



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 3, 2004

Mr. Julian W. Taylor, III  
Law Office of Wallace Shaw, P.C.  
P.O. Box 3073  
Freeport, Texas 77542-3073

OR2004-10277

Dear Mr. Taylor:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 214212.

The City of Freeport (the "city"), which you represent, received a request for information relating to a named police officer and the police chief. You inform us that the city has released some of the requested information. You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.102, 552.108, and 552.1175 of the Government Code. We have considered the exceptions you claim and have reviewed the information you submitted.

Initially, we address section 552.108, as it is the most inclusive exception you claim. This section excepts from public disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]" Gov't Code § 552.108(a)(1). A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why this exception is applicable to the information that the governmental body seeks to withhold. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986).

You inform us that the information submitted as Exhibit C relates to an internal affairs investigation conducted by the police department. We note that section 552.108 is generally not applicable to records of an administrative investigation that did not result in a criminal

investigation or prosecution. *See Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. Civ. App.—El Paso 1992, writ denied) (addressing statutory predecessor to Gov't Code § 552.108). You do not inform us that the internal affairs investigation has resulted in a criminal investigation by the police department or a criminal prosecution. You do state, however, that Exhibit C relates to a pending criminal investigation that is being conducted by the Texas Rangers. You further inform us that the police department has provided records of the internal affairs investigation to the Texas Rangers for use in their criminal investigation. Furthermore, the Texas Ranger in charge of the case has informed this office that the criminal investigation remains pending. He has asked that information held by the city that relates to the criminal investigation not be released at this time. We note that section 552.108 may be invoked by any proper custodian of information relating to an incident involving allegedly criminal conduct that remains under active investigation or prosecution. *See Open Records Decision No. 372* (1983) (addressing statutory predecessor). Therefore, based on your representations and those of the Texas Rangers and our review of the information at issue, we find that the release at this time of Exhibit C would interfere with the detection, investigation or prosecution of crime. *See Gov't Code § 552.108(a)(1); 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). We therefore conclude that the city may withhold Exhibit C under section 552.108(a)(1).

Although you also seek to withhold Exhibits D and E under section 552.108, you do not assert that those documents relate to the Texas Rangers' investigation or that they have been provided to the Texas Rangers. Rather, you inform us that Exhibits D and E concern completely unrelated administrative matters involving the police chief. You also state that Exhibits D and E, "considered alone . . . do[] not pertain to any criminal investigation." You argue, however, that Exhibits D and E could have been requested for the purpose of interfering with the investigation of crime. We first note that the motives of a requestor are irrelevant to the question of whether requested information may be withheld from public disclosure. *See Gov't Code § 552.222(a)-(b); Open Records Decision No. 542* at 4 (1990). We next note that Exhibits D and E consist of performance appraisals of the police chief. Section 552.108 is generally not applicable to personnel records. *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet. h.) (Gov't Code § 552.108(b)(1) not applicable to background and reference information police department obtained from third parties regarding applicants for employment); *Open Records Decision Nos. 562* at 10 (1990) (statutory predecessor to Gov't Code § 552.108 generally not applicable to general personnel information or information relating to complaints filed against police officer). Therefore, having considered your arguments and reviewed the information at issue, we conclude that you have not demonstrated that Exhibits D or E are excepted from disclosure under section 552.108. *See also Gov't Code § 552.022(a)(1)* (providing for public disclosure of completed evaluation made of, for, or by governmental body); *Open Records Decision Nos. 484* at 4-5 (1987) (public has substantial interest in complaints against police officers and their resolution by police department), 444 at 3-5 (1986) (law enforcement agency failed to demonstrate applicability of statutory predecessor

to Gov't Code § 552.108 to requested disciplinary records), 287 at 2 (1981) (law enforcement exception was not intended to shield from public view information in hands of police units that would ordinarily be available to public absent special law enforcement needs or circumstances).

