



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 24, 2011

Ms. Shelly Doty
City Secretary/Records Manager
City of Cleburne
P.O. Box 677
Cleburne, Texas 76033-0677

OR2011-12259

Dear Ms. Doty:

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# 428115.

The City of Cleburne (the "city") received a request for all communications related to the city manager and his office, the chief of police, and other named individuals from August 17, 2010 through August 27, 2010, including all communications "relating to Facebook."¹ You state the city has released some of the requested information, but claim some of the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.108, 552.111, 552.117, 552.1175, 552.130, 552.130, 552.131, 552.136, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

¹The city received a request for information on August 30, 2010, which you inform us the requestor clarified on September 15, 2010. *See* Gov't Code § 552.222 (if request for information is unclear, governmental body may ask requestor to clarify request); *see also* Open Records Decision No. 31 (1974) (when presented with broad requests for information rather than for specific records, governmental body may advise requestor of types of information available so that request may be properly narrowed). The city sent the requestor an estimate of charges related to this clarified request on September 24, 2010 pursuant to section 552.2615 of the Government Code. *See* Gov't Code § 552.2615. The requestor filed a complaint of the estimated charges with this office, which ultimately resulted in the city sending the requestor a revised estimate of charges on May 24, 2011. *See id.* § 552.269. The revised estimate of charges required the requestor to provide a deposit for payment of anticipated costs under section 552.263 of the Government Code. *See id.* § 552.163(a). You inform us the city received the deposit on June 15, 2011. *See id.* § 552.263(e) (if governmental body requires deposit or bond for anticipated costs pursuant to section 552.263, request for information is considered to have been received on date that governmental body receives deposit or bond).

Initially, we note the following information in the submitted documents is not responsive to the request for information because it does not appear to fall within any of the requested categories of information: the information in Exhibits 3, 5, 6, 8, 10, 11, 16 through 18, 21 through 24, and 28, and the information we have marked as nonresponsive in the remaining exhibits. This ruling does not address the public availability of any information that is not responsive to the request, and the city is not required to release this information in response to this request.² *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. App.—San Antonio 1978, writ dismissed). However, we will address your argument to withhold the submitted responsive information under the Act.

You also indicate the information in Exhibit 7 is not public information under the Act. 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.” Gov’t Code § 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 state “Exhibit 7 contains personal communications in which no governmental business was conducted.” Based on your representations and our review, we agree some of the information in Exhibit 7 does not constitute “information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business” by or for the city. *See* Gov’t Code § 552.021; *see also* Open Records Decision No. 635 (1995) (statutory predecessor not applicable to personal information unrelated to official business and created or maintained by state employee involving *de minimis* use of state resources). Therefore, this information, which we have marked, is not subject to the Act and need not be released in response to this request. However, upon review, we find the remaining information at issue in Exhibit 7 was collected or assembled or is maintained in connection with the transaction of official city business; thus, the remaining information at issue constitutes “public information” as defined by section 552.002(a). Accordingly, this information is subject to the Act and must be released, unless the information falls within an exception to public disclosure under the Act. *See* Gov’t Code § 552.305(b).

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses information protected by other statutes, including federal law. You assert the city “is required under The Privacy Act of 1974 to withhold Exhibits 25 and 26[,] which contain confidential [U.S. Department of Housing and Urban Development (“HUD”)]

²As our ruling is dispositive, we do not address your arguments to withhold this information.

Information, and represent a collection, maintenance, use and dissemination of personal information, as they disclose personal information of a program participant.” See 5 U.S.C. § 552a (the Privacy Act of 1974). Section 552a(b) of the Privacy Act provides, “[n]o agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains[.]” *Id.* § 552a(b). However, our office and the courts have stated the Privacy Act applies only to federal agencies, and not to state or local agencies. See *St. Michael’s Convalescent Hosp. v. State of California*, 643 F.2d 1369, 1373 (9th Cir. 1981) (definition of agency under Privacy Act does not encompass state agencies or bodies); *Shields v. Shetler*, 682 F.Supp. 1172, 1176 (D. Colo. 1988) (Privacy Act does not apply to state agencies or bodies); Attorney General Opinion MW-95 at 2 (1979) (neither FOIA nor federal Privacy Act applies to records held by state or local governmental bodies in Texas). Thus, the city may not withhold this information on the basis of the Privacy Act.

Section 552.101 encompasses section 261.201 of the Family Code. Section 261.201(a) provides in part as follows:

[T]he following information is confidential, is not subject to public release under Chapter 552, Government Code, 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). You assert Exhibit 9 was used or developed in an investigation under chapter 261. See *id.* §§ 101.003(a) (defining “child” for purposes of section 261.201), 261.001(1) (defining “abuse” for purposes of section 261.201). Upon review, we find the information is within the scope of section 261.201 of the Family Code. You do not indicate the city’s police department, which conducted the investigation, has adopted a rule that governs the release of this type of information; therefore, we assume no such rule exists. Given that assumption, Exhibit 9 is confidential pursuant to section 261.201 of the Family Code. See Open Records Decision No. 440 at 2 (1986) (predecessor statute). Accordingly, the city must withhold Exhibit 9 from disclosure under section 552.101 of the Government Code as information made confidential by law.

