



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 16, 2007

Ms. Pamela Smith
Assistant General Counsel
Texas Department of Public Safety
P.O. Box 4087
Austin, Texas 78773-0001

OR2007-10558

Dear Ms. Smith:

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# 286654.

The Texas Department of Public Safety (the "department") received a request for information relating to a named individual, an alleged victim, and a specified incident. You state that the department has released a portion of the requested information. You claim that a portion of the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.¹ We note that the department provided notice of this request for information to the named individual. We have received and considered comments from this individual's attorney (the "attorney") and the requestor.² See Gov't Code §§ 552.304 (interested third

¹We understand you to assert that the submitted information is a representative sample of the requested information. We assume that this representative sample is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

²The requestor asserts that the individual failed to comply with section 552.305(d) of the Government Code, which provides in part that a third party "is entitled to submit [its reason for withholding the information] in writing to the attorney general . . . not later than the tenth business day after the date the person receives the notice" from the governmental body of the request for the third party's information. Gov't Code

party may submit comments stating why requested information should or should not be released), .305(d) (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under the Act in certain circumstances).

The attorney contends that the submitted information is not responsive to the request for information because she disagrees with the requestor's characterization of a named person as a "victim." We note that a governmental body must make a good-faith effort to relate a request to information that it holds. *See* Open Records Decision No. 561 at (1990) (construing statutory predecessor). We note that the information claimed to be nonresponsive pertains to the specified incident. After reviewing the entire request for information, we find that the department has made a good-faith effort to relate the request for information to the information that the department maintains. We therefore address the claimed exceptions with respect to this information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes such as section 1703.306 of the Occupations Code. Section 1703.306(a) provides that "[a] polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person[.]" The department must withhold the polygraph information you have marked under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code.

Section 552.101 also encompasses the doctrine of common-law privacy. Section 552.109 excepts from public disclosure "[p]rivate correspondence or communications of an elected office holder relating to matters the disclosure of which would constitute an invasion of privacy[.]" Gov't Code § 552.109. This office has held that the test to be applied to information under section 552.109 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101. We will therefore consider the department's and the attorney's arguments regarding common-law privacy under section 552.101 together with the attorney's claim under section 552.109.

§ 552.305(d)(2)(B). The requestor states that the notice sent to the individual is dated June 12, 2007. The attorney informs us the individual was out of the county and did not receive the department's notice until July 17, 2007. This office received comments from the attorney on July 18, 2007.

In *Industrial Foundation*, the Texas Supreme Court held that information is protected by common-law privacy if it: (1) contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person; and (2) is not of legitimate concern to the public. *Id.* at 685. 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. Accordingly, the department must withhold the information you have marked under section 552.101 of the Government Code in conjunction with common-law privacy. None of the remaining submitted information may be withheld on this basis.

The attorney also claims that the remaining submitted information is excepted from disclosure under section 552.108 of the Government Code. We note that section 552.108 is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See* Gov't Code § 552.007; Open Records Decision Nos. 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions), 177 (1977) (statutory predecessor to section 552.108 subject to waiver). In this instance, the department did not raise section 552.108 as an exception to disclosure; thus, the department has waived its claim under section 552.108. *See* Gov't Code § 552.301. Therefore, none of the remaining submitted information may be withheld under section 552.108 of the Government Code.

We note that some of the remaining submitted information is excepted under section 552.130 of the Government Code, which provides that information relating to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by a Texas agency is excepted from public release.³ Gov't Code § 552.130(a)(1), (2). The department must withhold the Texas driver's license information we have marked under section 552.130.

The attorney also claims that some of the remaining submitted information is excepted from disclosure under section 552.132(f) of the Government Code. Section 552.132(f) permits an employee of a governmental body who is also a crime victim, as defined by subchapter B of chapter 56 of the Code of Criminal Procedure, to elect whether to allow public access to information held by the Office of the Attorney General or another governmental body that would identify or tend to identify the crime victim. Section 552.132(f) applies only to records held by the Office of the Attorney General or by the victim's employer in an employment capacity. *See generally id.* (describing procedures for employee to elect to withhold identifying information in the hands of employing entity). In this instance, we note that the department does not employ the individual at issue. Therefore, none of the remaining submitted information may be withheld under section 552.132(f).

³The Office of the Attorney General will raise a mandatory exception like section 552.130 on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

In summary, the department must withhold the polygraph information you have marked under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code. The department must withhold the information you have marked under section 552.101 of the Government Code in conjunction with common-law privacy.⁴ The remaining information must be released to the requestor.⁵

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

⁴We note that the submitted information contains a social security number. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

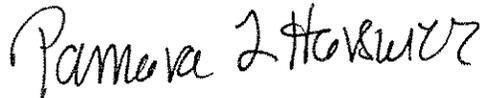
⁵Because the records being released contain information relating to the requestor's client that would be excepted from disclosure to the general public to protect the client's privacy, the department must request another ruling from our office if it receives a future request for this information from individuals other than this requestor's client or her authorized representative. *See* Gov't Code § 552.023 (governmental body may not deny access to person to whom information relates or person's agent on grounds that information is considered confidential by privacy principles).

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,



Tamara L. Harswick
Assistant Attorney General
Open Records Division

TLH/eeg

Ref: ID# 286564

Enc. Submitted documents

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