



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 17, 2010

Mr. John C. West  
General Counsel  
Office of the Inspector General  
Texas Department of Criminal Justice  
4616 Howard Lane, Suite 250  
Austin, Texas 78728

OR2010-12435

Dear Mr. West:

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# 390960.

The Texas Department of Criminal Justice (the "department") received a request for information pertaining to investigations involving a named former employee. You state you will release some of the requested information with information redacted pursuant to the previous determination issued to the department in Open Records Letter No. 2005-1067 (2005) and section 552.147 of the Government Code.<sup>1</sup> You claim some of the submitted information is excepted from disclosure under sections 552.108 and 552.122 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we must address the department's obligations under the Act. Section 552.301 describes the procedural obligations placed on a governmental body that receives a written

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<sup>1</sup>Open Records Letter No. 2005-1067 authorizes the department to generally withhold the present and former home addresses and telephone numbers, social security numbers, and family member information of its current or former employees under section 552.117(a)(3) of the Government Code, regardless of whether the current or former employee complies with section 552.1175 of the Government Code, without the necessity of requesting a decision under the Act. *See* Open Records Decision No. 673 (2001) (listing elements of first type of previous determination under section 552.301(a)). 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(b).

request for information it wishes to withhold. Pursuant to section 552.301(b) of the Government Code, the governmental body must request a ruling from this office and state the exceptions to disclosure that apply within ten business days after receiving the request. *See* Gov't Code § 552.301(b). The department states it received the request for information on June 3, 2010. Accordingly, the department's ten-business-day deadline was June 17, 2010. Although the department's request for a ruling and its claim under section 552.108 of the Government Code were timely submitted to this office on June 17, 2010, the department did not raise its claim under section 552.122 of the Government Code until June 24, 2010. Consequently, we find the department failed to comply with the procedural requirements of section 552.301 with respect to its claim under section 552.122 of the Government Code.

Generally, a governmental body's failure to comply with section 552.301 results in the waiver of its claims under the exceptions at issue, unless the governmental body demonstrates a compelling reason 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, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); *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. Open Records Decision No. 150 at 2 (1977). Although the department seeks to withhold some of the submitted information under section 552.122 of the Government Code, this is a discretionary exception to disclosure and does not demonstrate a compelling reason to withhold information from the public. *See* Open Records Decision No. 663 at 5 (1999) (waiver of discretionary exceptions). Because the department failed to comply with the procedural requirements of the Act with respect to section 552.122, the department has waived its claim under this exception. However, we will consider the applicability of your timely-raised claim under section 552.108 of the Government Code.

You claim the submitted case file is excepted from disclosure under section 552.108(a)(2) of the Government Code. Section 552.108(a)(2) excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (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.” Gov't Code § 552.108(a)(2). A governmental body claiming section 552.108(a)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than conviction or deferred adjudication. *See id.* §§ 552.108(a)(2), .301(e)(1)(A) (governmental body must provide comments explaining why exceptions raised should apply to information requested). You state the information at issue relates to “potential criminal allegations that did not result in a conviction or deferred adjudication.” However, you also state that the information at issue pertains to “an unresolved criminal case,” and you state the investigation “is subject to subsequent action at any time.” Because you state the information at issue relates to an unresolved criminal case, you have failed to explain how the submitted case file pertains to

a closed case that did not result in conviction or deferred adjudication. Therefore, we find that section 552.108(a)(2) is not applicable to the information at issue, and it may not be withheld on that basis.

We note portions of the submitted case file are subject to common-law privacy. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."<sup>2</sup> *Id.* § 552.101. This section 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). 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. Upon review, we find that portions of the submitted case file are intimate or embarrassing and of no legitimate public interest. Thus, we conclude the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.

We note some of the remaining information falls within the scope of section 552.117 of the Government Code. Section 552.117(a)(3) excepts from public disclosure the present and former home addresses and telephone numbers, social security numbers, and family member information of current or former employees of the department or the predecessor in function of the department or any division of the department, regardless of whether the current or former employee complies with section 552.1175 of the Government Code. Gov't Code § 552.117(a)(3). Therefore, the department must withhold the information we have marked pursuant to section 552.117(a)(3) of the Government Code.

We note the submitted case file is a law enforcement record that is held by the department in its investigative capacity as a law enforcement entity, and not as the employer of department employees involved. Accordingly, section 552.117 is not applicable to the personal information in the submitted case file. However, this information may be excepted from disclosure under section 552.1175, which provides in part:

(a) This section applies only to:

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<sup>2</sup>The 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) current or former employees of the Texas Department of Criminal Justice or of the predecessor in function of the department or any division of the department[.]

(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.

*Id.* § 552.1175(a)(3), (b). The remaining information in the submitted case file contains the personal information of employees or former employees of the department. We note section 552.1175 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988). Therefore, to the extent that the individuals whose information we have marked elect to restrict access to their information in accordance with section 552.1175(b), the department must withhold the information we marked under section 552.1175 of the Government Code. If the individuals do not elect to restrict access to the information we have marked, then the department may not withhold this information under section 552.1175.

We note the remaining information contains Texas motor vehicle record information subject to section 552.130. Section 552.130 of the Government Code 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." Gov't Code § 552.130. Therefore, the department must withhold the Texas motor vehicle record information we have marked under section 552.130 of the Government Code.

Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body," unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See id.* § 552.137(a)-(c). The e-mail address we have marked is not specifically excluded by section 552.137(c). As such, the marked e-mail address must be withheld under section 552.137 of the Government Code,

unless the owner of the address has affirmatively consented to its release. *See id.* § 552.137(b).<sup>3</sup>

In summary, the department must withhold the following: (1) the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy; (2) the information we have marked pursuant to section 552.117(a)(3) of the Government Code; (3) the information we have marked in the submitted case file under section 552.1175 of the Government Code, to the extent that the individuals whose information we have marked elect to restrict access to their information in accordance with section 552.1175(b); (4) the Texas motor vehicle record information we have marked pursuant to section 552.130 of the Government Code; and (5) the e-mail address we have marked under section 552.137 of the Government Code, unless the owner has affirmatively consented to its release. The remaining information must be released to the requestor.<sup>4</sup>

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](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

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<sup>3</sup>We 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 Texas driver's license numbers under section 552.130 of the Government Code and e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

<sup>4</sup>Regardless of the applicability of section 552.117 or 552.1175, as previously noted, section 552.147(b) 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(b).

Ref: ID# 390960

Enc. Submitted documents

c: Requestor  
(w/o enclosures)