Section 552.101 also encompasses sections 418.176 and 418.177 of the Texas Homeland Security Act, chapter 418 of the Government Code (the “HSA”). Section 418.176(a) provides the following:

Information is confidential if the information is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, responding to, or investigating an act of terrorism or related criminal activity and:

- (1) relates to the staffing requirements of an emergency response provider, including a law enforcement agency, a fire-fighting agency, or an emergency services agency;
- (2) relates to a tactical plan of the provider; or
- (3) consists of a list or compilation of pager or telephone numbers, including mobile and cellular telephone numbers, of the provider.

Gov't Code § 418.176(a). Similarly, section 418.177 provides the following:

Information is confidential if the information:

- (1) is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, or investigating an act of terrorism or related criminal activity; and
- (2) relates to an assessment by or for a governmental entity, or an assessment that is maintained by a governmental entity, of the risk or vulnerability of persons or property, including critical infrastructure, to an act of terrorism or related criminal activity.

Id. § 418.177. The fact that information may relate to a governmental body's security concerns or emergency management activities does not make the information per se confidential under the HSA. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). Furthermore, the mere recitation by a governmental body of a statute's key terms is not sufficient to demonstrate the applicability of a claimed provision. As with any exception to disclosure, a governmental body asserting one of the confidentiality provisions of the HSA must adequately explain how the responsive records fall within the scope of the claimed provision. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

You assert Exhibit 2, which includes an "after action report" related to a radiological full scale exercise by the city in 2010, is confidential under sections 418.176 and 418.77 of the Government Code. Upon review, we find you have demonstrated the information in Exhibit 2 was collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, or investigating an act of terrorism or related criminal activity and relates to an assessment of the risk or vulnerability of persons or property to an act of terrorism or related criminal activity. *See id.* § 418.177. Therefore, the city must

withhold Exhibit 2 under section 552.101 of the Government Code in conjunction with section 418.177 of the Government Code.

Section 552.101 also encompasses section 560.003 of the Government Code. Chapter 560 of the Government Code provides a governmental body may not release fingerprint information except in certain limited circumstances. *See id.* §§ 560.001 (defining “biometric identifier” to include fingerprints), 560.002 (prescribing manner in which biometric identifiers must be maintained and circumstances in which they can be released), 560.003 (biometric identifiers in possession of governmental body exempt from disclosure under the Act). You do not inform us, and the submitted information does not indicate, section 560.002 permits the disclosure of the submitted fingerprint information. Therefore, the city must withhold this information, which we have marked, under section 552.101 in conjunction with section 560.003 of the Government Code.

Section 552.101 also encompasses common-law privacy. Common-law privacy 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). The types 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. *Id.* at 683. This office has also found personal financial information not relating to a financial transaction between an individual and a governmental body is excepted from required public disclosure under common-law privacy. *E.g.*, Open Records Decision Nos. 600 (1992), 545 (1990). However, information pertaining to the work conduct and job performance of public employees is subject to a legitimate public interest and, therefore, generally not protected from disclosure under common-law privacy. *See* Open Records Decision Nos. 562 at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs, but in fact touches on matters of legitimate public concern), 470 at 4 (1987) (job performance does not generally constitute public employee’s private affairs), 455 (1987) (public employee’s job performance or abilities generally not protected by privacy). Some of the submitted responsive information is highly intimate or embarrassing and is not of legitimate concern to the public; therefore, the city must withhold this information, which we have marked, under section 552.101 in conjunction with common-law privacy. Upon review, however, we find the remaining information is not confidential under common-law privacy, and the city may not withhold it under section 552.101 on that ground.

We note the submitted documents include information that is excepted from disclosure under section 552.102(a) of the Government Code.³ Section 552.102(a) excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” Gov’t Code § 552.102(a). The Texas Supreme

³The Office of the Attorney General will raise a mandatory exception like section 552.102 on behalf of a governmental body, but ordinarily will not raise other exceptions.

Court recently held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, No. 08-0172, 2010 WL 4910163 (Tex. Dec. 3, 2010). Having carefully reviewed the information at issue, we have marked the information that must be withheld under section 552.102(a) of the Government Code.

You assert the information you have highlighted in Exhibits 12 through 15 is excepted from disclosure under section 552.108 of the Government Code. Section 552.108(a)(2) excepts from disclosure information concerning an investigation that concluded in a result other than conviction or deferred adjudication. *See Gov't Code § 552.108(a)(2)*. A governmental body claiming 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. You state the information you have highlighted in Exhibits 12 through 15 pertains to cases where “no charges were filed by the Cleburne Police Department” and, as such, concluded in results other than conviction or deferred adjudication. Therefore, we agree section 552.108(a)(2) is applicable to this information.

