



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 20, 2003

Deputy MW Morgan
Chief Deputy
Parker County Sheriff's Department
129 Hogle Street
Weatherford, Texas 76086

OR2003-8361

Dear Deputy Morgan:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 191374.

The Parker County Sheriff's Department (the "department") received a request for "[a]ny incident report, offense report, internal police reports, complaints filed or citations issued against any officer alleging assault, stalking, threats, or harassment toward spouses, boyfriends or girlfriends or children" during a specified time interval. We understand you to assert that the department is not required to comply with the request under the Public Information Act (the "Act"). In the alternative, you claim that the responsive information is excepted from disclosure under sections 552.101, 552.108, 552.117, 552.119, and 552.130 of the Government Code. We have considered your arguments and have reviewed the submitted information.

Initially, we address your argument that the request is too broad and unspecific to allow the department to locate the requested reports, and that the department is not obligated to perform research to accommodate the request. We agree that the Act does not require a governmental body to perform legal research, or to answer factual questions or create new information in responding to a request. *See* Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 534 at 2-3 (1989). Nevertheless, a governmental body that receives a request for information under the Act must make a good faith effort to relate the request to any responsive information that is within the governmental body's custody or

control. *See* Open Records Decision No. 561 at 8-9 (1990). Because you have submitted information responsive to the request, we will address your claimed exceptions to disclosure under the Act.

We first note that the submitted information includes an arrest warrant and supporting affidavit. The 78th Legislature recently amended article 15.26 of the Code of Criminal Procedure to add language providing:

The arrest warrant, and any affidavit presented to the magistrate in support of the issuance of the warrant, *is public information*, and beginning immediately when the warrant is executed the magistrate's clerk shall make a copy of the warrant and the affidavit available for public inspection in the clerk's office during normal business hours. A person may request the clerk to provide copies of the warrant and affidavit on payment of the cost of providing the copies.

Act of May 31, 2003, 78th Leg., R.S., ch. 390, § 1, Tex. Sess. Laws Serv. 1631 (to be codified as amendment to Crim. Proc. Code art. 15.26) (emphasis added). Thus, article 15.26 of the Code of Criminal Procedure makes an arrest warrant and an arrest warrant affidavit public. As a general rule, the exceptions found in chapter 552 of the Government Code do not apply to information that is made public by other statutes. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Therefore, the arrest warrant and supporting affidavit that we have marked must be released to the requestor.

Next, we note that "information that is also contained in a court record" is subject to required public disclosure under section 552.022(a)(17) of the Government Code. Section 552.022(a) of the Government Code provides that this information is not excepted from required disclosure under the Act unless the information is expressly confidential under other law. Gov't Code § 552.022(a)(17). Therefore, the public court records that we have marked may only be withheld from disclosure to the extent that it is confidential under "other law." *See id.* You claim that these records are excepted from disclosure pursuant to section 552.108 of the Government Code. However, section 552.108 is a discretionary exception under the Act and, as such, do not constitute "other law" for purposes of section 552.022(a)(17).¹ Consequently, we do not address your section 552.108 claim with regard to these records, and they must be released, except as noted below.

¹ Discretionary exceptions are intended to protect only the interests of the governmental body as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See* Open Records Decision Nos. 586 (1991) (governmental body may waive section 552.108), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions, therefore, do not constitute "other law" that makes information confidential.

We now address your claim under section 552.108, as it is potentially the broadest. Section 552.108 provides, in relevant part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

....

(2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication

A governmental body claiming section 552.108(a)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication.

You inform this office that one of the submitted investigations pertains to a criminal case that was investigated by the department. You state that the case did not result in conviction or deferred adjudication. Therefore, we agree that section 552.108(a)(2) is applicable to this information. However, section 552.108 does not except from disclosure "basic information about an arrested person, an arrest, or a crime." Gov't Code § 552.108(c). We believe such basic information refers to the information held to be public in *Houston Chronicle Publishing Company 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). *See also* Open Records Decision No. 127 at 3-4 (1976) (summarizing types of information deemed public by *Houston Chronicle*). Thus, with the exception of basic information, which must be released, the department may withhold the information in this investigation under section 552.108.

You inform us that the remaining submitted information relates to an internal affairs investigation conducted by the department in which the accused officer resigned prior to formal disciplinary findings and action. You also state that criminal allegations relating to this matter were brought by another agency and that the case did not result in conviction or deferred adjudication. We note that section 552.108 may be invoked by any proper custodian of information which relates to an investigation or prosecution. *See, e.g.*, Open Records Decision Nos. 474 (1987), 372 (1983); *see also* 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). However, you have not represented that the agency that brought criminal allegations against the officer has requested that this information be withheld. Further, we note that section 552.108 is generally not applicable to the records of an internal affairs investigation that is purely administrative in nature. *See Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. Civ. App.--El Paso 1992, writ

denied) (statutory predecessor not applicable to internal investigation that did not result in criminal investigation or prosecution); Open Records Decision No. 350 at 3-4 (1982). You do not inform us, and the submitted information does not otherwise indicate, that the internal affairs investigation conducted by the department resulted in any criminal charges. Moreover, the submitted investigative records reflect that the subject of the investigation was notified that information provided to internal affairs investigators could not be used for the purposes of criminal proceedings. *See Garrity v. New Jersey*, 385 U.S. 493, 500 (1967) (“protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office”). We therefore conclude that the department has not demonstrated that the information pertaining to this investigation is excepted from disclosure under section 552.108 of the Government Code.

