



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 3, 2011

Ms. S. McClellan
Assistant City Attorney
Criminal Law and Police Division
City of Dallas
1400 South Lamar
Dallas, Texas 75215

OR2011-05994

Dear Ms. McClellan:

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# 416117 (DPD Request No. 2011-01148).

The Dallas Police Department (the "department") received a request for "[a]ll materials that are saved on any city computer controlled by [a named officer] and which are not related to [the officer's] official assignment within the [department]." You claim that portions of the requested information are excepted from disclosure under sections 552.101, 552.103, 552.108, 552.111, 552.117, 552.1175, 552.136, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.¹

Initially, we must address the department's obligations under the Act. Section 552.301 of the Government Code prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Gov't Code § 552.301. Section 552.301(b) requires that a governmental body

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.

ask for a decision from this office and state which exceptions apply to the requested information by the tenth business day after receiving the request. *Id.* § 552.301(b). You state that the department received the request for information on February 9, 2011, and was closed for business on February 18, 2011, and February 21, 2011. Accordingly, the tenth business day after the receipt of the request was February 25, 2011. Although you timely submitted your initial request for a decision to this office, you did not raise section 552.117 of the Government Code until March 4, 2011. Thus, with respect to your claim under section 552.117, the department failed to comply with the procedural requirements mandated by section 552.301(b).

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the waiver of its claims under the exception 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 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). Generally, a compelling reason exists when third party interests are at stake or when information is confidential under other law. Open Records Decision No. 177 (1977). Because section 552.117 of the Government Code can provide a compelling reason to overcome the presumption of openness, we will address your argument under this exception, as well as your timely raised arguments.

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. Section 552.101 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 satisfied. *Id.* at 681-82. This office has found that personal financial information not related to a financial transaction between an individual and a governmental body is highly intimate or embarrassing and of no legitimate public interest. *See* Open Records Decision Nos. 545 (1990) (deferred compensation information, mortgage payments, assets, bills, and credit history protected under common-law privacy), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy). You claim that the information you have marked is confidential pursuant to common-law privacy. Upon review, we agree that portions of the submitted information are highly intimate or embarrassing and not of legitimate public concern. Therefore, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.²

²As our ruling is dispositive for this information, we need not address your remaining arguments against the disclosure of portions of this submitted information.

However, we find that the remaining information you have marked is not highly intimate or embarrassing. Thus, the remaining information at issue is not confidential under common-law privacy, and the department may not withhold it under section 552.101 on that ground.

You claim that draft responses to requests for production are excepted under section 552.103 of the Government Code, which provides, in relevant part, as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The purpose of section 552.103 is to protect the litigation interests of governmental bodies that are parties to the litigation at issue. *See id.* § 552.103(a); Open Records Decision No. 638 at 2 (1996) (section 552.103 only protects the litigation interests of the governmental body claiming the exception). A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You indicate that prior to the department's receipt of this request, the City of Dallas was a party to a pending civil lawsuit that involves the department. You further explain that the information at issue consists of draft discovery documents that have not been disclosed to outside parties or the public and relate to the pending litigation. Accordingly, we find that litigation was pending when the department received this request for information. We also

find the information you marked relates to the pending litigation. Therefore, the department may withhold the information you marked under section 552.103 of the Government Code.³

However, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Next, you claim that the police officers' cellular telephone numbers you have marked are excepted from disclosure under section 552.108(b)(1) of the Government Code. Section 552.108(b)(1) excepts from required public disclosure an internal record of a law enforcement agency maintained for internal use in matters relating to law enforcement or prosecution if "release of the internal record or notation would interfere with law enforcement or prosecution." Gov't Code § 552.108(b)(1). A governmental body that seeks to withhold information under section 552.108(b)(1) must sufficiently explain how and why the release of the information would interfere with law enforcement and crime prevention. *See id.* § 552.301(e)(1)(A); *City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.) (section 552.108(b)(1) protects information that, if released, would permit private citizens to anticipate weaknesses in police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate state laws); Open Records Decision Nos. 562 at 10 (1990), 531 at 2 (1989). In Open Records Decision No. 506 (1988), this office determined that the statutory predecessor to section 552.108(b) excepted from disclosure "cellular mobile phone numbers assigned to county officials and employees with specific law enforcement responsibilities." Open Records Decision No. 506 at 2 (1988). We noted that the purpose of the cellular telephones was to ensure immediate access to individuals with specific law enforcement responsibilities and that public access to these numbers could interfere with that purpose. *Id.*

