



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

October 11, 2011

Ms. Donna L. Johnson  
Olson & Olson, L.L.P.  
2727 Allen Parkway, Suite 600  
Houston, Texas 77019

OR2011-14684

Dear Ms. Johnson:

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# 432693.

The City of Tomball (the "city"), which you represent, received a request for information pertaining to a specified case number and a named police officer. You state you will release some of the requested information. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.108, and 552.130 of the Government Code. You also state release of some of the information may implicate the interests of the Department of the Navy (the "Navy"). You state the Navy was notified of the request and of its right to submit arguments to this office explaining why the information at issue should or should not be released. *See Gov't Code* § 552.304 (permitting interested third party to submit to attorney general reasons why requested information should or should not be released). We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that the city has redacted portions of the submitted information. Pursuant to section 552.301 of the Government Code, a governmental body that seeks to withhold requested information must submit to this office a copy of the information, labeled to indicate which exceptions apply to which parts of the copy, unless the governmental body has received a previous determination for the information at issue or has statutory authorization to withhold the information in question without requesting a decision under the Act. *See id.* §§ 552.301(a), .301(e)(1)(D); *see also id.* §§ 552.024(c), .147. We understand

the city has redacted, in part, some information pursuant to section 552.117 of the Government Code as permitted by section 552.024(c) of the Government Code.<sup>1</sup> In addition, the city may redact social security numbers under section 552.147 of the Government Code.<sup>2</sup> We also note this office issued a previous determination in Open Records Decision No. 670 (2001) authorizing all governmental bodies to withhold certain information relating to a peace officer under section 552.117(a)(2) of the Government Code without requesting a decision. *See* ORD 670 at 6-7. It also appears the city has redacted a driver's license number under section 552.130 of the Government Code pursuant to Open Records Decision No. 684 (2009). Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including a Texas driver's license number under section 552.130 of the Government Code, without the necessity of requesting an attorney general decision. However, on September 1, 2011, the Texas legislature amended section 552.130 to allow a governmental body to redact the information described in subsections 552.130(a)(1) and (a)(3) without the necessity of seeking a decision from the attorney general. *See* Act of May 30, 2011, 82nd Leg., R.S., S.B. 602, § 22 (to be codified at Gov't Code § 552.130(c)). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). *See* Act of May 30, 2011, 82nd Leg., R.S., S.B. 602, § 22 (to be codified at Gov't Code § 552.130(d), (e)). Thus, the statutory amendments to section 552.130 of the Government Code supercede Open Records Decision No. 684 on September 1, 2011. Therefore, a governmental body may only redact information subject to subsections 552.130(a)(1) and (a)(3) in accordance with section 552.130, not Open Records Decision No. 684. You do not assert, nor do our records indicate, that the city is authorized to withhold any of the remaining redacted information without first seeking a ruling from this office. *See* Gov't Code § 552.301(a); Open Records Decision No. 673 (2000) (previous determinations). As such, these types of information must be submitted in a manner that enables this office to determine whether the information comes within the scope of an exception to disclosure. Because we are able to discern the nature of the redacted information, we will address its public availability. In the future, the city should refrain from redacting responsive information that it submits to this office in connection with a request for an open records ruling, unless the information is the subject of a previous determination under section 552.301 of the Government Code or may be withheld pursuant to sections 552.024(c) or 552.147(b) of the Government Code. *See* Gov't Code §§ 552.301(e)(1)(D), .302. Failure to do so may result in the presumption the redacted information is public. *See id.* § 552.302.

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<sup>1</sup>Section 552.024 of the Government Code authorizes a governmental body to withhold information subject to section 552.117 without requesting a decision from this office if the employee or official or former employee or official chooses not to allow public access to the information. *See* Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 1 (to be codified as an amendment to Gov't Code § 552.024(a)).

<sup>2</sup>Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting an attorney general decision under the Act. *See* Gov't Code § 552.147(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.” *Id.* § 552.101. This section encompasses information protected by other statutes, including federal law. The city claims Exhibit 4 is confidential under the Privacy Act. 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[.]” 5 U.S.C. § 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 Exhibit 4 on the basis of the Privacy Act.

