



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 9, 2005

Ms. Luz E. Sandoval Walker
Assistant City Attorney
City of El Paso
2 Civic Center Plaza, 9th Floor
El Paso, Texas 79901

OR2005-01183

Dear Ms. Walker:

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# 217633.

The El Paso Police Department (the "department") received a request for information pertaining to an offense report. You state you will release some of the requested information, but claim that some of the submitted information is excepted from disclosure under sections 552.101, 552.108, 552.117, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we must address the department's obligations under section 552.301 of the Government Code. Pursuant to section 552.301(b), a governmental body that wishes to withhold information from disclosure under an exception in the Act must state the exceptions that apply to the information. Gov't Code § 552.301(b). Pursuant to section 552.301(e)(1)(A), a governmental body must submit written comments to this office explaining how the governmental body's claimed exceptions are applicable to the information at issue. *Id.* § 552.301(e)(1)(A). In addition, pursuant to section 552.301(e)(2), a governmental body must label the copy of the information at issue to indicate which exceptions under the Act apply to which parts of the copy. *Id.* § 552.301(e)(2).

You state that the submitted 9-1-1 transcript contains a telephone number "that is exempt from disclosure pursuant [to] Open Records Decision 506." Open Records Decision

No. 506 (1988), in part, dealt with the applicability of the statutory predecessors of sections 552.108 and 552.117 to certain cellular telephone numbers.¹ See Open Records Decision No. 506 (statutory predecessor to section 552.108 can apply to cellular telephone number used by public employee for specific law enforcement duties, but statutory predecessor to section 552.117 not applicable to cellular phone numbers provided and paid for by governmental body and intended for official use). However, you have not provided comments explaining how the exceptions considered in Open Records Decision No. 506 are applicable to any telephone number at issue. You have also highlighted in yellow some telephone and cellphone numbers in the 9-1-1 transcript, but have not labeled the number which you assert is excepted under section 552.108. We therefore find you have failed to comply with the procedural requirements of section 552.301 with respect to your claim for the number at issue.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. See Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). Because section 552.108 is a discretionary exception to disclosure that protects a governmental body's interests, we find the department has waived section 552.108 in this instance. See Open Records Decision No. 177 (1977) (governmental body may waive statutory predecessor to section 552.108); see also Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). However, section 552.117 does provide a compelling reason to overcome the presumption of openness, therefore, we will consider the applicability of section 552.117 to the telephone and cellphone numbers in the 9-1-1 transcript, as well as the marked address in the offense report you assert is excepted under section 552.117. See Open Records Decision No. 630 (1994) (presumption of openness overcome by a showing that the information is made confidential by another source of law or affects third party interests).

Section 552.117(a)(2) excepts from public disclosure a peace officer's home address and telephone number, social security number, and family member information regardless of whether the peace officer made an election under section 552.024 or 552.1175 of the Government Code.² Section 552.117 is applicable only to information that a governmental

¹That decision also considered whether such numbers were protected by privacy or the statutory predecessor to section 552.109, and determined that these provisions are not applicable to the numbers. See Open Records Decision No. 506 (1988).

² Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure.

body holds in its capacity as an employer. In this instance, the telephone and cellphone numbers highlighted in yellow in the 9-1-1 transcript and the address highlighted in yellow in the offense report are held by the department in its investigative capacity as a law enforcement entity, and not as the employer of the individual at issue. Accordingly, section 552.117 is not applicable to this information. We further note, however, that the information at issue may be excepted under section 552.1175 of the Government Code, which provides in part the following:

(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). You do not inform this office, nor does any of the submitted information indicate, whether any individual whose information is at issue is currently a licensed peace officer who has notified the department of his election of confidentiality for this information in accordance with subsections 552.1175(b)(1) and (2). *See, e.g.*, Open Records Decision No. 678 (2003) (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 recipient governmental entity receives a section 552.1175 notification). Accordingly, the department must withhold (1) the address you have highlighted in yellow in the submitted offense report and (2) any personal telephone or cellphone number you have highlighted in yellow in the 9-1-1 transcript if this information is the home address or personal number of a police officer who has elected to restrict access to this information in accordance with section 552.1175(b). However, if any cellphone number at issue pertains to a cellphone that was provided to the officer at public expense or if the department does not receive proper notice from the officers under section 552.1175(2), the department may not withhold this information under section 552.1175.

You assert that some of the information in the submitted 9-1-1 transcript is excepted 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. Chapter 772 of the Health and Safety Code relates to local emergency communications districts. Section 772.318 applies to an emergency 9-1-1 district established in accordance with

chapter 772, and makes confidential the originating telephone numbers and addresses of 9-1-1 callers that are furnished by a service supplier. See Open Records Decision No. 649 (1996). We understand that the City of El Paso is part of an emergency communication district that was established under section 772.318.³ Accordingly, the department must withhold the telephone numbers and addresses of 9-1-1 callers obtained from a 9-1-1 service supplier, which we have marked, under section 552.101 of the Government Code in conjunction with section 772.318. However, we find the department has not established that the remaining information contains the telephone numbers and addresses of 9-1-1 callers obtained from a 9-1-1 service supplier; therefore, the remaining information is not confidential under section 772.318, and the city may not withhold it under section 552.101 on that ground:

Section 552.101 also encompasses the doctrine 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. *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. *Id.* at 683. The common law right to privacy is a personal right that lapses at death, and therefore it does not encompass information that relates to a deceased individual. See *Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 491 (Tex. App.—Texarkana 1979, writ ref'd n.r.e.); Open Records Decision No. 272 at 1 (1981). However, the United States Supreme Court has determined that surviving family members can have a privacy interest in information relating to their deceased relatives. See *Nat'l Archives & Records Admin. v. Favish*, 124 S. Ct. 1570 (2004). We have marked the information that is confidential under common law privacy, and that the department must withhold under section 552.101.

Finally, you assert some of the remaining information is excepted under section 552.130 of the Government Code, which provides in relevant part the following:

(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]

³Section 772.318 applies to an emergency communication district for a county with a population of more than 20,000. See Health & Safety Code § 772.314(a).

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

Gov't Code § 552.130(a). We note that section 552.130 does not encompass motor vehicle record information that pertains exclusively to a deceased individual. *See* Open Records Decision No. 272 (1981). The department must withhold the Texas motor vehicle record information we have marked under section 552.130 of the Government Code.

To conclude, the department must withhold the address you have highlighted in yellow in the submitted offense report and any personal telephone or cellphone number you have highlighted in yellow in the 9-1-1 transcript if this information is the home address or personal number of a police officer who has elected to restrict access to this information in accordance with section 552.1175(b). The department must also withhold pursuant to section 552.101 the information we have marked that is confidential under section 772.318 of the Health and Safety Code and the information we have marked that is confidential under common law privacy. Finally, the department must withhold the Texas motor vehicle record information we have marked under section 552.130. The department must release the remaining information at issue.

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).

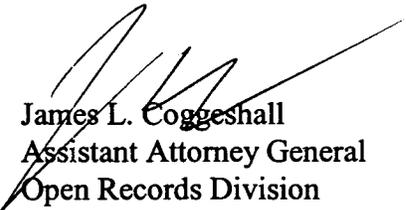
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/seg

Ref: ID# 217633

Enc. Submitted documents

c: Mr. Carl Jones
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(w/o enclosures)