



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 10, 2004

Ms. Elaine S. Hengen
Assistant City Attorney
City of El Paso
2 Civic Center Plaza, 9th Floor
El Paso, Texas 79901

OR2004-4761

Dear Ms. Hengen:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 203233.

The El Paso Police Department (the "department") received a request for records relating to Professional Responsibility Unit case number CP02-289, concerning a named officer of the department. You state that some responsive information relating to administrative matters and disciplinary information concerning several officers has been released to the requestor, with some information redacted pursuant to a previous determination issued by this office in Open Records Decision No. 670 (2001). *See* Open Records Decision No. 670 (2001) (allowing a governmental body to withhold information within the scope of the statutory predecessor to section 552.117(a)(2) without the necessity of requesting an attorney general decision); *see also* Gov't Code § 552.301(a) (allowing a governmental body to withhold information that is subject to a previous determination). You claim that the submitted 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 the exceptions you claim and reviewed the submitted information.

You state that a portion of the submitted information is the subject of expunction orders issued by the 346th District Court of El Paso County, and you contend that this information is excepted from disclosure under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," and encompasses information

protected by other statutes. Article 55.03 of the Code of Criminal Procedure concerns the effect of an expunction order and provides:

When the order of expunction is final:

- (1) the release, dissemination, or use of the expunged records and files for any purpose other than a purpose described by Section 411.083(a) or (b)(1), (2), or (3), Government Code, is prohibited;
- (2) except as provided in Subdivision 3 of the article, the person arrested may deny the occurrence of the arrest and the existence of the expunction order; and
- (3) the person arrested or any other person, when questioned under oath in a criminal proceeding about an arrest for which the records have been expunged, may state only that the matter in question has been expunged.

Code Crim. Proc. art. 55.03. You state that portions of the submitted information are subject to court-ordered expunction. Based on your representations, we determine that this information, which we have marked, is confidential under article 55.03 of the Code of Criminal Procedure. *See id*; *see also* Open Records Decision No. 457 (1987) (governmental body prohibited from releasing arrest records subject to expunction order). Accordingly, we find that the department must withhold this information pursuant to section 552.101 of the Government Code.

Next, you seek to withhold the information submitted as Exhibit C pursuant to 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.” Gov’t Code § 552.108(a)(1). A governmental body claiming section 552.108 must reasonably explain how and why section 552.108 is applicable to the information. *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). In general, information held by a law enforcement agency that pertains to a pending criminal investigation conducted by the agency can be excepted under section 552.108(a)(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).

In this case, you represent that the information in Exhibit C relates to a pending criminal investigation in which officers of the department and the Office of the District Attorney for

the 34th Judicial District are the subjects of the investigation. This criminal investigation is currently being conducted pursuant to a Court of Inquiry convened by the 346th District Court of El Paso County. *See* Crim. Proc. Code art. 52.01. Because the department is the subject of the criminal investigation by the Court of Inquiry, we find that it is the Court of Inquiry, rather than the department, that has the pertinent law enforcement interest in the present investigation. In these circumstances, this office requires a representation from the entity with the law enforcement interest stating that the entity wishes to withhold the information pursuant to section 552.108. *See* Open Records Decision Nos. 586 (1991), 474 (1987). The Attorney Pro Tem appointed by the 346th District Court to assist in the Court of Inquiry proceeding at issue has advised us that the Court of Inquiry does not object to the release of the information. We therefore determine that the department may not withhold any of the information at issue pursuant to section 552.108 of the Government Code.

You also contend that a portion of the information in Exhibit C is protected from disclosure under common-law privacy. Section 552.101 also encompasses the doctrine of common-law privacy, which 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. *Indus. Found. v. Tex. 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. In addition, this office has found that some kinds of medical information or information indicating disabilities or specific illnesses are protected by common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, specific illnesses, procedures, and physical disabilities). Based on your representations and our review of the submitted information, we agree that a portion of the information in Exhibit C is protected by common-law privacy. Accordingly, we have marked the information that the department must withhold pursuant to section 552.101 in conjunction with common-law privacy. We further determine, however, that the remaining information you seek to withhold in Exhibit C does not contain highly intimate or embarrassing facts and is therefore not protected by common-law privacy. Consequently, the department may not withhold any of the remaining information in Exhibit C under section 552.101 on that basis.

You contend that the photographs submitted as Exhibit D are excepted from disclosure under section 552.119 of the Government Code, which 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 photographs at issue would endanger the life or physical safety of officers depicted therein. We therefore determine that the department may not withhold the submitted photographs pursuant to section 552.119.

You also indicate that the submitted photographs, as well as other information you have marked in the submitted documents, is excepted from disclosure under section 552.117(a)(2) of the Government Code. Section 552.117(a)(2) excepts from required public disclosure the home address, home telephone number, social security number, and the family member information of a peace officer as defined by article 2.12 of the Code of Criminal Procedure. *See* Open Records Decision No. 622 (1994). We have marked information in the submitted documents that the department must withhold pursuant to section 552.117(a)(2) of the Government Code. You also indicate that the submitted photographs may contain images of family members of police officers. Based on your representation, we determine that to the extent photographs depict the family members of police officers, the photographs are excepted under section 552.117(a)(2) and must be withheld.

We also note that the protections of section 552.117 only apply to information that the governmental body holds in its capacity as an employer. *See* Gov't Code § 552.117 (providing that employees of governmental entities may protect certain personal information in the hands of their employer); *see also* Gov't Code § 552.024 (establishing election process for section 552.117). In this instance, a portion of the information you seek to withhold under section 552.117(a)(2) is held by the department in its capacity as a law enforcement entity, not as an employer of the individuals at issue. This information may not be withheld under section 552.117(a)(2). However, this information may be excepted under section 552.1175 of the Government Code. Section 552.1175 of the Government Code provides in part:

- (b) Information that relates to the home address, home telephone number, or social security number of [a peace officer as defined by article 2.12 of the Code of Criminal Procedure], 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.

Gov't Code § 552.1175(b). We have marked information in a portion of the submitted documents held by the department in its capacity as a law enforcement agency, that makes reference to family members of a peace officer. If the officer at issue notifies the department that the officer chooses to keep this information confidential in accordance with section 552.1175(2), the department must withhold this information pursuant to section 552.1175 of the Government Code.

Finally, you have marked Texas license plate numbers contained in Exhibit E. Information relating to a Texas motor vehicle driver's license and information relating to a Texas motor vehicle title or registration is excepted from disclosure under section 552.130 of the Government Code. Gov't Code § 552.130. The department must withhold the marked Texas license plate numbers under section 552.130 of the Government Code.

In summary, we have marked information that must be withheld pursuant to section 552.101 of the Government Code in conjunction with article 55.03 of the Code of Criminal Procedure. We have marked the information that the department must withhold pursuant to section 552.101 in conjunction with the doctrine of common-law privacy. We have marked information that the department must withhold under sections 552.117(a)(2) and 552.130 of the Government Code. We have also marked information that must be withheld under section 552.1175 of the Government Code, provided the officer at issue chooses to keep the information confidential. The remainder of the submitted information must be released 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,



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Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 203233

Enc: Submitted documents

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