



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 18, 2011

Ms. Katherine A. Tapley
Attorney for City of Schertz
Fulbright & Jaworski, LLP
300 Convent Street, Suite 2100
San Antonio, Texas 78205-3792

OR2011-10197

Dear Ms. Tapley:

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# 424158.

The Schertz Police Department (the "department"), which you represent, received a request for two specified incident reports and all reports during a specified time period concerning a named person. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.108, and 552.130 of the Government Code.¹ We have considered the claimed exceptions and reviewed the submitted information.

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 common-law right to 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

¹ Although you do not explicitly raise section 552.102, you ask whether the department should withhold birth dates pursuant to the recent Texas Supreme Court decision in *Texas Comptroller of Public Accounts v. Attorney General of Texas*, No. 08-0172, 2010 WL 4910163 (Tex. Dec. 3, 2010). Thus, we understand you to raise section 552.102.

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 met. *Id.* at 681-82. 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 a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. However, information that refers to an individual solely as a victim, witness, or involved person is not private as criminal history and may not be withheld under section 552.101 on that basis.

In this instance, the requestor asks for unspecified police reports regarding a named person. This request requires the department to compile unspecified police records concerning the named individual, thus implicating such individual's right to privacy. Therefore, to the extent the department maintains any law enforcement records depicting the named individual as a suspect, arrestee, or criminal defendant, the department must withhold such information under section 552.101 of the Government Code in conjunction with common-law privacy. We note you have submitted information that does not list the named individual as a suspect, arrestee, or criminal defendant. This information does not implicate the privacy interests of the named individual and may not be withheld as a compilation of the individual's criminal history. Accordingly, we will address your arguments against disclosure of this information.

Common-law privacy also protects the types of information held to be intimate or embarrassing in *Industrial Foundation*. See 540 S.W.2d at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). Generally, only highly intimate information that implicates the privacy of an individual is withheld. However, in certain instances, where it is demonstrated the requestor knows the identity of the individual involved, as well as the nature of certain incidents, the entire report must be withheld to protect the individual's privacy.

You assert the four reports you have marked with blue flags should be withheld in their entirety on the basis of common-law privacy. In this instance, the requestor knows the nature of two of the incidents at issue, as well as the identity of the individual involved.² Therefore, withholding only the individual's identity or certain details of the incidents from the requestor would not preserve the individual's common-law right of privacy. Accordingly,

² Furthermore, you copied the requestor on your brief to this office, in which you reveal the nature of the private information at issue. In the future, the department should redact such information from the copy of the brief sent to the requestor. See Gov't Code § 552.301(e-1) (governmental body may redact information that reveals substance of requested information in copy of written comments sent to requestor).

we find report numbers 2011-15298 and 2011-15432, which we have marked, must be withheld in their entirety under section 552.101 of the Government Code in conjunction with common-law privacy.

Although you also seek to withhold report numbers 2010-49124 and 2011-12276 in their entirety on the basis of common-law privacy, you have not demonstrated, nor does it otherwise appear, this is a situation in which the entire reports must be withheld on the basis of common-law privacy. Therefore, these two reports may not be withheld in their entirety under section 552.101 in conjunction with common-law privacy. However, upon review, we find portions of these reports, which we have marked, are highly intimate or embarrassing and of no legitimate public concern. Accordingly, the department must withhold the information we have marked in report numbers 2010-49124 and 2011-12276 under section 552.101 in conjunction with common-law privacy.

You ask whether the birth dates in the remaining information should be withheld pursuant to the ruling in *Texas Comptroller of Public Accounts v. Attorney General of Texas*, No. 08-0172, 2010 WL 4910163 (Tex. Dec. 3, 2010). In that decision, the Texas Supreme Court held section 552.102(a) of the Government Code exempts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. We note section 552.102(a) exempts "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). Thus, *Texas Comptroller* applies only to a public employee's birth date maintained by the employer in an employment context. The department does not hold the submitted law enforcement records in an employment context. Therefore, the department may not withhold the birth dates in the remaining information under section 552.102(a).

In summary, the department must withhold any law enforcement records in which the named individual is listed as a suspect, arrestee, or criminal defendant under section 552.101 of the Government Code in conjunction with common-law privacy. The department must also withhold report numbers 2011-15298 and 2011-15432 in their entirety, and the information we have marked in report numbers 2010-49124 and 2011-12276, under section 552.101 in conjunction with common-law privacy. The remaining information in report numbers 2010-49124 and 2011-12276 must be released to the requestor. As we are able to make these determinations, we need not address the other exceptions you claim.

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,

A handwritten signature in black ink that reads "Misty Haberer Barham". The signature is written in a cursive, flowing style.

Misty Haberer Barham
Assistant Attorney General
Open Records Division

MHB/bs

Ref: ID # 424158

Enc. Submitted documents

c: Requestor
(w/o enclosures)