



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 8, 2008

Mr. Eric Brittain
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201 East Main Drive Suite 1350
El Paso, Texas 79901

OR2008-16699

Dear Mr. Brittain:

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# 329449.

The Anthony Police Department (the "department"), which you represent, received a request for information relating to a former officer of the department. You claim that the requested information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.108, and 552.117 of the Government Code.¹ We have considered the exceptions you claim and reviewed the information you submitted.

We first note that the department did not comply with section 552.301 of the Government Code in requesting this decision. Section 552.301 prescribes procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. *See* Gov't Code § 552.301(a). Section 552.301(b) provides that a governmental body must request the attorney general's decision and claim its exceptions to disclosure not later than the tenth business day after the date of its receipt of the written request for information. *See id.* § 552.301(b). If a governmental body fails to comply with section 552.301, the requested information is presumed to be subject to required public disclosure and must be released, unless there is a compelling reason to withhold any of the

¹Although you raise section 552.1175 of the Government Code, we note that section 552.117 is the proper exception to claim for information relating to a former employee of the department.

information. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ).

You inform us that the department received the instant request for information on September 16, 2008; therefore, the department's ten-business-day deadline under section 552.301(b) was September 30. The department requested this decision on October 1. Thus, because the department did not comply with section 552.301(b), the submitted information is presumed to be public under section 552.302. This statutory presumption can generally be overcome when information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). Although the department seeks to withhold the submitted information under sections 552.103 and 552.108 of the Government Code, those sections are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *See* Gov't Code § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (Gov't Code § 552.103 may be waived); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions), 663 at 5 (1999) (waiver of discretionary exceptions), 177 at 3 (1977) (statutory predecessor to Gov't Code § 552.108 subject to waiver). In failing to comply with section 552.301, the department has waived its claims under sections 552.103 and 552.108. Nevertheless, the interests under section 552.108 of a governmental body other than the one that failed to comply with section 552.301 can provide a compelling reason for non-disclosure under section 552.302. *See* Open Records Decision No. 586 at 2-3 (1991). You inform us that the submitted information implicates the interests of law enforcement agencies other than the department. Accordingly, we will determine whether the department may withhold the information on behalf of those agencies under section 552.108. We also will consider the department's claims under sections 552.101, 552.102, and 552.117 of the Government Code, whose applicability can provide compelling reasons for non-disclosure for the purposes of section 552.302.

We next note that the submitted information includes notices of meetings of the town council of the Town of Anthony. Notices of a governmental body's public meetings are specifically made public under provisions of the Open Meetings Act, chapter 551 of the Government Code. *See* Gov't Code §§ 551.041 (governmental body shall give written notice of date, hour, place, and subject of each meeting), 551.043 (notice of meeting of governmental body must be posted in place readily accessible to general public for at least 72 hours before scheduled time of meeting). As a general rule, the exceptions to disclosure found in the Act do not apply to information that other statutes make public. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Therefore, the department must release the meeting notices that we have marked under sections 551.041 and 551.043 of the Government Code.

We also note that some of the remaining information is contained in documents that have been filed with a court. Those documents, which we have marked, are subject to section 552.022(a)(17) of the Government Code which provides for required public

disclosure of "information that is also contained in a public court record," unless the information is expressly confidential under other law. Gov't Code § 552.022(a)(17). Section 552.108 is a discretionary exception that may be waived and, as such, is not other law that makes information confidential for the purposes of section 552.022(a)(17). Therefore, the department may not withhold any of the information contained in the court documents under section 552.108. However, we will consider whether the department may withhold any of the information in the court documents under section 552.101, section 552.102, or section 552.117.

You contend that information contained in the court documents is protected by privacy under sections 552.101 and 552.102 of the Government Code. 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 exception encompasses constitutional and common-law privacy. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976); Open Records Decision Nos. 600 at 4 (1992) (constitutional privacy), 611 at 1 (1992) (common-law privacy). Section 552.102(a) excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]" Gov't Code § 552.102(a). The privacy analysis under section 552.102(a) is the same as the common-law privacy test under section 552.101 and *Industrial Foundation*. *See Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref'd n.r.e.). We note, however, that constitutional and common-law rights of privacy are not applicable to information contained in public court documents. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 496 (1975) (action for invasion of privacy cannot be maintained where information is in public domain); *Star-Telegram v. Walker*, 834 S.W.2d 54 (Tex. 1992) (sexual assault victim's privacy right not violated by release of information in public court document). We therefore conclude that the department may not withhold any of the information contained in the court documents on privacy grounds under section 552.101 or section 552.102.

