



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 17, 2008

Ms. Bonnie Lee Goldstein
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P. O. Box 140940
Dallas, Texas 75214-0940

OR2008-17157

Dear Ms. Goldstein:

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# 330223.

The City of Jacksboro (the "city"), which you represent, received two requests for personnel and investigative records relating to the requestor. You state that some of the requested information will be released. You claim that the rest of the requested information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code.¹ We have considered the exceptions you claim and reviewed the information you submitted.²

We first note that some of the submitted information is illegible. As this office cannot review illegible information, we conclude that you have failed to comply with the requirements of section 552.301 of the Government Code with respect to that information. *See Gov't Code § 552.301(e)(1)(D)*. Under section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the presumption that

¹Although you also raise section 552.103 of the Government Code, you have submitted no arguments in support of your assertion of that exception. Therefore, this ruling does not address section 552.103. *See Gov't Code §§ 552.301(e)(1)(A)* (governmental body must submit written comments stating why claimed exceptions apply to information at issue), .302.

²This letter ruling assumes that the submitted representative samples of information are truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the city to withhold any information that is substantially different from the submitted information. *See Gov't Code §§ 552.301(e)(1)(D)*, .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

the information is public and must be released, unless there is a compelling reason to withhold the information. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ); Open Records Decision No. 319 (1982). Generally, a compelling reason to withhold information exists when the 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). Because this office is unable to review the illegible information, we have no basis to conclude that the information is confidential by law. Therefore, we have no choice but to order the city to release that information. If you maintain a legible copy of the information and believe that any of the information is confidential and may not lawfully be released, then you must challenge this ruling in court as outlined below.

Next, we address your arguments under section 552.108 of the Government Code, which is the more inclusive exception you claim. Section 552.108(a)(1) 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). Section 552.108(b)(1) excepts “[a]n 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 . . . if . . . release of the internal record or notation would interfere with law enforcement or prosecution[.]” *Id.* § 552.108(b)(1). A governmental body must reasonably explain how and why section 552.108 is applicable to the information at issue. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). In this instance, the city seeks to withhold records relating to two administrative internal affairs investigations. Section 552.108 is generally not applicable to records of 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) (addressing statutory predecessor to Gov’t Code § 552.108). Both of the administrative investigations to which the submitted information pertains appear to be closed. You do not indicate that either of the administrative investigations to which the submitted information pertains resulted in a criminal investigation or prosecution. Therefore, having considered your arguments, we conclude that the city may not withhold any of the submitted information under section 552.108 of the Government Code.

You also raise section 552.101 of the Government Code, which 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 information that other statutes make confidential. You raise section 552.101 in conjunction with section 1701.306 of the Occupations Code, which provides in part:

- (a) The [Texas Commission on Law Enforcement Officer Standards and Education (“TCLEOSE”)] may not issue a license to a person as an officer or county jailer unless the person is examined by:

(1) a licensed psychologist or by a psychiatrist who declares in writing that the person is in satisfactory psychological and emotional health to serve as the type of officer for which a license is sought; and

(2) a licensed physician who declares in writing that the person does not show any trace of drug dependency or illegal drug use after a physical examination, blood test, or other medical test.

(b) An agency hiring a person for whom a license as an officer or county jailer is sought shall select the examining physician and the examining psychologist or psychiatrist. The agency shall prepare a report of each declaration required by Subsection (a) and shall maintain a copy of the report on file in a format readily accessible to [TCLEOSE]. *A declaration is not public information.*

Occ. Code § 1701.306(a)-(b) (emphasis added). The city must withhold the declaration that we have marked under section 1701.306 of the Occupations Code.

