



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 12, 2010

Mr. Adrian A. Spears II
McKamie Krueger, L.L.P.
For City of New Braunfels
941 Proton Road
San Antonio, Texas 78258

OR2010-15515

Dear Mr. Spears:

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# 396431.

The City of New Braunfels (the "city"), which you represent, received a request for twenty-five categories of information pertaining to the requestor and several named city and city police department (the "department") employees, various city departments, specified training events, and specified correspondence.¹ You indicate the city will provide some of the requested information to the requestor with unspecified information redacted under section 552.117 of the Government Code.² You claim some of the submitted information is not subject to the Act. You claim portions of the remaining submitted information are excepted from disclosure under sections 552.108 and 552.117 of the Government Code. We

¹You state, and provide documentation showing, the city sought clarification from the requestor regarding several of the categories in the request. See Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used).

²We note the previous determination issued in Open Records Decision No. 670 (2001) authorizes all governmental bodies to withhold the home addresses and telephone numbers, personal cellular telephone and pager numbers, social security numbers, and family member information of peace officers under section 552.117(a)(2) of the Government Code, without the necessity of requesting an attorney general decision.

have considered your arguments and reviewed the submitted information. We have also received and considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit written comments regarding availability of requested information).

Initially, we note the requestor has specifically excluded from his request all home telephone numbers, home addresses, social security numbers, driver's license numbers, and e-mail addresses. Thus, any such information is not responsive to the request. Additionally, the submitted information includes a copy of part of the request for information and an e-mail that was created after the date the request was received. This information, which we have marked, is also not responsive to the request. This decision does not address the public availability of the non-responsive information, and that information need not be released.

Next, you contend some of the submitted information is not subject to the Act because the information is personal correspondence. The Act applies to "public information," which is defined in section 552.002 of the Government Code as:

information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

- (1) by a governmental body; or
- (2) for a governmental body and the governmental body owns the information or has a right of access to it.

Id. § 552.002. Thus, virtually all of the information in a governmental body's physical possession constitutes public information and, thus, is subject to the Act. *Id.* § 552.002(a)(1); *see* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). The Act also encompasses information that a governmental body does not physically possess, if the information is collected, assembled, or maintained for the governmental body, and the governmental body owns the information or has a right of access to it. Gov't Code § 552.002(a)(2); *see* Open Records Decision No. 462 at 4 (1987). You generally assert information responsive to several of the categories of the request constitutes personal e-mails, text messages, telephone calls, and telephone records between city officials or employees. You have not, however, marked, or otherwise indicated, what specific information you claim is not subject to the Act. Furthermore, we find the submitted information pertains to the transaction of official business of the city and is, thus, subject to the Act. *See* Gov't Code § 552.002(a). Consequently, we will consider your remaining arguments against disclosure for the submitted information.

You assert the request is overly broad and seeks voluminous records that cannot be easily identified by the city. You also contend the request requires the city to perform research and investigations to find the information responsive to the request. For these reasons, you seek

to withhold unspecified documents pursuant to section 552.227 of the Government Code. That provision, however, is not an exception to disclosure. Rather, section 552.227 states a governmental body "is not required to perform general research within the reference and research archives and holdings of state libraries." *Id.* § 552.227. We note, however, a governmental body may not decline to comply with the requirements of the Act on the ground of administrative inconvenience. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 687 (Tex. 1976); *see also* Open Records Decision No. 497 at 4 (1988) (noting fact that submitting copies for review may be burdensome does not relieve governmental body of its responsibility to do so). Moreover, a governmental body must make a good-faith effort to relate a request to information that is within the governmental body's possession or control. *See* Open Records Decision No. 561 at 8-9 (1990). As you have submitted information the city deems to be responsive to the request, we will address your claimed exceptions for the submitted information.

You claim unspecified portions of the submitted information are excepted from disclosure under section 552.108 of the Government Code, which provides in pertinent part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

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

(2) it is information that the 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)(1)-(2). Section 552.108(a)(1) typically protects information that pertains to a pending criminal investigation or prosecution. In contrast, section 552.108(a)(2) protects information that relates to a concluded criminal investigation or prosecution that did not result in conviction or deferred adjudication. A governmental body claiming section 552.108(a)(1) must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). A governmental body that claims section 552.108(a)(2) must demonstrate the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. *See* Gov't Code §§ 552.108(a)(2), .301(e)(1)(A).

Although you generally assert some of the submitted information is excepted under section 552.108, you have not specified the subsection of section 552.108 that applies to the information, nor have you submitted any specific arguments explaining how that subsection applies to the information. *See id.* § 552.301(e)(1)(A) (stating it is governmental body's

burden to establish applicability of claimed exception or otherwise explain why requested information should not be released). Furthermore, you have not marked, or otherwise indicated, what information is excepted under section 552.108. *See id.* § 552.301(e)(2) (governmental body must label copy of information at issue to indicate which exceptions apply to which parts of the information). Consequently, you have failed to establish the applicability of section 552.108 of the Government Code to the submitted information, and the city may not withhold any portion of the information on that basis.