Section 552.101 also encompasses information that other statutes make confidential. You raise section 552.101 in conjunction with the federal Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C. §§ 1320d-1320d-8. At the direction of Congress, the Secretary of Health and Human Services ("HHS") promulgated regulations setting privacy standards for medical records, which HHS issued as the Federal Standards for Privacy of Individually Identifiable Health Information. *See Health Insurance Portability and Accountability Act of 1996*, 42 U.S.C. § 1320d-2 (Supp. IV 1998) (historical & statutory note); Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. Pts. 160, 164 ("Privacy Rule"); *see also* Attorney General Opinion JC-0508 at 2 (2002). These standards govern the releasability of protected health information by a covered entity. *See* 45 C.F.R. pts. 160, 164. Under these standards, a covered entity may not use or disclose protected health information, excepted as provided by parts 160 and 164 of the Code of Federal Regulations. *See id.* § 164.502(a). This office has addressed the interplay of the Privacy Rule and the Act. In Open Records Decision No. 681 (2004), we noted that

section 164.512 of title 45 of the Code of Federal Regulations provides that a covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law. *See* 45 C.F.R. § 164.512(a)(1). We further noted that the Act “is a mandate in Texas law that compels Texas governmental bodies to disclose information to the public.” *See* ORD 681 at 8; *see also* Gov’t Code §§ 552.002, .003, .021. We therefore held that the disclosures under the Act come within section 164.512(a). Consequently, the Privacy Rule does not make information confidential for the purpose of section 552.101 of the Government Code. *See Abbott v. Tex. Dep’t of Mental Health & Mental Retardation*, 212 S.W.3d 648 (Tex. App.—Austin 2006, no pet.); ORD 681 at 9; *see also* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Thus, because the Privacy Rule does not make confidential information that is subject to disclosure under the Act, the department may withhold protected health information from the public only if the information is confidential under other law or an exception in subchapter C of the Act applies.

You also raise section 552.101 in conjunction with section 261.201 of the Family Code, which provides in part:

(a) The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with [the Family Code] and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under [chapter 261 of the Family Code] and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, and working papers used or developed in an investigation under [chapter 261 of the Family Code] or in providing services as a result of an investigation.

Fam. Code § 261.201(a); *see id.* § 261.001(1), (4) (defining “abuse” and “neglect” for purposes of Fam. Code ch. 261). We find that none of the information in the court records consists of files, reports, records, communications, or working papers used or developed in an investigation of alleged or suspected child abuse or neglect under chapter 261 of the Family Code. We therefore conclude that the department may not withhold any of that information under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. *See* Open Records Decision No. 440 at 2 (1986) (addressing predecessor statute).

Section 552.117(a)(2) of the Government Code excepts from public disclosure the home address, home telephone number, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with sections 552.024 or 552.1175. Section 552.117(a)(2) adopts the definition of peace officer found at article 2.12 of the Code of Criminal Procedure. You indicate that the former department officer to whom the court documents pertain is still a licensed peace officer. Based on your representation, we have marked information in the court documents that the department must withhold under section 552.117(a)(2). The rest of the information in the court documents must be released pursuant to section 552.022(a)(17).

With respect to the rest of the submitted information, we address your claim under section 552.108. Section 552.108 of the Government Code excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov’t Code § 552.108(a)(1). We note that some of the remaining information is related to an administrative internal affairs investigation conducted by the department. We note that section 552.108 is generally not applicable to records of an administrative internal affairs 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) (addressing statutory predecessor to Gov’t Code § 552.108). You state, however, that all of the remaining information is related to investigations that are being conducted by other state and federal law enforcement agencies. You contend that the release of the information in question would interfere with the detection, investigation, or prosecution of crime. You inform us that the El Paso County Sheriff’s Office has requested that the remaining information be withheld from disclosure. Based on your representations, we conclude that the department may withhold the remaining information under section 552.108(a)(1).

In summary: (1) the marked notices of meetings must be released; (2) except for the marked information that must be withheld under section 552.117 of the Government Code, the information in the marked court documents must be released pursuant to section 552.022(a)(17) of the Government Code; and (3) the department may withhold the rest of the submitted information under section 552.108(a)(1) of the Government Code.

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, 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,



James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/ma

Ref: ID# 329449

Enc: Submitted documents

c: Requestor
(w/o enclosures)