The submitted documents also include F-5 forms ("Report of Separation of Licensee") that appear to have been submitted to TCLEOSE under subchapter J of chapter 1701 of the Occupations Code. Section 1701.454 of the Occupations Code governs the public availability of an F-5. We note that some of the submitted F-5's were created prior to the effective date of the amendment of section 1701.454 by the Seventy-ninth Legislature. *See* Act of May 25, 2005, 79th Leg., R.S., ch. 1298, § 4, 2005 Tex. Gen. Laws 4094, 4096. Those documents are governed by the previous version of section 1701.454. *See id.* § 6.³ Section 1701.454 previously provided as follows:

(a) A report or statement submitted to [TCLEOSE] under this subchapter is confidential and is not subject to disclosure under Chapter 552, Government Code, unless the person resigned or was terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses.

(b) Except as provided by this subsection, a [TCLEOSE] member or other person may not release the contents of a report or statement submitted under this subchapter. The report or statement may be released only by the

³Section 6 of the amending legislation states that "[t]he changes in law made by this Act in relation to employment termination reports apply only to an employment termination report under Subchapter J, Chapter 1701, Occupations Code, regarding a resignation or termination that occurs on or after the effective date of this Act. An employment termination report regarding a resignation or termination that occurs before the effective date of this Act is governed by the law as it existed immediately before the effective date, and that law is continued in effect for that purpose." Act of May 25, 2005, 79th Leg., R.S., ch. 1298, § 6, 2005 Tex. Gen. Laws 4094, 4096.

[TCLEOSE] employee having the responsibility to maintain the report or statement and only if:

(1) the head of a law enforcement agency or the agency head's designee makes a written request on the agency's letterhead for the report or statement accompanied by the agency head's or designee's signature; and

(2) the person who is the subject of the report or statement authorizes the release by providing a sworn statement on a form supplied by [TCLEOSE] that includes the person's waiver of liability regarding an agency head who is responsible for or who takes action based on the report or statement.

Occ. Code § 1701.454. As amended by the 79th Legislature, section 1701.454 now provides:

(a) A report or statement submitted to [TCLEOSE] under this subchapter is confidential and is not subject to disclosure under Chapter 552, Government Code, unless the person resigned or was terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses.

(b) Except as provided by this subchapter, a [TCLEOSE] member or other person may not release the contents of a report or statement submitted under this subchapter.

Id. None of the submitted F-5's appears to be subject to release under either version of the statute. Therefore, the city must withhold the F-5's that we have marked under section 1701.454 of the Occupations Code.

Section 552.101 of the Government Code also encompasses common-law privacy, which protects information that is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and of no legitimate public interest. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Common-law privacy encompasses the specific types of information that are held to be intimate or embarrassing in *Industrial Foundation*. *See id.* at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). This office has determined that other types of information also are private under section 552.101. *See generally* Open Records Decision No. 659 at 4-5 (1999) (summarizing information attorney general has held to be private). You state that some of the submitted investigative information is related to an alleged sexual relationship between a police officer and a juvenile. We have marked information that tends to identify the juvenile. The city must

withhold that information under section 552.101 in conjunction with common-law privacy. Cf. Open Records Decision Nos. 393 (1993), 339 (1992) (information that identifies or tends to identify victim of sexual offense must be withheld).

You also raise section 552.101 in conjunction with the common-law informer's privilege, which Texas courts have long recognized. See, e.g., *Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). The informer's privilege protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided that the subject of the information does not already know the informer's identity. See Open Records Decision No. 208 at 1-2 (1978). The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 279 at 1-2 (1981). The report must be of a violation of a criminal or civil statute. See Open Records Decision Nos. 582 at 2 (1990), 515 at 4 (1988). The privilege excepts the informer's statement only to the extent necessary to protect that informer's identity. Open Records Decision No. 549 at 5 (1990). You claim the informer's privilege for the identities and statements of witnesses in the submitted records of the administrative investigations. You have not demonstrated, however, that any of the witnesses in question reported a violation of law punishable by a civil or criminal penalty. Witnesses who provide information in the course of an investigation but do not make the initial report of the violation are not informants for the purposes of the informer's privilege. We therefore conclude that the city may not withhold any of the remaining information under section 552.101 in conjunction with the informer's privilege.