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). Whether 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). As previously noted, the requestor has specifically excluded home telephone numbers, home addresses, and social security numbers from his request. 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. We have marked city employees' family information in the remaining information. You have not informed us whether or not the employees whose information is at issue timely chose to not allow public access to their personal information. Therefore, to the extent the employees timely requested confidentiality for their personal information, the city must withhold the marked information pursuant to section 552.117(a)(1) of the Government Code. To the extent the employees did not timely request confidentiality, the marked information may not be withheld under section 552.117(a)(1) of the Government Code.

Section 552.117(a)(2) of the Government Code excepts from public disclosure the home addresses, home telephone numbers, 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 and 552.1175 of the Government Code.³ Gov't Code § 552.117(a)(2). Thus, the city must withhold the marked peace officers' family member information under section 552.117(a)(2) of the Government Code.

We note portions of the remaining information may be subject to sections 552.101, 552.130, and 552.136 of the Government Code.⁴ Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional,

³"Peace officer" is defined by Article 2.12 of the Texas Code of Criminal Procedure.

⁴The 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).

statutory, or by judicial decision.” *Id.* § 552.101. This section encompasses information protected by other statutes, such as section 261.201(a) of the Family Code, which provides:

(a) [T]he following information is confidential, is not subject to public release under [the Act], and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a). The remaining information contains a police incident report that reflects it was used or developed in an investigation by the department of alleged child abuse or neglect. *See id.* § 261.001(1), (4) (defining “abuse” and “neglect” for purposes of Fam. Code ch. 261); *see also id.* § 101.003(a) (defining “child” for purposes of this section as person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes). We find the report is within the scope of section 261.201 of the Family Code. You have not indicated the department has adopted a rule that governs the release of this type of information; therefore, we assume no such regulation exists. Given that assumption, the city must withhold the incident report, which we have marked, under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. *See Open Records Decision No. 440 at 2 (1986) (predecessor statute).*

Section 552.101 also encompasses section 1703.306 of the Occupations Code, which provides:

(a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:

(1) the examinee or any other person specifically designated in writing by the examinee;

(2) the person that requested the examination;

(3) a member, or the member's agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner's activities;

(4) another polygraph examiner in private consultation; or

(5) any other person required by due process of law.

(b) The [Polygraph Examiners] Board or any other governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information.

(c) A polygraph examiner to whom information acquired from a polygraph examination is disclosed under Subsection (a)(4) may not disclose the information except as provided by this section.

Occ. Code § 1703.306. We have marked information that was acquired from a polygraph examination and is, therefore, within the scope of section 1703.306. It does not appear the requestor falls into any of the categories of individuals who are authorized to receive the polygraph information under section 1703.306(a). Accordingly, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code.

Section 552.101 also 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). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. This office has found some kinds of medical information or information indicating disabilities or specific illnesses are generally highly intimate or embarrassing. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Upon review, we find the medical information we have marked in the remaining information is not of legitimate public interest. Thus, the city must withhold the medical information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.

The remaining information contains Texas license plate numbers. Section 552.130 of the Government Code provides information relating to a motor vehicle title or registration issued by a Texas agency is excepted from public release. Gov't Code § 552.130(a)(2). Thus, the city must withhold the Texas license plate numbers we have marked under section 552.130 of the Government Code.

The remaining information contains bank account, bank routing, and procurement card numbers. Section 552.136 of the Government Code provides:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

(1) obtain money, goods, services, or another thing of value; or

(2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, 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. We conclude the bank account, bank routing, and procurement card numbers we have marked constitute access device numbers for purposes of section 552.136. Thus, the city must withhold the marked information under section 552.136 of the Government Code.

In summary, the city must withhold under section 552.101 of the Government Code the marked incident report in conjunction with section 261.201 of the Family Code; the marked polygraph information in conjunction with section 1703.306 of the Occupations Code; and the marked medical information in conjunction with common-law privacy. To the extent the employees whose family information we have marked timely requested confidentiality for their personal information, the city must withhold the marked information pursuant to section 552.117(a)(1) of the Government Code. The city must withhold the marked peace officers' family information under section 552.117(a)(2) of the Government Code; the marked Texas license plate numbers under section 552.130 of the Government Code; and the marked bank account, bank routing, and procurement card numbers under section 552.136 of the Government Code.⁵ The remaining 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.

⁵We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including Texas license plate numbers under section 552.130 of the Government Code and bank account and bank routing numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

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,

A handwritten signature in cursive script that reads "Leah B. Wingerson".

Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/dls

Ref: ID# 396431

Enc. Submitted documents

c: Requestor
(w/o enclosures)