



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 24, 2007

Ms. Cary Grace
Assistant City Attorney
City of Austin
P.O. Box 1088
Austin, Texas 78767-8828

OR2007-13920

Dear Ms. Grace:

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# 291362.

The Austin Police Department (the "department") received a request for a specified incident report. You claim that portions of the requested information are excepted from disclosure under sections 552.101 and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 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 that (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. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). 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. In addition, this office has found that some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. See Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps).

In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), the court addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment in an employment context. You state that the submitted incident report “obviously consists of a criminal investigation of allegations of sexual harassment and other alleged crimes.” Upon review of your representation and the submitted incident report, we find that the report concerns a criminal investigation of an alleged assault. Because the submitted report focuses on a criminal investigation involving law enforcement, this report does not constitute a sexual harassment investigation in the employment context of the department for the purposes of *Ellen*. In addition, we find there is a legitimate public interest in the details of a criminal investigation. See *Lowe v. Hearst Communications, Inc.* 487 F.3d 246, 250 (5th Cir. 2007) (noting a “legitimate public interest in facts tending to support an allegation of criminal activity” (citing *Cinel v. Connick*, 15 F.3d 1338, 1345-46 (1994))). Consequently, the department may not withhold any of the submitted information under section 552.101 on the basis of *Ellen*.

Information may also be withheld under section 552.101 in conjunction with common-law privacy upon a showing of “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.* In this instance, you contend that the release of identifying information of the victim and witnesses would threaten the safety of these individuals. You submitted an affidavit from an investigator who states that release of the victim’s and witnesses’ identifying information would subject each of these individuals to an imminent threat of physical danger. Further, the investigator states that the victim continues to fear retaliation, and based on information gathered in the investigation, this fear is credible. Based on your representations, and our review, we agree that the witnesses’ identifying information must be withheld. However, from our review of the incident report, and the fact that the requestor pleaded guilty to a lesser misdemeanor charge stemming from the investigation, it is clear that he knows the name of the victim; thus, the victim’s name may not be withheld. We do agree that the victim’s contact information must be withheld. We have marked a representative sample of this information.¹ The department must also withhold the marked medical information under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.101 also encompasses confidentiality provisions of other statutes. Criminal history record information (“CHRI”) generated by the National Crime Information Center (“NCIC”) or by the Texas Crime Information Center (“TCIC”) is confidential under federal and state law. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision

¹As our ruling is dispositive, we need not address the department’s claim under section 552.130 of the Government Code.

No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety (“DPS”) maintains, except that the DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov’t Code § 411.083. Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090 -.127. Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. Upon review, we find that none of information in the report consists of CHRI that is confidential under chapter 411 of the Government Code. The incident report does, however, contain a compilation of an individual’s criminal record. Generally, a compilation of an individual’s criminal history is highly embarrassing information, and is not of legitimate public interest. Thus, this information is generally protected under common-law privacy. *Cf. United States Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989). However, we note that section 552.023 of the Government Code gives the requestor a special right of access, beyond the right of the general public, to information held by a governmental body that relates to himself and that is protected from disclosure by laws intended to protect privacy interests. *See* Gov’t Code § 552.023. Accordingly, because the compilation pertains to the requestor, it may not be withheld under section 552.101 of the Government Code.

Section 552.101 also encompasses section 1703.306 of the Occupations Code, which provides in relevant part:

(a) 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 other than:

(1) the examinee or any other person specifically designated in writing by the examinee[.]

...

(b) The board or any other governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information.

Occ. Code § 1703.306(a)(1), (b). Section 1703.306(a) makes the polygraph results in the submitted information confidential. However, we note that the polygraph information at

issue consists of the polygraph examination results of the requestor. Thus, the department has the discretion to release the requestor's polygraph information, which we have marked, pursuant to section 1703.306(a)(1). *See* Open Records Decision No. 481 at 9 (1987) (predecessor to section 1703.306 permits, but does not require, examination results to be disclosed to examinees).

In summary, the following information must be withheld under section 552.101 of the Government Code in conjunction with common-law privacy: (1) the representative sample of information we marked pertaining to the victim, and the witnesses' identifying information under with the "special circumstances" aspect of common-law privacy. The department has the discretion to release the polygraph information pertaining to the requestor pursuant to section 1703.306(a)(1) of the Occupations Code. The remaining information must be released to the requestor.²

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,

² We note that some of the information being released is confidential and not subject to release to the general public. However, the requestor in this instance has a special right of access to the information. Gov't Code § 552.023 (person or person's authorized representative has special right of access to records that contain information relating to the person that are protected from public disclosure by laws intended to protect that person's privacy interests). Because such information may be confidential with respect to the general public, if the department receives another request for this information from an individual other than this requestor or his authorized representative, the department must again seek a ruling from this office.

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,



M. Alan Akin
Assistant Attorney General
Open Records Division

MAA/mcf

Ref: ID# 291362

Enc. Submitted documents

c: Mr. William S. McCann
4613 Everest Lane
Austin, Texas 78727
(w/o enclosures)