



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

January 8, 2010

Ms. Samantha Friedman
Assistant City Attorney
Law Offices of JC Brown, PC
1411 West Avenue, Suite 100
Austin, Texas 78701

OR2010-00365

Dear Ms. Friedman:

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# 366690.

The City of Bastrop (the "city"), which you represent, received a request for information pertaining to a named former city police officer. You state you will release some information to the requestor. You claim the remaining requested information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Section 552.101 of the Government Code 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 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. *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.

¹We assume that the representative sample of records submitted to this office 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.

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. The information at issue concerns allegations of an employee of the city's police department harassing members of the public, not a fellow employee or employees. Because this information does not concern sexual harassment in the employment arena, we find that *Ellen* is not applicable. Therefore, none of the submitted information may be withheld under section 552.101 of the Government Code in conjunction with common-law privacy and the court's holding in *Ellen*.

Common-law privacy also encompasses the types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation*, including 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. See 540 S.W.2d 668 at 683. This office has held that the compilation of an individual's criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. Cf. *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (when considering prong regarding individual's privacy interest, court recognized distinction between public records found in courthouse files and local police stations and compiled summary of information, and notes that individual has significant privacy interest in compilation of one's criminal history). Furthermore, we find that the compilation of a private citizen's criminal history is generally not of legitimate concern to the public. We note, however, that records relating to routine traffic violations are not considered criminal history record information. Cf. Gov't Code § 411.082(2)(B) (criminal history record information does not include driving record information). This office has also found that personal financial information not relating to a financial transaction between an individual and a governmental body is excepted from required public disclosure. See Open Records Decision Nos. 600 (1992), 545 (1990), 523 (1989) (individual's mortgage payments, assets, bills, and credit history). Upon review, we find that the information we have marked must be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

Next, you raise section 552.101 of the Government Code in conjunction with the common-law informer's privilege, which Texas courts have long recognized. See *Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969). The informer's privilege protects 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 Nos. 515 at 3 (1998), 208 at 1-2 (1978). The 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." See Open Records Decision No. 279 at 2 (1981) (citing Wigmore, *Evidence*, § 2374, at 767 (McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute.

See Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5. The privilege excepts the informer's statement only to the extent necessary to protect the informer's identity. *See* Open Records Decision No. 549 at 5 (1990).

You seek to withhold the identities of witnesses, informants, and persons interviewed by the city's police department in the course of an internal investigation involving the former officer named in the request. You state the individuals at issue reported a violation or possible violation of the law. However, you have not identified any alleged violation, nor have you explained whether the alleged violation carries civil or criminal penalties. We also note that 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. Accordingly, the city has failed to demonstrate that the informer's privilege is applicable to the information at issue. Thus, we conclude that the city may not withhold the information at issue under section 552.101 of the Government Code in conjunction with the informer's privilege.

You claim portions of the remaining information are excepted from disclosure under section 552.108 of the Government Code. Section 552.108 provides in relevant part the following:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if:

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

....

(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 the requirements of Section 552.021 if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution;

Gov't Code § 552.108(a)(1), (b)(1). A governmental body claiming section 552.108(a)(1) or section 552.108(b)(1) must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), (b)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977).

The information at issue pertains to an internal administrative investigation of a former city police officer. You assert that release of the information you have marked might subject the

persons who were interviewed by the city's police department to possible intimidation or harassment or might harm the prospects of future cooperation. This office has previously determined that, when it can be established from an examination of the facts of a particular case that disclosure of witness identities and statements might subject the witnesses to possible intimidation or harassment, that information may be excepted from disclosure under the predecessor to section 552.108. *E.g.*, Open Records Nos. 329 (1982), 313 (1982), 297 (1981). However, after review of your arguments and the information at issue, we find the city has not established that release of the information at issue would subject any individual to possible intimidation or harassment. Furthermore, 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 (addressing statutory predecessor). You have failed to explain how the release of the information at issue would interfere with a particular pending criminal investigation or prosecution. Accordingly, the city may not withhold any of the information you have marked under section 552.108 of the Government Code.

Next, we note the remaining information contains the former officer's personal information. Section 552.117(a)(2) excepts from disclosure the home address, home telephone number, social security number, and the family member information of a peace officer as defined by article 2.12 of the Code of Criminal Procedure regardless of whether the officer requested confidentiality under section 552.024 or 552.1175 of the Government Code.² Gov't Code § 552.117(a)(2). Upon review, we note that some of the information may be subject to section 552.117(a)(2). We are unable to determine from the information provided whether the former officer at issue is still a licensed peace officer. Thus, we must rule conditionally. Accordingly, if the former officer at issue is still a licensed peace officer, then the city must withhold the information we have marked under section 552.117(a)(2). If the former officer at issue is not currently a licensed peace officer, section 552.117(a)(1) may apply to the information we have marked under section 552.117(a)(2).

Section 552.117(a)(1) of the Government Code excepts from disclosure the current and former 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 this information be kept confidential under section 552.024 of the Government Code. *Id.* § 552.117(a)(1). The city may only withhold information under section 552.117(a)(1) on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. The submitted information does not reflect whether the former officer elected to keep his information confidential pursuant to section 552.024 of the Government Code prior to the city receiving the request at issue. If the former officer made a timely election under section 552.024, the city must withhold the information we have marked under

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

section 552.117(a)(1). If the former officer did not make timely elections under section 552.024, the information that we have marked under section 552.117(a)(1) may not be withheld under that exception.

We note section 552.1175 of the Government Code may apply to a portion of the remaining information. Section 552.1175 provides in part:

(b) Information that relates to the home address, home telephone number, or social security number of [a peace officer as defined by article 2.12 of the Code of Criminal Procedure], 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.

Id. § 552.1175(b). *See, e.g.*, Open Records Decision No. 678 (2003) (ruling that confidentiality of information subject to section 552.1175 is dependent on a governmental body's receipt of an election of confidentiality from the individual whose information is at issue). The remaining information includes the personal information of a peace officer who is not a city employee. Thus, to the extent the peace officer whose information is at issue elects to restrict access to the information we have marked in accordance with section 552.1175(b), the city must withhold this information under section 552.1175. If the city does not receive the appropriate election, this information may not be withheld under section 552.1175.

Next, we note some of the remaining information is subject to section 552.130 of the Government Code. Section 552.130 excepts from disclosure information that "relates to... a motor vehicle operator's or driver's license or permit issued by an agency of this state [or] a motor vehicle title or registration issued by an agency of this state." *Id.* § 552.130. The city must withhold the information we have marked under section 552.130 of the Government Code.³

In summary, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. If the former officer at

³We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including a Texas driver's license number under section 552.130 of the Government Code, without the necessity of requesting an attorney general decision.

issue is still a licensed peace officer, then the city must withhold the information we have marked under section 552.117(a)(2) of the Government Code. However, if the officer at issue is no longer a licensed peace officer, the city must withhold the information we marked under section 552.117(a)(1) of the Government Code only if the former officer made a timely election under section 552.024. The city must withhold the personal information we have marked under section 552.1175 of the Government Code if the peace officer at issue elects to restrict access to this information in accordance with section 552.1175(b). The city must withhold the information we have marked under section 552.130 of the Government Code. The remaining information must be released.⁴

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Amy L.S. Shipp
Assistant Attorney General
Open Records Division

ALS/eeg

Ref: ID# 366690

Enc. Submitted documents

cc: Requestor
(w/o enclosures)

⁴We note that the remaining information includes 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. *See Gov't Code* § 552.147.