



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 29, 2008

Mr. Ricardo Gonzalez
Interim City Attorney
City of Edinburg
P.O. Box 1079
Edinburg, Texas 78540

OR2008-13289

Dear Mr. Gonzalez:

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# 322902.

The City of Edinburg (the "city") received a request for information pertaining to the indefinite suspension of the requestor's client from the Edinburg Police Department (the "department"). You indicate the city has no information responsive to a portion of the request.¹ You also indicate the city has released some of the requested information to the requestor. You claim the submitted information is excepted from disclosure under section 552.108 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we note some of the submitted information may be the subject of previous requests for information, in response to which this office issued Open Records Letter Nos. 2008-10031 (2008) and 2008-08370 (2008). The submitted information includes a letter from the requestor's client appealing his indefinite suspension. This letter was previously requested and ruled upon in Open Records Letter No. 2008-10031. In Open

¹We note the Act does not require a governmental body to release information that did not exist at the time the request for information was received or create new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

Records Letter No. 2008-08370, the city received a request for this officer's civil service record, and the city submitted to this office information which addressed the findings of an internal affairs investigation. Because this officer was suspended, it would appear some of the internal affairs records submitted for the present request were also responsive to this prior request, and thus are subject to the previous ruling. *Cf.* Local Gov't Code § 143.089(a)(2) (records relating to investigation and disciplinary action against officer must be placed in officer's civil service file). If so, the city must comply with Open Records Letter Nos. 2008-10031 and 2008-08370 for the information that was at issue in those rulings. *See* Open Records Decision No. 673 (2001) (governmental body may rely on prior ruling as a previous determination when (1) the records or information at issue are precisely the same records or information that were previously submitted to this office pursuant to section 552.301(e)(1)(D); (2) the governmental body which received the request for the records or information is the same governmental body that previously requested and received a ruling from the attorney general; (3) the prior ruling concluded that the precise records or information are or are not excepted from disclosure under the Act; and (4) the law, facts, and circumstances on which the prior ruling was based have not changed since the issuance of the ruling). We note some of the submitted information was created after the date the city received the request for information in Open Records Letter No. 2008-08370. Thus, to the extent the submitted information is not the same as the information previously ruled upon, we will address your arguments.

Section 552.108 of the Government Code 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:

- (1) release of the information would interfere with the detection, investigation, or prosecution of crime;
- (2) 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;

(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:

- (1) release of the internal record or notation would interfere with law enforcement or prosecution[.]

Gov't Code § 552.108(a)-(b). Section 552.108(a)(1) protects information, the release of which would interfere with a particular pending criminal investigation or prosecution, while section 552.108(b)(1) encompasses internal law enforcement and prosecution records, the release of which would interfere with on-going law enforcement and prosecution efforts in general. In contrast, section 552.108(a)(2) applies only to information that relates to a concluded criminal investigation or prosecution that did not result in conviction or deferred adjudication. A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why this exception is applicable to the information that the governmental body seeks to withhold. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). The submitted information relates to an internal affairs investigation concerning the requestor's client. We note section 552.108 is generally not applicable to information relating to an administrative investigation that did not result in a criminal investigation or prosecution. *See Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. Civ. App.—El Paso 1992, writ denied) (statutory predecessor to section 552.108 not applicable to internal investigation that did not result in criminal investigation or prosecution); *see also* Open Records Decision No. 350 at 3-4 (1982). Upon review, we find you have failed to demonstrate, and the submitted letter from the department's police chief does not indicate, this internal affairs investigation resulted in a *criminal* investigation or prosecution. We therefore conclude the city may not withhold any of the submitted information under section 552.108 of the Government Code.

We note some of the submitted information is confidential and must be withheld from disclosure pursuant to 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."² Gov't Code § 552.101. This section encompasses section 1703.306 of the Occupations Code, which provides as follows:

(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;
- (2) the person that requested the examination;

²The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

(3) a member, or the member's agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner's activities;

(4) another polygraph examiner in private consultation; or

(5) any other person required by due process of law.

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

(c) A polygraph examiner to whom information acquired from a polygraph examination is disclosed under Subsection (a)(4) may not disclose the information except as provided by this section.