We note that the submitted information to be released includes some information that is subject to section 552.117(a)(2) of the Government Code. Section 552.117(a)(2) excepts from public disclosure a peace officer's² current and former home addresses, home telephone number, social security number, and information indicating whether the peace officer has family members, regardless of whether the peace officer complies with section 552.024 or 552.1175 of the Government Code. We have marked the types of information that the department must withhold under section 552.117(a)(2).

Further, we note that the submitted information to be released contains information pertaining to peace officers in their capacity as criminal suspects. The protections of section 552.117 only apply to information that the department holds in its capacity as an employer. Section 552.1175, which also applies to current peace officers, is the applicable exception under these circumstances and provides in part that

(b) Information that relates to the home address, home telephone number, or social security number of an individual to whom this section applies, or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

- (1) chooses to restrict public access to the information; and
- (2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

² “Peace officer” is defined by article 2.12 of the Code of Criminal Procedure.

Gov't Code § 552.1175(b). However, you do not inform this office, nor does any of the submitted information indicate, whether either of the officers whose information is at issue have notified the department of his election of confidentiality for this information in accordance with the above-cited subsections 552.1175(b)(1) and (2). *See, e.g.*, Open Records Decision No. 678 (2003) (concluding that county voter registrar was authorized to release voter information made confidential under section 552.1175 of Government Code to another governmental entity, but that transferred information would not be confidential in possession of transferee until that governmental entity receives a section 552.1175 notification). If the peace officers comply with section 552.1175(b), the department must withhold the types of information that we have marked pursuant to section 552.1175. If not, the department must release this information.

We now turn to your privacy claim under section 552.101 of the Government Code in relation to the remaining submitted information. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by common-law privacy and excepts from disclosure private facts about an individual. *See Industrial Foundation of the South v. Texas Industrial Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). Information must be withheld from the public under 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 id.* at 685; *see also* Open Records Decision No. 611 at 1 (1992). 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. This office has also 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), and personal financial information pertaining to voluntary financial decisions and financial transactions that do not involve public funds, *see* Open Records Decision Nos. 600 (1992), 545 (1990).

On the other hand, a public employee's job performance does not generally constitute his or her private affairs. Open Records Decision No. 470 (1987); *see* Open Records Decision Nos. 329 at 2 (1982) (information relating to complaints against public employees and discipline resulting therefrom is not protected under former section 552.101 or 552.102), 208 at 2 (1978) (information relating to complaint against public employee and disposition of complaint is not protected under either constitutional or common-law right of privacy). *See also* Open Records Decision No. 444 at 5-6 (1986) (public has genuine interest in information concerning public employee's job performance and reasons for dismissal, demotion or promotion). Upon consideration of your arguments and our review of the

information at issue, we find that none of it is protected by the common-law right to privacy. Therefore, the department may not withhold any of this information under section 552.101.

You also contend that a photograph of one of the investigated officers is excepted under section 552.119 of the Government Code. Section 552.119 provides:

(a) A photograph that depicts a peace officer as defined by Article 2.12, Code of Criminal Procedure, or a security officer commissioned under Section 51.212, Education Code, the release of which would endanger the life or physical safety of the officer, is excepted from [required public disclosure] unless:

- (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.

(b) A photograph exempt from disclosure under Subsection (a) may be made public only if the peace officer or security officer gives written consent to the disclosure.

Gov't Code § 552.119. In this instance, you have not demonstrated, nor is it apparent from our review of the submitted information, that release of the photograph at issue would endanger the life or physical safety of the officer. We therefore determine that the department may not withhold the photograph of the officer in the submitted documents pursuant to section 552.119.

Finally, section 552.130 excepts from disclosure information relating to a driver's license or motor vehicle title or registration issued by an agency of this state. Gov't Code § 552.130. Thus, the department must withhold the driver's license numbers we have marked under section 552.130.

In summary, you must release the marked arrest warrant and supporting affidavit pursuant to article 15.26 of the Code of Criminal Procedure. The court records we have marked must be released pursuant to section 552.022(a)(17), except that the information we have marked under section 552.1175 must be withheld if that provision applies. You may withhold the information pertaining to the criminal investigation conducted by the department under section 552.108, except that basic information must be released. You must withhold the types of information we have marked under section 552.117(a)(2). You must withhold the

driver's license numbers we have marked under section 552.130. The remaining submitted information 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).

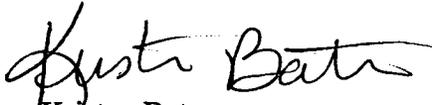
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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,



Kristen Bates
Assistant Attorney General
Open Records Division

KAB/lmt

Ref: ID# 191374

Enc. Submitted documents

c: Ms. Donna Ressler
Fox 4 News
400 North Griffin
Dallas, TX 75202
(w/o enclosures)