However, section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. *Gov't Code § 552.108(c)*. Basic information refers to the information held to be public in *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Basic information includes the date, time, and location of the arrest and the arrestee's name, race, and address. *See Houston Chronicle*, 531 S.W.2d at 186-88. We note some of the information you seek to withhold under section 552.108 appears to consist of basic information. Thus, with the exception of basic information, the city may withhold the information you have highlighted in Exhibits 12 through 15 under section 552.108(a)(2).

You assert some of the submitted responsive information is excepted from disclosure under section 552.117 of the Government Code. Section 552.117(a)(1) 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 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)*). Section 552.117(a)(2) excepts from disclosure this same information regarding a peace officer, as defined by article 2.12 of the Texas Code of Criminal Procedure, regardless of whether the officer elected under section 552.024 or 552.1175 of the Government Code to keep such information confidential. *Id.* 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)*. We note section 552.117 encompasses a personal cellular telephone number if a governmental body does not pay for the cellular phone service. *See Open Records Decision No. 506 at 5-6 (1988)* (Government Code section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). But an individual's personal post office box number is not a

“home address” for purposes of section 552.117, and therefore may not be withheld under section 552.117. *See* Open Records Decision No. 622 at 4 (1994) (purpose of section 552.117 is to protect public employees from being harassed at home); *see also* Open Records Decision No. 658 at 4 (1998) (statutory confidentiality provision must be express and cannot be implied).

We have marked information, including cellular telephone numbers, of city police officers that the city must withhold under section 552.117(a)(2). We have also marked information of other current or former city employees that the city must withhold under section 552.117(a)(1) if the employees elected to keep such information confidential prior to the city’s receipt of the request for information. However, the city may not withhold the cellular telephone numbers we have marked under section 552.117(a)(1) or 552.117(a)(2) if the officers or employees concerned did not pay for the cellular telephone service. The city may also not withhold the information we have marked under section 552.117(a)(1) if the employees at issue did not timely elect to keep such information confidential prior to the city’s receipt of the request for information.

You assert some of the remaining information is excepted under section 552.1175 of the Government Code. Section 552.1175(b) provides in part the following:

Information that relates to the home address, home telephone number, emergency contact information, or social security number of [a peace officer as defined by article 2.12 of the Code of Criminal Procedure], 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)). Upon review, we find you have not established section 552.1175 is applicable to any of the remaining information. Therefore, the city may not withhold any of the remaining information on that ground.

You assert some of the remaining information is excepted from disclosure under section 552.130 of the Government Code. Section 552.130(a) of the Government Code provides the following:

Information is excepted from the requirements of Section 552.021 if the information relates to:

- (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state or another state or country;
- (2) a motor vehicle title or registration issued by an agency of this state or another state or country; or
- (3) a personal identification document issued by an agency of this state or another state or country or a local agency authorized to issue an identification document.

Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 4 (to be codified as an amendment to Gov't Code § 552.130). The city must withhold the motor vehicle record information we have marked under section 552.130. Although you seek to withhold a current expiration date of a notary commission on an application for appointment as a Texas notary public under section 552.130, this information does not consist of motor vehicle record information for purposes of section 552.130 and, thus, the city may not withhold it from the requestor on that ground.

You assert some of the remaining information is excepted from disclosure under section 552.137 of the Government Code. 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* Gov't Code § 552.137(a)-(c). Section 552.137 does not apply to a government employee's work e-mail address because such an address is not that of the employee as a "member of the public," but is instead the address of the individual as a government employee. The e-mail addresses at issue do not appear to be of a type specifically excluded by section 552.137(c). You do not inform us a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. Therefore, the city must withhold the e-mail addresses we have marked under section 552.137.

To conclude, the city must withhold the following: (1) Exhibit 9 under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code; (2) Exhibit 2 under section 552.101 of the Government Code in conjunction with section 418.176 of the Government Code; (3) the information we have marked under section 552.101 in conjunction with section 560.003 of the Government Code, and common-law privacy; and (4) the information we have marked under sections 552.102(a), 552.130, and 552.137 of the Government Code.⁴ The city must also withhold the information pertaining to peace officers we have marked under section 552.117(a)(2) of the Government Code, as well as the

⁴We 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 a fingerprint under section 552.101 in conjunction with section 560.003 of the Government Code, Texas driver's license and license plate numbers under section 552.130, credit card, and an e-mail address of a member of the public under section 552.137, without the necessity of requesting an attorney general opinion.

information pertaining to city employees, other than peace officers, we have marked under section 552.117(a)(1) of the Government Code if the employees elected to keep such information confidential prior to the city's receipt of the request for information; however, the city may not withhold the cellular telephone numbers we have marked under section 552.117(a)(1) or 552.117(a)(2) if the officers or employees concerned did not pay for the cellular telephone service. With the exception of basic information, the city may withhold the information you have highlighted in Exhibits 12 through 15 under section 552.108(a)(2) of the Government Code. The city must release the remaining responsive 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,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/eb

Ref: ID# 428115

Enc. Submitted documents

c: Requestor
(w/o enclosures)