You inform us that the cellular telephone numbers you have marked are assigned to department police officers who require the cellular telephones to perform jobs in the field. You assert that the release of these cellular telephone numbers would interfere with law enforcement and crime prevention. Based on your representations and our review, we conclude that the department may withhold the police officer cellular telephone numbers you have marked under section 552.108(b)(1) of the Government Code.

Section 552.117(a)(2) of the Government Code excepts from public disclosure a peace officer's home address and telephone number, social security number, and family member information regardless of whether the peace officer made an election under section 552.024 of the Government Code. Gov't Code § 552.117(a)(2). Section 552.117(a)(2) applies to

³As our ruling is dispositive for this information, we need not address your remaining arguments against the disclosure of portions of this submitted information.

peace officers as defined by article 2.12 of the Code of Criminal Procedure. We note section 552.117 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* ORD 506 at 5-6 (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). In this instance, it is unclear whether the employees whose information you have marked are currently licensed peace officers as defined by article 2.12. Accordingly, if the employees at issue are currently licensed peace officers as defined by article 2.12, then the department must withhold the information you have marked, as well as the additional information we have marked, under section 552.117(a)(2) of the Government Code. However, the department may not withhold a cellular telephone number under this exception unless the officer pays for the cellular telephone service.

If the employees at issue are not currently licensed peace officers, then the marked personal information may be subject to section 552.117(a)(1) of the Government Code. Section 552.117(a)(1) excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who did not timely request under section 552.024 that the information be kept confidential. You do not indicate whether the employees whose information is at issue requested confidentiality pursuant to section 552.024. Accordingly, if these employees timely elected confidentiality, then the department must withhold the information you have marked, as well as the additional information we have marked, under section 552.117(a)(1); however, the department may only withhold the marked cellular telephone numbers if the numbers are not paid for by the department. If the employees did not timely elect confidentiality, the department may not withhold any of the marked information under section 552.117(a)(1).

Section 552.136(b) of the Government Code states that "[n]otwithstanding any other provision of [the Act], 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." Gov't Code § 552.136(b); *see id.* § 552.136(a) (defining "access device"). You inform us that an employee's identification number is also used as an employee's credit union bank account number. Thus, the department must withhold the information that you have marked in the remaining information under section 552.136 of the Government Code.

You claim the e-mail addresses you have marked in the remaining information are excepted from public disclosure under section 552.137 of the Government Code.⁴ Section 552.137 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). Accordingly, the department must withhold the personal e-mail addresses you have marked under section 552.137 of the Government Code, unless the owners of the addresses affirmatively consent to their public disclosure.

You have noted that some of the materials at issue may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The department may withhold the information you have marked under section 552.103 of the Government Code and section 552.108(b)(1) of the Government Code. If the employees at issue are currently licensed peace officers as defined by article 2.12 of the Code of Criminal Procedure, then the department must withhold the information you have marked, as well as the additional information we have marked, under section 552.117(a)(2) of the Government Code. If the employees at issue are not licensed peace officers, but timely elected confidentiality, then the department must withhold the information you have marked, as well as the additional information we have marked, under section 552.117(a)(1) of the Government Code. However, the department may only withhold the marked cellular telephone numbers if the numbers are not paid for by the department. The department must withhold the information you have marked under section 552.136 of the Government Code and section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their public disclosure.⁵ The remaining information must be released in accordance with copyright law.

⁴Although you appear to mark the e-mail addresses at issue under section 552.437, we note that section 552.137 is the proper exception to raise in this instance.

⁵Open Records Decision No. 684 (2009) is a previous determination authorizing all governmental bodies to withhold ten categories of information, including a bank account number under section 552.136 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.

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,



Laura Ream Lemus
Assistant Attorney General
Open Records Division

LRL/bs

Ref: ID# 416117

Enc. Submitted documents

c: Requestor
(w/o enclosures)