Section 552.101 also encompasses the doctrine of common-law privacy, which protects information if (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *See Indus. Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both elements of the test must be established. *Id.* at 681-82. The type of information considered intimate or 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. In addition, this office has found that some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *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 a portion of the submitted information, which we have marked, is highly intimate or embarrassing and not of legitimate public concern. Therefore, the city must withhold this information pursuant to section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.102(a) of the Government Code 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 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.

Section 552.108(a)(1) of the Government Code excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov’t Code § 552.108(a)(1). A governmental body claiming section 552.108 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). You state Exhibit 3 pertains to a pending criminal case. You state that release of the submitted information would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests that are present in active cases), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Based on your representations and our review, we agree section 552.108(a)(1) is applicable to the submitted information.

However, as you acknowledge, 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*. *See* 531 S.W.2d at 186-88; Open Records Decision No. 127 (1976) (summarizing types of information considered to be basic information). Thus, with the exception of the basic information, the city may withhold Exhibit 3 under section 552.108(a)(1) of the Government Code.<sup>3</sup>

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, family member information, and emergency contact information, regardless of whether the peace officer made an election under sections 552.024 or 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)(2)). Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. We note section 552.117(a)(2) encompasses a peace officer’s personal cellular telephone and pager numbers if the officer personally pays for the cellular or pager service. *See* ORD 670 at 6; *see also* Open Records Decision No. 506 at 5-6 (1998) (Gov’t Code § 552.117 not applicable to cellular mobile telephone numbers paid for by governmental body and intended for official use). We note section 552.117 does

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<sup>3</sup>As our ruling is dispositive for this information, we need not address your remaining arguments against its disclosure, except to note basic information held to be public in *Houston Chronicle* is generally not excepted from public disclosure under section 552.103 of the Government Code. Open Records Decision No. 597 (1991).

not protect a governmental employee's work telephone number. You have redacted the home address, home telephone number, cellular telephone number, family member information, and emergency contact information of a peace officer employed by the city's police department. Upon review, we find this information must be withheld under section 552.117(a)(2); however, the redacted cellular telephone number may only be withheld under section 552.117(a)(2) if the officer paid for the cellular telephone services with his own funds. We note, however, you have also marked the officer's work telephone number. Because this information does not constitute the home telephone number, home address, social security number, emergency contact information, or family member information of a peace officer, this information, which we have marked for release may not be withheld under section 552.117(a)(2) of the Government Code.

Section 552.130 of the Government Code provides that information relating to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by a Texas agency, or an agency of another state or country, is excepted from public release. 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(a)(1), (2)). Upon review, we find the information you have redacted pursuant to section 552.130 and the submitted video recording contain Texas motor vehicle information. You state the city lacks the technical capability to redact the information subject to section 552.130 in the video recording. Thus, the city must withhold the information you have redacted and the video recording in its entirety under section 552.130 of the Government Code.

In summary, the city must withhold the information we have marked pursuant to section 552.101 of the Government Code in conjunction with common-law privacy and section 552.102(a) of the Government Code. With the exception of the basic information, the city may withhold Exhibit 3 under section 552.108(a)(1) of the Government Code. With the exception of the information we have marked for release, the city must withhold information you have redacted under section 552.117(a)(2) of the Government Code; however, the redacted cellular telephone number may only be withheld if the officer paid for the cellular telephone services with his own funds. The city must withhold the information you have redacted and the video recording in its entirety under section 552.130 of the Government Code. The remaining information must be released to the requestor.

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](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, appearing to read 'Sarah Casterline', with a large, stylized flourish at the end.

Sarah Casterline  
Assistant Attorney General  
Open Records Division

SEC/ag

Ref: ID# 432693

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Department of the Navy  
Bureau of Navy Personnel  
Millington, Tennessee 38055  
(w/o enclosures)