



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 24, 2010

Ms. YuShan Chang
Assistant City Attorney
City of Houston Legal Department
P.O. Box 368
Houston, Texas 77001-0368

OR2010-14520

Dear Ms. Chang:

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# 394497 (City of Houston Reference No. 17368).

The City of Houston and the Houston Police Department (collectively the "city"), received two requests for information related to a named city council member. You state the city has redacted personal e-mail addresses and driver's license information pursuant to the previous determination issued to all governmental bodies in Open Records Decision No. 684 (2009).¹ You also state some responsive information will be made available to the requestors. You claim that some of the submitted information is excepted from disclosure under sections 552.101 and 552.117 of the Government Code. Although you take no position with respect to the public availability of the remaining submitted information, you state that release of the information at issue may implicate the proprietary interests of the United States Department of Justice, Federal Bureau of Investigation (the "FBI"). Accordingly, you state, and provide documentation showing, you have notified the FBI of the request and of the FBI's right to submit comments to this office as to why the information at issue should not be released to the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have received

¹Open Records Decision No. 684 is 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 and an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

comments from the FBI. We have considered the submitted arguments and reviewed the submitted information, some of which consists of representative samples.²

You indicate that a portion of the submitted information constitutes law enforcement records of the Federal Bureau of Investigation (the "FBI"). Section 552.101 of the Government Code exempts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This office has repeatedly held that the transfer of confidential information between governmental agencies does not destroy the confidentiality of that information. Attorney General Opinions H-917 (1976), H-836 (1974), Open Records Decision Nos. 561 (1990), 414 (1984), 388 (1983), 272 (1981), 183 (1978). These opinions recognize the need to maintain an unrestricted flow of information between state agencies. In Open Records Decision No. 561 we considered whether the same rule applied regarding information deemed confidential by a federal agency. In that decision, we noted the general rule that the federal Freedom of Information Act ("FOIA") applies only to federal agencies and does not apply to records held by state agencies. ORD 561 at 6. Further, we stated that information is not confidential when in the hands of a Texas agency simply because the same information is confidential in the hands of a federal agency. *Id.* However, in the interests of comity between state and federal authorities and to ensure the flow of information from federal agencies to Texas governmental bodies, we concluded that: "when information in the possession of a federal agency is 'deemed confidential' by federal law, such confidentiality is not destroyed by the sharing of the information with a governmental body in Texas. In such an instance, [section 552.101] requires a local government to respect the confidentiality imposed on the information by federal law." *Id.* at 7. Accordingly, if a federal agency shares its information with a Texas governmental agency, the Texas agency must withhold the information the federal agency determines to be confidential under federal law. *See id.* at 6-7; accord *United States v. Napper*, 887 F.2d 1528, 1530 (11th Cir. 1989) (finding documents FBI lent to city police department remained property of FBI and were subject to any restrictions on dissemination of FBI-placed documents).

The FBI asserts it maintains exclusive ownership of the information submitted as Exhibit 2, and, as such, Exhibit 2 is excepted under section 552.101 in conjunction with FOIA, chapter 552 of the United States Code. Therefore, the information submitted to the city by the FBI must be withheld under section 552.101 and federal law.

Section 552.101 also encompasses information protected by chapter 411 of the Government Code, which deems confidential criminal history record information ("CHRI"). CHRI is defined as "information collected about a person by a criminal justice agency that consists

²We 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.

of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions.” Gov’t Code § 411.082(2). Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. *See* Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* at 10-12. Sections 411.083(b)(1) and 411.089 (a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *See* Gov’t Code § 411.089(b)(1). Upon review, we determine the information we marked constitutes CHRI which must be withheld pursuant to section 552.101 in conjunction with section 411.083 of the Government Code.

Section 552.101 also encompasses the doctrine of common-law privacy. For information to be protected from public disclosure by the common-law right of privacy, the information must meet the criteria set out by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976). In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts, the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. 540 S.W.2d at 685. To demonstrate the applicability of common-law privacy, both prongs of this test must be demonstrated. *See id.* at 681-82.

The type 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. *See id.* at 683. In addition, a compilation of an individual’s criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *Cf. U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (finding significant privacy interest in compilation of individual’s criminal history by recognizing distinction between public records found in courthouse files and local police stations and compiled summary of criminal history information). Furthermore, we find that a compilation of a private citizen’s criminal history is generally not of legitimate concern to the public.

Upon review, we agree portions of the submitted information in Exhibit 3 are highly intimate or embarrassing and of no legitimate public concern. Therefore, the city must withhold the information we have marked in Exhibit 3 under section 552.101 in conjunction with common-law privacy. However, we find the remaining information in Exhibit 3 is not private; therefore, the remaining information in Exhibit 3 may not be withheld under section 552.101 on that basis.

Section 552.117(a)(1) excepts from disclosure the 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

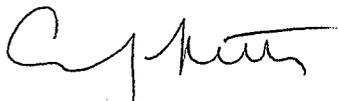
section 552.024 of the Government Code. *Id.* § 552.117(a)(1). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). The city may only withhold information under section 552.117(a)(1) if the individual at issue elected confidentiality under section 552.024 prior to the date on which the request for this information was made. Therefore, if the current or former employees at issue timely elected to withhold personal information pursuant to section 552.024, then the city must withhold the information we have marked under section 552.117(a)(1). The city may not withhold this information under section 552.117(a)(1) if the employees at issue did not make timely elections to keep the marked information confidential.

In summary, the information in Exhibit 2 that was submitted to the city by the FBI must be withheld under section 552.101 of the Government Code and federal law. The city must also withhold the information we have marked under section 552.101 of the Government Code in conjunction with (1) section 411.083 of the Government Code, and (2) common-law privacy. If the current or former employees whose information is at issue timely elected to withhold personal information pursuant to section 552.024 of the Government Code, then the city must withhold the information we have marked under section 552.117(a)(1) of the Government Code. The remaining submitted information must be released.

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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/dls

Ref: ID# 394497

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Michael H. Bonner
Assistant Special Agent in Charge
Federal Bureau of Investigation
P.O. Box 924427
Houston, Texas 77292-4427
(w/o enclosures)