explain, if the information does not supply the explanation on its face, how and why the release of the requested information would interfere with law enforcement. See Gov't Code §§ 552.108(a)(1), (b)(1), .301(e)(1)(a); see also *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977).

¹You also claim the submitted information is excepted from disclosure under section 552.022. However, this section is not an exception to disclosure but instead constitutes an illustrative list of types of information that are public and that may not be withheld unless "expressly confidential under other law."

²As you did not submit to this office written comments stating the reasons why section 552.103 would allow the submitted information to be withheld, we find that you have waived that exceptions. See Gov't Code §§ 552.301, .302.

You indicate that portions of the requested information involve the arrest of an individual and that the documents are part of the department's internal investigation into misconduct by a former officer. Internal affairs investigations are generally administrative, as opposed to criminal, in nature. Unless the internal affairs investigation results in a criminal investigation, we do not believe that either section 552.108(a)(1) or 552.108(b)(1) was intended to protect records of such an investigation. See *Morales v. Ellen*, 840 S.W.2d 519, 526 (Tex. App.—El Paso 1992, writ denied) (predecessor statute to section 552.108 not applicable where no criminal investigation resulted). In this instance, you have not demonstrated either that the arrest report involves an ongoing case or that the internal affairs investigation has resulted in a criminal investigation. Therefore, we conclude that you have not shown how release of any of the information at issue would interfere with law enforcement for purposes of section 552.108(a)(1) or (b)(1). See *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), writ *ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases).

You argue that a portion of Exhibit 3 is excepted by section 552.107 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 "for the purpose of facilitating 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 Texas 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 to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of 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, no writ). 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).

Upon review of the portion of Exhibit 3 that you have marked under section 552.107, we conclude that it documents a confidential attorney-client communication for purposes of section 552.107. Therefore, you may withhold the information you have marked under section 552.107.

We note that portions of the information in Exhibit 3 are confidential under section 552.117(2) of the Government Code. The department must withhold those portions of the records that reveal any licensed peace officer's home address, home telephone number, social security number, and family member information. You must withhold the information we have marked under section 552.117(2).³ We note that you have submitted audiotapes and a videotape that contain information that reveals whether peace officers have family members. You must withhold that information under section 552.117(2).

We next address your argument that some of the information in Exhibit 3 is excepted under section 552.101 and the informer's privilege. Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." The informer's privilege, incorporated into the Public Information Act by section 552.101, protects the identity of persons who report violations of the law to officials having the duty of enforcing particular laws. See *Roviaro v. United States*, 353 U.S. 53, 59 (1957). The informer's privilege does not, however, apply to information that does not describe alleged illegal conduct. Open Records Decision No. 515 at 5 (1988). For example, the informer's privilege aspect of section 552.101 does not protect memoranda and written statements complaining of a fellow employee's work performance when those statements do not reveal the suspected violation of specific laws to the officials charged with enforcing those laws. See Open Records Decision Nos. 579 at 8 (1990), 515 at 3 (1988). In addition, the informer's privilege protects the content of the communication only to the extent that it identifies the informant. *Roviaro*, 353 U.S. at 60. In this instance, you have not demonstrated that the individuals in question reported a violation of law. Therefore, you may not withhold any of the submitted information under section 552.101 and the informer's privilege.

We next address whether any of the submitted information is confidential under common-law privacy. Section 552.101 encompasses the doctrines of common-law privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found.*

³Based on this finding, we need not reach your argument under section 552.1175 of the Government Code.

v. *Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type 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. 540 S.W.2d at 683.

This office has found that the following types of information are excepted from required public disclosure under common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990), information concerning the intimate relations between individuals and their family members, *see* Open Records Decision No. 470 (1987), and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982).