You also seek to withhold Exhibits D and E under sections 552.101 and 552.102. Section 552.101 excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses the common-law right to privacy. Information must be withheld from the public under section 552.101 in conjunction with common-law privacy when the information is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) of no legitimate public interest. See *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Common-law privacy protects the specific types of information that are held to be intimate or embarrassing in *Industrial Foundation*. See *id.* at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). This office has since concluded that other types of information also are private under section 552.101. See Open Records Decision Nos. 659 at 4-5 (1999) (summarizing information attorney general has held to be private), 470 at 4 (1987) (illness from severe emotional job-related stress), 455 at 9 (1987) (prescription drugs, illnesses, operations, and physical handicaps), 343 at 1-2 (1982) (references in emergency medical records to drug overdose, acute alcohol intoxication, obstetrical/gynecological illness, convulsions/seizures, or emotional/mental distress).

Section 552.101 also encompasses constitutional rights of privacy. Constitutional privacy protects two kinds of interests. See *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7 (1987). The first is the interest in independence in making certain important decisions related to the "zones of privacy," pertaining to marriage, procreation, contraception, family relationships, and child rearing and education, that have been recognized by the United States Supreme Court. See *Fadjo v. Coon*, 633 F.2d 1172 (5<sup>th</sup> Cir. 1981); Open Records Decision No. 455 at 3-7 (1987). The second constitutionally protected privacy interest is in freedom from public disclosure of certain personal matters. See *Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5<sup>th</sup> Cir. 1985); Open Records Decision No. 455 at 6-7 (1987). This aspect of constitutional privacy balances the individual's privacy interest against the public's interest in the information. See Open Records Decision No. 455 at 7 (1987). Constitutional privacy under section 552.101 is reserved for "the most intimate aspects of human affairs." *Id.* at 8 (quoting *Ramie v. City of Hedwig Village*, 765 F.2d at 492).

Section 552.102 excepts from public 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). Section 552.102(a) is applicable to information that relates to public officials and employees. See Open Records Decision No. 327 at 2 (1982) (anything relating to employee's employment and its terms constitutes information relevant to person's

employment relationship and is part of employee's personnel file). The privacy analysis under section 552.102(a) is the same as the common-law privacy test under section 552.101. *See Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref'd n.r.e.) (addressing statutory predecessor).

In this instance, the information that you claim is private relates to the professional performance of the police chief. As this office has often stated, the public has a legitimate interest in information that relates to the official conduct of public officials and employees. *See Open Records Decision Nos.* 562 at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs, but in fact touches on matters of legitimate public concern), 542 at 5 (1990) (information in public employee's resume not protected by constitutional or common-law privacy under statutory predecessors to Gov't Code §§ 552.101 and 552.102), 470 at 4 (1987) (public employee's job performance does not generally constitute his or her private affairs), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of governmental employees), 405 at 2 (1983) (manner in which public employee performed his or her job cannot be said to be of minimal public interest), 400 at 5 (1983) (statutory predecessor to Gov't Code § 552.102 is "very narrow" and protects information only if release would lead to clearly unwarranted invasion of privacy). Therefore, having considered your arguments, we conclude that the city may not withhold any of the information in Exhibits D or E on the basis of common-law or constitutional privacy under sections 552.101 and 552.102.

In summary: (1) the city may withhold Exhibit C under section 552.108(a)(1); and (2) the rest of the submitted information must be released. As we are able to make these determinations, we need not address your other arguments against disclosure.

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

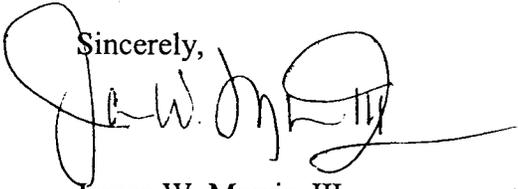
governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge 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,



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

JWM/sdk

Ref: ID# 214212

Enc: Submitted documents

c: Mr. Michael Baker  
The Facts  
P.O. Box 549  
Clute, Texas 77531  
(w/o enclosures)