We note that the city may be required to withhold some of the remaining information under section 552.117 of the Government Code.⁴ Section 552.117(a)(2) excepts from 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 of the Government Code. Section 552.117(a)(2) adopts the definition of peace officer found at article 2.12 of the Code of Criminal Procedure. The information that we have marked under section 552.117 must be withheld under section 552.117(a)(2) to the extent that the marked information is related to a licensed peace officer.

Section 552.117(a)(1) excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former official or

⁴Unlike other exceptions to disclosure under the Act, this office will raise section 552.117 on behalf of a governmental body, as this exception is mandatory and may not be waived. See Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

employee of a governmental body who requests that this information be kept confidential under section 552.024. Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who did not timely request under section 552.024 that the information be kept confidential. The information that we have marked under section 552.117 must be withheld under section 552.117(a)(1) to the extent that the information is related to a current or former city employee who timely requested confidentiality for the marked information under section 552.024.

The city also may be required to withhold some of the remaining information under section 552.1175 of the Government Code.⁵ Section 552.1175 provides in part:

(a) This section applies only to:

(1) peace officers as defined by Article 2.12, Code of Criminal Procedure;

...

(5) employees of a district attorney, criminal district attorney, or county or municipal attorney whose jurisdiction includes any criminal law or child protective services matters[.]

(b) Information that relates to the home address, home telephone number, or social security number of an individual to whom this section applies, 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.

⁵Section 552.1175 also is a mandatory exception and may not be waived. Gov't Code §§ 552.007, .352; ORD 674 at 3 n.4.

Gov't Code § 552.1175(a)(1), (5), (b). The information that we have marked under section 552.1175 is related to individuals employed by governmental entities other than the city. The city must withhold that information under section 552.1175 to the extent that the individuals involved fall within the scope of section 552.1175(a) and elect to restrict access to the marked information in accordance with section 552.1175(b).

We note that section 552.136 of the Government Code is applicable to some of the remaining information.⁶ Section 552.136(b) states that “[n]otwithstanding any other provision of [the Act], 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); *see id.* § 552.136(a) (defining “access device”). We have marked an account number that the city must withhold under section 552.136.

In summary: (1) the city must withhold the marked information that is confidential under section 552.101 of the Government Code in conjunction with sections 1701.306 and 1701.454 of the Occupations Code and common-law privacy; (2) the information that we have marked under section 552.117 of the Government Code must be withheld under section 552.117(a)(2) to the extent that the marked information is related to a licensed peace officer; (3) the information that we have marked under section 552.117 must be withheld under section 552.117(a)(1) to the extent that the information is related to a current or former city employee who timely requested confidentiality for the marked information under section 552.024 of the Government Code; (4) the information that we have marked under section 552.1175 of the Government Code must be withheld to the extent that the individuals involved fall within the scope of section 552.1175(a) and elect to restrict access to the information in accordance with section 552.1175(b); and (5) the marked account number must be withheld under section 552.136 of the Government Code. The rest of the submitted information must be released.⁷

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

⁶Section 552.136 also is mandatory and may not be waived. Gov't Code §§ 552.007, .352; ORD 674 at 3 n.4.

⁷We note that the city would be required to withhold some of the remaining information from the public to protect the requestor's privacy. The requestor has a right, however, to his own private information. *See* Gov't Code § 552.023(a); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning himself). Should the city receive another request for these same records from a person who would not have a right of access to this requestor's private information, the city should resubmit these records and request another decision. *See* Gov't Code §§ 552.301(a), .302.

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).

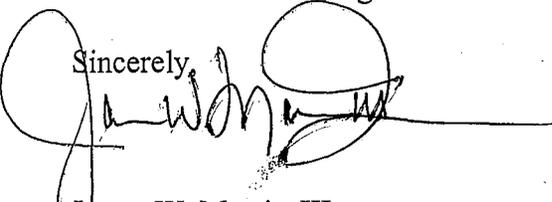
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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/eb

Ref: ID# 330223

Enc: Submitted documents

c: Requestor
(w/o enclosures)