Occ. Code § 1703.306. Section 1703.306(a) makes the submitted information acquired from polygraph examinations confidential. We note a portion of the information at issue consists of the polygraph examination information of the requestor's client, and the city has released this information to the requestor. The city has the discretion to release the officer's polygraph information 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). However, the city must withhold the remaining polygraph information, which we have marked, that pertains to an individual other than the requestor's client under section 552.101 in conjunction with section 1703.306 of the Occupations Code.

Section 552.101 also 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). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. This office has found common-law privacy applies to the identifying information of juvenile offenders. *See* Open Records Decision No. 384 (1983); *cf.* Fam. Code § 58.007. Thus, the city must withhold the identifying information of the juvenile offender that we have marked under section 552.101 in conjunction with common-law privacy.

We also note some of the submitted information is subject to section 552.130 of the Government Code, which excepts from disclosure information that relates to a motor vehicle title or registration issued by an agency of this state. Gov't Code § 552.130(a)(1)-(2). Therefore, the city must withhold the Texas license plate numbers we have marked under section 552.130 of the Government Code.

The remaining submitted information also contains a bank account number. Section 552.136 of the Government Code states that “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” *Id.* § 552.136(b). An access device number is one that may be used to (1) obtain money, goods, services, or another thing of value, or (2) initiate a transfer of funds other than a transfer originated solely by paper instrument, and includes an account number. *Id.* § 552.136(a). Accordingly, the city must withhold the account number we have marked under section 552.136 of the Government Code.

Finally, we note a portion of the remaining information may be excepted from disclosure under section 552.117 of the Government Code. Section 552.117(a)(2) excepts from disclosure the home address, home telephone number, social security number, and family member information of a peace officer, as defined by article 2.12 of the Code of Criminal Procedure. *See id.* § 552.117(a)(2); Open Records Decision No. 622 (1994). In this case, it is unclear whether the individuals whose personal information is at issue are licensed peace officers as defined by article 2.12 of the Code of Criminal Procedure. To the extent the individuals at issue are licensed peace officers as defined by article 2.12, the city must withhold the personal information we have marked pursuant to section 552.117(a)(2) of the Government Code.

If these individuals are no longer peace officers, then their personal information may be excepted under section 552.117(a)(1) of the Government Code. 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 of the Government Code. 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). The city may only withhold information under section 552.117(a)(1) if the individuals at issue elected confidentiality under section 552.024 prior to the date on which the request for this information was made. If the individuals timely elected, the city must withhold the personal information we have marked under section 552.117(a)(1). The city may not withhold this information under section 552.117(a)(1), however, if these individuals did not make timely elections to keep their information confidential.³

³We note the requestor in this instance has a special right of access to his client’s personal information under section 552.023 of the Government Code. *See* Gov’t Code § 552.023(b) (governmental body may not deny access to person or person’s authorized representative to whom information relates on grounds that information is considered confidential under privacy principles). Thus, should the city receive another request for these same records from a person who would not have a special right of access to the private information, the city should resubmit this same information and request another ruling from this office. *See id.* §§ 552.301(a), .302.

In summary, to the extent the pertinent facts and circumstances have not changed since the issuance of these rulings, the city must comply with Open Records Letter Nos. 2008-10031 and 2008-08370 for the information that was at issue in those rulings. The city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 1703.306(a)(1) of the Occupations Code and common-law privacy. The city must also withhold the information we have marked under sections 552.130 and 552.136 of the Government Code. If the individuals to whom the marked personal information pertains are licensed peace officers as defined by article 2.12 of the Code of Criminal Procedure, the city must withhold this information pursuant to section 552.117(a)(2) of the Government Code. If these individuals are not peace officers, then the city must withhold the marked personal information under section 552.117(a)(1) of the Government Code if the individuals timely elected confidentiality under section 552.024 of the Government Code. The remaining submitted information must be released to the requestor.⁴

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3). If the governmental body does not file suit over 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,

⁴The remaining information contains social security numbers. 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. The requestor has a right, however, to his client's social security number. *See generally* Gov't Code § 552.023(b).

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 challenge 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,



Katherine M. Kroll
Assistant Attorney General
Open Records Division

KMK/eeg

Ref: ID# 322902

Enc. Submitted documents

c: Mr. Carlos E. Hernandez, Jr.
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(w/o enclosures)