



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

June 2, 2010

Mr. Robert L. Dillard III
Nichols, Jackson, Dillard, Hager & Smith, L.L.P.
1800 Lincoln Plaza
500 North Akard
Dallas, Texas 75201

OR2010-07961

Dear Mr. Dillard:

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# 381301.

The University Park Police Department (the "department"), which you represent, received a request for a specified incident report. You claim the submitted information is 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. We have also considered comments submitted by the requestor's attorney. *See* Gov't Code § 552.304(a) (providing that a person may submit comments stating why information should or should not be released).

Initially, we address the requestor's attorney's contention that the department failed to meet its procedural obligations under section 552.301 of the Government Code. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. *See id.* § 552.301(b). Under section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See id.* § 552.301(e). In this instance, the requestor's attorney contends, and provides documentation showing, that her

client made a previous request to the department on March 1, 2010 that encompassed the incident report that is the subject of the present request. She further contends that the department did not provide her client with the information at issue, nor did the department timely request a ruling from this office seeking to withhold the information in response to the previous request and thus, the department has waived its claimed exceptions under the Act for the submitted incident report. We note we have not received correspondence from the department responding to these contentions.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless a compelling reason exists to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). Generally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). In failing to comply with the requirements of section 552.301, the department has waived its claim under the informer's privilege, which is a discretionary exception to disclosure. *See* Open Records Decision Nos. 522 (1989) (discretionary exceptions in general), 549 at 6 (1990) (purpose of the informer's privilege is to protect the flow of information to a governmental body, rather than to protect third party). Consequently, no portion of the submitted information may be withheld under this exception. However, the department also raises mandatory exceptions to disclosure for the submitted information. Unlike discretionary exceptions that protect the interests of the governmental body, mandatory exceptions protect the interests of third parties and cannot be waived by a governmental body's failure to timely submit required information. *See* Gov't Code § 552.302; *see also* ORD 150 at 2, 319 (1982). Accordingly, we will consider the mandatory exceptions the department raises for the information at issue.

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 common-law privacy and excepts from disclosure private facts about an individual. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). Information is excepted from required public disclosure by common-law right privacy if the information (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and the information (2) is not of legitimate concern to the public. *See id.* at 685. In Open Records Decision No. 393 (1983), this office concluded that, generally, only that information which either identifies or tends to identify a victim of sexual assault or other sex-related offense may be withheld under common-law privacy; however, because the identifying information was inextricably intertwined with other releasable information, the governmental body was required to withhold the entire report. *See* Open Records Decision Nos. 393 at 2, 339 (1982); *see also Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied) (identity of witnesses to and victims of sexual harassment was highly intimate or embarrassing information and public did not have a legitimate interest in such information); Open Records

Decision No. 440 (1986) (detailed descriptions of serious sexual offenses must be withheld). The requestor in this case knows the identity of the alleged victim. We believe that, in this instance, withholding only identifying information from the requestor would not preserve the victim's common law right to privacy. We therefore conclude the department must withhold the entire incident report pursuant to section 552.101 of the Government Code in conjunction with common-law privacy.¹

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,



Pamela Wissemann
Assistant Attorney General
Open Records Division

PFW/em

Ref: ID# 381301

Enc. Submitted documents

c: Requestor
(w/o enclosures)

cc: Ms. Shannon Teicher
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901 Main Street, Suite 6000
Dallas, Texas 75202
(w/o enclosures)

¹As our ruling is dispositive, we do not address your other arguments against disclosure.