You argue that Exhibit 3 is excepted in its entirety under section 552.101 and common-law privacy.⁴ We find, however, that the majority of the information in question relates to the workplace behavior and performance of a public employee and thus is a matter of legitimate public interest. Therefore, none of this information is excepted from disclosure under section 552.101. *See also* Open Records Decision Nos. 473 at 3 (1987) (fact that public employee receives less than perfect or even very bad performance evaluation is not private), 470 at 4 (1987) (public employee's job performance does not generally constitute private affairs), 444 at 5 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employee), 423 at 2 (1984) (information is not private if it is of sufficient legitimate public interest, even if person of ordinary sensibilities would object to release on grounds that information is highly intimate or embarrassing), 405 at 2 (1983) (manner in which public employee performed his or her job cannot be said to be of minimal public interest). However, we have marked portions of Exhibit 3 and Exhibit 4 that are highly intimate and embarrassing and are of no legitimate public concern. In addition, the submitted audiotapes contain the same information that we have marked in the paper documents. You must withhold the portions of the paper documents that we have marked under section 552.101 and common-law privacy as well as any portions of the audiotapes and videotape that correspond to our markings.

⁴We note that you also raised section 552.102 in your initial brief to this office. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the Act. *See Industrial Found.*, 540 S.W.2d at 683-85. Accordingly, we will consider your section 552.101 and section 552.102 claims together.

The submitted documents contain social security numbers. Social security numbers may be withheld in some circumstances under section 552.101 of the Government Code. A social security number or "related record" may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments 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 id.* We have no basis for concluding that the social security numbers in the document 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 number, you should ensure that no such information was obtained or is maintained by the department pursuant to any provision of law, enacted on or after October 1, 1990.

Section 552.119 of the Government Code excepts from public disclosure a photograph of a peace officer 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. Open Records Decision No. 502 (1988). The submitted information includes a videotape that depicts peace officers and it does not appear that any of the exceptions are applicable. You have not informed us that the peace officers have executed any written consent to disclosure. Thus, the department must withhold any portion of the submitted videotape that include the image of a peace officer under section 552.119, unless the department obtains written consent from the peace officers for their disclosure. The remaining portions of the videotape are not protected under section 552.119 of the Government Code and must be released to the requestor. If, however, the department is unable to obscure the faces of peace officers on the videotape, or otherwise remove the portions of the videotape that include the images of peace officers, then the department must withhold the videotape in its entirety under section 552.119.

Finally, we note that the submitted materials contain information that is confidential under section 552.130 of the Government Code. Section 552.130 provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]

(2) a motor vehicle title or registration issued by an agency of this state[.]

Upon review of the submitted information, we are unable to determine whether some of the driver's license information or license plate numbers we have marked were issued by the State of Texas. To the extent the driver's license information and license plate numbers we have marked were issued by the State of Texas, they must be withheld under section 552.130.

In summary, the department may withhold the information you have marked under section 552.107. You must withhold the information we have marked under section 552.117(2) and the information on the audiotapes and videotape that reveals whether a peace officer has family members. You must withhold the portions of the submitted information that we have marked under section 552.101 and common-law privacy and the portions of the audiotapes and videotape that correspond to those markings. Social security numbers may be confidential under federal law. You must withhold the portions of the submitted videotape that include images of police officers, or if you are unable to obscure the faces of peace officers on the videotape or otherwise remove the portions of the videotape that include the images of peace officers, then the department must withhold the videotape in its entirety under section 552.119. To the extent the driver's license information and license plate numbers we have marked were issued by the State of Texas, they must be withheld under section 552.130. You must release the remaining 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

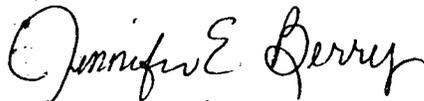
fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

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,



Jennifer E. Berry
Assistant Attorney General
Open Records Division

JEB/sdk

Ref: ID# 184800

Enc: Submitted documents

c: Mr. David Chenault
Reporter
The Mineola Monitor
P.O. Box 210
Mineola, Texas 75773
(w/o enclosures)