



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 28, 2011

Mr. Timothy B. Kirwin
Randle Law Office LTD.
Memorial City Plaza II
820 Gessner, Suite 1570
Houston, Texas 77024-4494

OR2011-09189

Dear Mr. Kirwin:

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# 421987.

The City of Fulshear (the "city"), which you represent, received a request for the requestor's time sheets, personnel file, and records pertaining to the complaint he filed against the former chief of police. You state the requestor's time sheets and, with the exception of one document, the personnel file have been released. You claim the remaining personnel document and the records pertaining to the complaint are excepted under sections 552.101 and 552.103 of the Government Code.¹ We have considered your claimed exceptions and reviewed the submitted information.

Pursuant to section 552.022(a)(1) of the Government Code, "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body" is expressly public unless excepted under section 552.108 of the Government Code or expressly confidential

¹Although you indicate on your chart that some of the records may be excepted under the attorney-client privilege, you submit no arguments establishing the applicability of that privilege to any of the submitted records. Accordingly, to the extent the city is asserting the attorney-client privilege, that assertion is waived. *See* Open Records Decision Nos. 676 at 11 (2002) (attorney-client privilege is waived by failure to comply with Gov't Code § 552.301), 665 at 2 n.5 (2000) (addressing distinction between mandatory and discretionary exceptions to disclosure), 630 at 4 (1994) (governmental body may waive attorney-client privilege under Gov't Code § 552.107(1)).

under "other law." Gov't Code § 552.022(a)(1). The submitted information is a completed investigation conducted by the city that resulted in the termination of the city's former police chief. Accordingly, these records are subject to section 552.022(a)(1). Although you raise section 552.103 for this information, section 552.103 is a discretionary exception to disclosure that protects the governmental body's interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 (1999) (governmental body may waive Gov't Code § 552.103). As such, section 552.103 is not "other law" that makes information confidential for purposes of section 552.022. Therefore, the city may not withhold the submitted records under section 552.103. Although you did not submit any arguments establishing its applicability, you indicate in your chart that some of the information may be confidential under the doctrine of common-law privacy. Pursuant to section 552.301(e) of the Government Code, a governmental body is required to submit arguments to this office establishing its claimed exceptions to disclosure. *See* Gov't Code § 552.301(e)(1). Generally, a governmental body's failure to submit arguments in accordance with section 552.301(e)(1) results in the waiver of the claimed exception. *See generally id.* § 552.302. However, because your privacy claim protects the interests of third parties, it cannot be waived by the city's failures under section 552.301(e)(1). *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (addressing distinction between mandatory and discretionary exceptions to disclosure), 630 (1994) (governmental body may demonstrate a compelling reason to withhold information by showing information is made confidential by another source of law or affects third party interests). Furthermore, the doctrine of common-law privacy is "other law" for the purposes of section 552.022. Accordingly, we will review the documents to determine whether any of the information is protected under common-law privacy. We will also determine if the records contain information that is otherwise subject to mandatory exceptions to disclosure.²

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. 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). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. The submitted documents pertain to the actions of public employees and the conditions prescribed by the city for their continued employment. As we have stated in numerous decisions, the public has a legitimate interest in knowing the reasons for the dismissal, demotion, promotion, or resignation of public employees. Open Records

²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Decision No. 444 (1986); *see generally* Open Records Decision Nos. 484 (1987) (public's interest in knowing how police departments resolve complaints against police officer ordinarily outweighs officer's privacy interest), 470 (1987) (public employee's job performance does not generally constitute his private affairs), 455 (1987) (public employee's job performances or abilities generally not protected by privacy) 423 at 2 (1984) (scope of public employee privacy is narrow), 329 at 2 (1982) (information relating to complaints against public employees and discipline resulting therefrom is not protected under former Gov't Code § 552.101), 208 at 2 (1978) (information relating to complaint against public employee and disposition of the complaint is not protected under either the constitutional or common-law right of privacy). Accordingly, you may not withhold any of the submitted information under section 552.101 in conjunction with common-law privacy.³

Section 552.117 of the Government Code may be applicable to some of the submitted information. Section 552.117 excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 2 (to be codified as an amendment to Gov't Code § 552.117(a)). Whether a particular piece of information is protected by section 552.117 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) on behalf of employees and officials 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 the information that may be subject to section 552.117(a)(1). If the official at issue timely elected to keep his personal information confidential, the city must withhold this marked information under section 552.117(a)(1) of the Government Code. If the official did not make a timely election, the marked information must be released.

Section 552.117(a)(2) of the Government Code excepts from public disclosure the home addresses, home telephone numbers, emergency contact information, 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. Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 2 (to be codified as an amendment to Gov't Code § 552.117(a)). For purposes of section 552.117, "peace officer" is defined by Article 2.12 of the Texas Code of Criminal Procedure. We

³We note the records contain some information about the requestor that may be protected by common-law privacy or certain exceptions enacted to protect an individual's privacy interests. *See, e.g.*, Gov't Code § 552.117(a)(2). Pursuant to section 552.023 of the Government Code, the requestor has a right of access to his private information. *See id.* § 552.023 (person or person's authorized representative has special right of access to information that is protected by laws intended to protect person's privacy). However, if the city should receive another request for this information, it should seek another decision from this office.

have marked the personal information of the city's peace officers that must be withheld under section 552.117(a)(2) of the Government Code.

The records also contain the personal information of a peace officer who is not employed by the city. Section 552.1175 of the Government Code provides in part:

(a) This section applies only to:

(1) peace officers as defined by Article 2.12, Code of Criminal Procedure[.]

(b) Information that relates to the home address, home telephone number, emergency contact information, 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.

Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 3 (to be codified as an amendment to Gov't Code § 552.1175(b)). If the peace officer whose information is at issue elects to restrict access to the marked personal information in accordance with section 552.1175(b), the information must be withheld from disclosure. If the peace officer does not properly elect in accordance with section 552.1175(b), the marked information must be released.

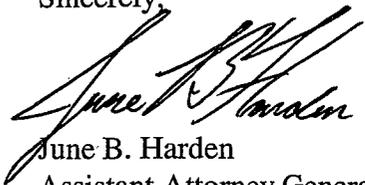
In summary, we have marked the information that is excepted from disclosure under section 552.117(a)(2). The information subject to 552.117(a)(1) must be withheld if the official timely elected to withhold his personal information in accordance with section 552.024. The information subject to section 552.1175 must be withheld if the peace officer to whom this information belongs elects to restrict access to his personal information in accordance with section 552.1175(b). Otherwise, the information subject to sections 552.117(a)(1) and 552.1175 must be released along with the remaining information.

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,



June B. Harden
Assistant Attorney General
Open Records Division

JBH/sdk

Ref: ID# 421987

Enc. Submitted documents

c: Requestor
(w/o enclosures)