



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 26, 2006

Mr. Warren Spencer
Legal Advisor
Plano Police Department
P.O. Box 860358
Plano, Texas 75086

OR2006-04207

Dear Mr. Spencer:

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# 246101.

The Plano Police Department (the "department") received a request for "[a]ny information on the criminal history" of a named individual. You claim that the requested information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered the comments that we received from the requestor's attorney. *See* Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 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. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common law privacy, both prongs of this test must be demonstrated. *Id.* at 681-82.

In this instance, the request asks for all criminal history information held by the department concerning a named individual. This request for unspecified law enforcement records requires the department to compile the criminal history of the individual. The department indicates that this compilation of criminal history is protected under the common law privacy

standard set out *Industrial Foundation* as well as the decision in *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989). The attorney for the requestor notes that the federal Freedom of Information Act ("FOIA") privacy test set out in *Reporters Committee* differs from the common law privacy test set out in Texas law. Under the FOIA privacy test, federal courts must first determine if an individual has a privacy interest and then balance that interest against the public's interest in shedding light on the conduct of a government agency or official. Thus, we agree that the common law privacy test under *Industrial Foundation* differs from the privacy standard provided under the exemptions of the FOIA that prohibit the disclosure of information that "could reasonably be expected to constitute an unwarranted invasion of personal privacy." See 5 U.S.C. §§ 552(b)(6), (7)(C). The public interest prongs for the two tests differ, and the FOIA test requires a balancing of the two factors, while the common law privacy test requires satisfaction of both factors.

This office will apply the common law privacy test as set forth in *Industrial Foundation* rather than the FOIA privacy test, to a compilation of an individual's criminal history. See Attorney General Opinion MW-95 (1979) (FOIA exceptions apply to federal agencies, not to state agencies); Open Records Decision Nos. 496 (1988), 124 (1976); see also Open Records Decision No. 561 at 7 n 3 (1990) (noting that federal authorities may apply confidentiality principles found in FOIA differently from way in which such principles are applied under Texas open records law). In doing so, we note that the United States Supreme Court found that where an individual's criminal history information has been compiled by a governmental entity, the information takes on a character that implicates the individual's right to privacy. *Reporters Committee*, 489 U.S. at 764 (considering first prong of FOIA's balancing test). The Court recognized a distinction between public records that might be found in courthouse files and local police stations and a compiled summary of information, and noted that individual subjects have a significant privacy interest in a compilation of their criminal histories. *Id.* Likewise, we see an important distinction between a compilation of an individual's criminal history and the individual law enforcement records in an uncompiled state. This compilation is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. Furthermore, we find that a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. Therefore, to the extent the department maintains law enforcement records depicting the named individual as a suspect, arrestee, or criminal defendant, the department must withhold such information under section 552.101 in conjunction with common law privacy.¹

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

¹As our ruling is dispositive, we do not address your remaining arguments.

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,



Debbie K. Lee
Assistant Attorney General
Open Records Division

DKL/sdk

Ref: ID# 246101

Enc: Submitted documents

c: Mr. P.J. Howard
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(w/o enclosures)