



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 15, 2005

Mr. Brad Norton
Assistant City Attorney
City of Austin
P.O. Box 1546
Austin, Texas 78767-1546

OR2005-10308

Dear Mr. Norton:

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# 236175.

The City of Austin (the "city") received three requests for information regarding a police report, an audit, and various complaints against a specific city employee. You state that some information has been released. You claim that the submitted information is excepted from disclosure under sections 552.101; 552.103, 552.108, 552.116, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments from several interested third parties. *See* Gov't Code § 552.304 (allowing interested party to submit comments indicating why requested information should or should not be released).

Initially, we note that the information in response to request number three is subject to section 552.022(a)(1) of the Government Code. Under section 552.022(a)(1), a completed report, audit, evaluation, or investigation made of, for, or by a governmental body is expressly public unless it either is excepted under section 552.108 of the Government Code or is expressly confidential under other law. Section 552.103 is a discretionary exception to disclosure that protect the governmental body's interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived); *see also* Open

Records Decision No. 522 (1989) (discretionary exceptions in general). As such, section 552.103 is not "other law" that makes information confidential for the purposes of section 552.022. Therefore, the "Report of Findings," as a completed report, may not be withheld under section 552.103. However, we will address your claim under section 552.101 for this and the remaining submitted information.

You contend that the submitted employee investigations and "Report of Findings" should be withheld from disclosure under section 552.101 of the Government Code in conjunction with common-law privacy. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," and encompasses the doctrine of common-law privacy. Common-law privacy protects information that 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). 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 determined that information may also be withheld from public disclosure under section 552.101 in conjunction with common-law privacy upon a showing of certain "special circumstances." *See* Open Records Decision No. 169 (1977). This office considers "special circumstances" to refer to a very narrow set of situations in which the release of information would likely cause someone to face "an imminent threat of physical danger." *Id.* at 6. Such "special circumstances" do not include "a generalized and speculative fear of harassment or retribution." *Id.*

You state that release of the information would "likely cause someone to face an imminent threat of physical danger." Upon review, we find that you have not adequately demonstrated an imminent physical danger that would constitute such "special circumstances." Thus, we conclude that you may not withhold the complainant's identifying information in the submitted documents under section 552.101 on the basis of "special circumstances." As you raise no other exceptions for the "Report of Findings," this document must be released to the third requestor. However, we have marked some information in the remaining submitted documents that is confidential under common-law privacy and that the city must withhold under section 552.101. We note, however, that section 552.023(a) of the Government Code affords a person or person's authorized representative a special right of access to information otherwise protected from public disclosure by laws intended to protect that person's privacy interests. As one of the requestors in this instance is the attorney for the employee whose information is at issue, you must release the information we have marked that pertains to that employee to her attorney requestor. *See* Gov't Code § 552.023(a) (information may not be withheld from a person who is the subject of the information solely on the basis that the information is excepted from disclosure to protect the subject's privacy.)

Next, we address your claim under section 552.108 of the Government Code for the information in the submitted police report. Section 552.108(a)(2) excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . 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 [.]” Gov’t Code § 552.108(a)(2). Section 552.108(a)(2) is applicable only if the information in question relates to a concluded case that did not result in a conviction or a deferred adjudication. You inform us that the submitted police report pertains to a criminal investigation that did not result in a conviction or deferred adjudication. Based on your representations and our review, we agree that section 552.108(a)(2) is applicable to this information.

However, section 552.108 does not except basic information about an arrested person, an arrest, or a crime. See Gov’t Code § 552.108(c); *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). We believe such basic information refers to the information held to be public in *Houston Chronicle*, including a detailed description of the offense. See 531 S.W.2d at 186-87. Thus, the city must release the types of information that are considered to be front page information, even if this information is not actually located on the front page. See Open Records Decision No. 127 (1976) (summarizing types of information made public by *Houston Chronicle*). With the exception of the basic information, the city may withhold the submitted police report pursuant to section 552.108(a)(2). We note that the city has the discretion to release all or part of this information that is not otherwise confidential by law. See Gov’t Code § 552.007.

Additionally, you claim that a portion of the submitted information is excepted under section 552.116 of the Government Code. Section 552.116 of the Government Code provides as follows:

(a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, a municipality, or a joint board operating under Section 22.074, Transportation Code, is excepted from the requirements of Section 552.021. If information in an audit working paper is also maintained in another record, that other record is not excepted from the requirements of Section 552.021 by this section.

(b) In this section:

(1) “Audit” means an audit authorized or required by a statute of this state or the United States, the charter or an ordinance of a municipality, an order of the commissioners court of a county, or a

resolution or other action of a joint board described by Subsection (a) and includes an investigation.

(2) 'Audit working paper' includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Gov't Code § 552.116, as amended by Act of May 17, 2005, 79th Leg., R.S., H.B. 1285, §§ 1-2 (effective May 27, 2005). A governmental body that invokes section 552.116 must demonstrate that the audit working papers are from an audit authorized or required by statute by identifying the applicable statute. A statute is defined as a law passed by a legislative body at the federal, state, county, or city level of government. *See* BLACK'S LAW DICTIONARY 1420 (7th ed. 1999), BLACK'S LAW DICTIONARY 1410 (6th ed. 1990). A municipal charter, which is "a legislative enactment conferring the governmental powers of the state upon its local agencies," falls under this definition of a "statute." *Id.* at 1017.

You state that section 17 of Article VII of the Charter of the City of Austin established the position of city auditor and imparts to it the "responsibility to conduct, or cause to be conducted, financial, performance, investigative, and other audits following government auditing standards as promulgated by the Comptroller General of the United States." You also inform us that the authority of the city auditor to conduct audits is further authorized by chapter 2-3 of the Austin City Code. We understand you to represent that the audits at issue were initiated by the office of the city auditor under the authority granted by chapter 2-3-5 of the Austin City Code. Based on our review of your representations and the information at issue, we find you have demonstrated that this information was prepared or maintained by the city's auditors in conducting audits authorized or required by the charter or an ordinance of a municipality. *See* Gov't Code § 552.116(a), (b)(1), (b)(2). Accordingly, the city may withhold the information you have marked under section 552.116 of the Government Code.

Lastly, you claim that section 552.117 may be applicable to portions of the remaining submitted information. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. *See* Gov't Code § 552.117(a)(1). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the city may only withhold information under section 552.117 on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. For those employees who

timely elected to keep their personal information confidential, the city must withhold the information we have marked under section 552.117(a)(1). The city may not withhold this information under section 552.117 for those employees who did not make a timely election to keep the information confidential. We note, however, that two of the requestors have a special right of access pursuant to section 552.023 to their own information and to their client's information that would otherwise be excepted from disclosure to the public under section 552.117. *See* Gov't Code § 552.023. Information to which a requestor has a right of access under section 552.023 may not be withheld with respect to that requestor under section 552.117.

In summary, the city must withhold the information we have marked under section 552.101 in conjunction with common law privacy. We note, however, that the first requestor has a right of access to her client's own information. The city may withhold the submitted offense report under section 552.108(a)(2), with the exception of the basic front page offense and arrest information. Additionally, the city may withhold audit working papers under section 552.116. The city may withhold the information we have marked under section 552.117(a)(1) if applicable. The "Report of Findings" must be released to the third requestor. The remaining information must be released to all the requestors.

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 Office of the Attorney General 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. 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,



Michael A. Lehmann
Assistant Attorney General
Open Records Division

MAL/sdk

Ref: ID# 236175

Enc. Submitted documents

c: Ms. Alicia Wilde
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(w/o enclosures)