



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 13, 2007

Mr. Charles K. Eldred
Assistant City Attorney
Knight & Partners
223 West Anderson Lane, Suite A-105
Austin, Texas 78752

OR2007-08889

Dear Mr. Eldred:

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# 283965.

The Kyle Police Department (the "department"), which you represent, received a request for all reports, radio logs, or information related to a specified incident. The requestor has specifically excluded driver's license numbers, social security numbers, employee numbers, and the addresses and phone numbers of the reporting officers from his request. You claim that the requested information is excepted from disclosure under sections 552.101, 552.108, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.108 provides in pertinent part:

- (a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:
 - (2) it is information that the deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication[.]

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [required public disclosure] if:

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication[.]

Gov't Code § 552.108. A governmental body claiming section 552.108(a)(2) or 552.108(b)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. Gov't Code § 552.108(a)(2),(b)(2). You state that the requested information pertains to a closed criminal investigation that did not result in conviction or deferred adjudication. After reviewing your arguments and the submitted information, we agree that section 552.108(a)(2) is applicable to offense report number 03-0386.

However, as you acknowledge, section 552.108 does not except from required public disclosure "basic information about an arrested person, an arrest, or a crime." Gov't Code § 552.108(c); *see also* Open Records Decision No. 127 (1976) (summarizing basic information). Basic information refers to the information held to be public in *Houston Chronicle Publishing Company v. City of Houston*, 531 S.W.2d 177, 186-87 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Thus, with the exception of basic information, the department may withhold offense report number 03-0386 under section 552.108(a)(2).

You also claim that the remaining information, which consists of an internal affairs investigation, is excepted by section 552.108 of the Government Code. Section 552.108 is generally not applicable to the records of an internal affairs investigation that is purely administrative in nature. *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no pet.), *Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. Civ. App.—El Paso 1992, writ denied) (statutory predecessor not applicable to internal investigation that did not result in criminal investigation or prosecution); *see also* Open Records Decision Nos. 562 at 10 (1990) (predecessor to section 552.108(b) inapplicable to employment information in police officer's file), 361 at 2-3 (1983) (statutory predecessor to section 552.108(b) inapplicable to background information collected on unsuccessful applicant for employment with sheriff's department), 350 at 3-4 (1982). You have failed to explain, and the information does not indicate, that the internal affairs investigation resulted in any criminal investigation by the department or a criminal prosecution. Therefore, we have no basis for concluding that the internal affairs investigation is excepted from disclosure under section 552.108 of the Government Code. Accordingly, we conclude that the department may not withhold any portion of this information under section 552.108 of the Government Code.

Next, you claim section 552.101 of the Government Code. 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. This section 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 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. The types 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. We note that this office has found that the public has a legitimate interest in information relating to employees of governmental bodies and their employment qualifications. *See generally* Open Records Decision Nos. 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 423 at 2 (1984) (scope of public employee privacy is narrow). Furthermore, information concerning domestic violence generally does not come within the scope of common-law privacy. Open Records Decision No. 611 (1992) (“An assault by one family member on another is a crime, not a family matter normally considered private”). You assert that the information is protected by common-law privacy. However, the information at issue relates to an internal affairs investigation by the department into the conduct of a peace officer and how such information relates to her employment with the department. We conclude that there is a legitimate public interest in the majority of the submitted information as it pertains to the officer’s ability to satisfy employment conditions. However, a portion of the information implicates matters not of legitimate public concern. Therefore, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common law privacy.

The department also cites to *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App. —El Paso 1992, writ denied). In *Morales v. Ellen*, the court addressed the applicability of common-law privacy to files of an investigation of allegations of sexual harassment. In this case, the information relates to a criminal assault charge and its resulting internal affairs investigation, not an investigation of sexual harassment. Therefore, the common-law privacy protection afforded in *Ellen* is not applicable here.

Section 552.101 also encompasses the doctrine of constitutional privacy. Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual’s interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual’s autonomy within “zones of privacy” which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual’s privacy interests and the public’s need to know information of public concern. *Id.* The scope of information

protected is narrower than that under the common-law doctrine of privacy; the information must concern the “most intimate aspects of human affairs.” *Id.* at 5; *see Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985). We find that the remaining information does not fall within the zones of privacy or implicate an individual’s privacy interests for purposes of constitutional privacy; therefore, the department may not withhold it under section 552.101 on that ground.

Finally, you contend that some of the submitted information is excepted from disclosure under section 552.117 of the Government Code. Section 552.117(a)(2) excepts from disclosure the present and former home addresses and personal telephone numbers, social security number, and family member information of a peace officer regardless of whether the officer requests confidentiality for that information under section 552.024 of the Government Code.¹ Gov’t Code § 552.117(a)(2). Thus, we agree that the department must withhold the information we have marked in the internal affairs investigation under section 552.117 of the Government Code.

The department also raises section 552.117 for portions of the basic information in offense report number 03-0386. We note, however, that the protections of section 552.117 of the Government Code 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, the named peace officer is listed as the suspect in the submitted report. Thus, the peace officer’s personal information included in the basic information is not information that the department holds in its capacity as an employer, and it may therefore not be withheld based on section 552.117.

However, this information may be excepted under section 552.1175 of the Government Code, which provides in pertinent 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.

¹“Peace Officer” is defined by article 2.12 of the Code of Criminal Procedure.

Gov't Code § 552.1175(b). If the peace officer at issue notifies the department that she chooses to keep her personal information confidential in accordance with section 552.1175(2), the department must withhold her personal information from the basic information in offense report number 03-0386 pursuant to section 552.1175 of the Government Code.

In summary, with the exception of the basic information, the department may withhold offense report number 03-0386 pursuant to section 552.108(a)(2) of the Government Code. The department must withhold information marked pursuant to section 552.101 in conjunction with common-law privacy. The department must also withhold the information we have marked in the internal affairs investigation pursuant to section 552.117 of the Government Code. If the peace officer at issue notifies the department that she chooses to keep her personal information confidential in accordance with section 552.1175(2) of the Government Code, the department must withhold her personal information from the basic information in offense report number 03-0386 pursuant to section 552.1175 of the Government Code. The remaining information must be released.

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).

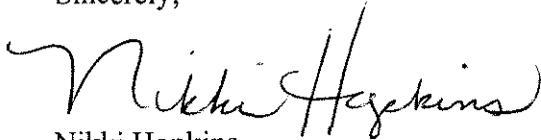
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental

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,

A handwritten signature in cursive script that reads "Nikki Hopkins".

Nikki Hopkins
Assistant Attorney General
Open Records Division

NH/mcf

Ref: ID# 283965

Enc. Submitted documents

c: Mr. Mark G. Hanna
3478 Old Kelly Road
Lockhart, Texas 78644
(w/o enclosures)