



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 14, 2011

Mr. Jason D. King
Akers & Boulware-Wells, LLP
6618 Sitio Del Rio Boulevard, Building E, Suite 102
Austin, Texas 78730

OR2011-18404

Dear Mr. King:

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# 441539.

The City of Glenn Heights (the “city”), which you represent, received a request for seven categories of information related to the city’s police department (the “department”), including (1) complaints involving city police officers; (2) information related to salaries and benefits of officers, employees, and staff; (3) records of incidents involving the city’s municipal court; (4) a list of vehicles, aircraft, or other moving equipment the department owns, operates, or is licensed to use for law enforcement purposes; (5) a list of weapons, guns, and Tasers used for law enforcement purposes; (6) a list of the department’s membership or involvement in regional, state, and federal task forces; and (7) photographs of all officers of the department. You claim information responsive to categories four and seven of the request is excepted from disclosure under sections 552.101 and 552.119 of the Government Code. We have considered the exceptions you claim and reviewed the information you submitted.¹ We assume the city has released any other information encompassed by this request that existed on the date of the city’s receipt of the request. If not, then any such information must be released immediately.² See Gov’t Code §§ 552.221, .301, .302; Open Records Decision No. 664 (2000).

¹This letter ruling assumes the submitted representative sample of information is truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the city to withhold any information that is substantially different from the submitted information. See Gov’t Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

²We note the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

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 exception encompasses information other statutes make confidential. You claim section 552.101 in conjunction with section 418.181 of the Government Code. Sections 418.176 through 418.182 were added to chapter 418 of the Government Code as part of the Texas Homeland Security Act. Section 418.181 provides as follows:

Those documents or portions of documents in the possession of a governmental entity are confidential if they identify the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism.

Id. § 418.181; *see generally id.* § 421.001 (defining critical infrastructure to include “all public or private assets, systems, and functions vital to the security, governance, public health and safety, and functions vital to the state or the nation”). The fact that information may pertain to public or private infrastructure does not make the information *per se* confidential under the Texas Homeland Security Act. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). Moreover, the mere recitation of a statute’s key terms is not sufficient to demonstrate the applicability of the claimed provision. As with any exception to disclosure, a claim under section 418.181 must be accompanied by an adequate explanation of 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 contend the list of vehicles submitted as Exhibit B is confidential under section 418.181. You state this information is related to the city’s capability to respond to threats and crime. You assert the information at issue could be utilized to “exploit any perceived weaknesses in the [c]ity’s ability to respond to emergency situations.” Having considered your arguments and reviewed the information at issue, we conclude you have not sufficiently demonstrated that Exhibit B identifies technical details of particular vulnerabilities of critical infrastructure to an act of terrorism. We therefore conclude the city may not withhold any of the information in Exhibit B under section 552.101 of the Government Code on the basis of section 418.181 of the Government Code.

Section 552.101 of the Government Code also encompasses common-law privacy, which protects information that is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and of no legitimate public interest. *See Indus. Found. v. Tex. 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. Common-law privacy protects the specific types of information held to be intimate or embarrassing in *Industrial Foundation*. *See id.* 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). This office has concluded other types of information also are private under section 552.101. *See generally* Open Records Decision No. 659 at 4-5 (1999) (summarizing information attorney general has held to be private). We have marked medical information

in Exhibit C that is highly intimate or embarrassing and not a matter of legitimate public interest. The city must withhold that information under section 552.101 of the Government Code in conjunction with common-law privacy.

We note Exhibit C also contains information protected by section 552.102 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 Court has 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. *See Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, No. 08-0172, 2010 WL 4910163 (Tex. Dec. 3, 2010). The city must withhold the birth date we have marked under section 552.102(a) of the Government Code.

Lastly, we address your claim under section 552.119 of the Government Code for the photographs in Exhibit C. This exception provides as follows:

(a) A photograph that depicts a peace officer as defined by Article 2.12, Code of Criminal Procedure, the release of which would endanger the life or physical safety of the officer, is excepted from [required public disclosure] unless:

(1) the officer is under indictment or charged with an offense by information;

(2) the officer is a party in a civil service hearing or a case in arbitration; or

(3) the photograph is introduced as evidence in a judicial proceeding.

(b) A photograph excepted from disclosure under Subsection (a) may be made public only if the peace officer gives written consent to the disclosure.

Gov’t Code § 552.119. Under section 552.119, a governmental body must demonstrate, if the documents do not demonstrate on their face, that release of the photograph would endanger the life or physical safety of a peace officer. You state the photographs in Exhibit C are those of officers of the department. You inform us the officers concerned have not consented to public disclosure of their photographs. You also state the submitted photographs are not subject to subdivisions (1) through (3) of section 552.119(a). You explain that the officers to whom the photographs pertain may participate from time to time in undercover or other police operations in which public knowledge of the officers’

³This office will raise section 552.102 on behalf of a governmental body, as this section is a mandatory exception to disclosure. *See* Gov’t Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

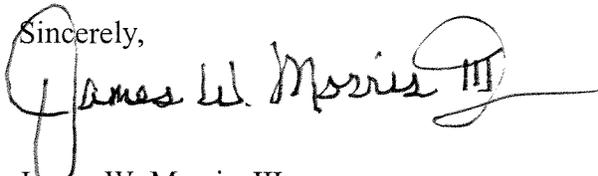
appearance would endanger their lives or physical safety. We note section 552.119 is applicable only to a photograph of a peace officer, as defined by article 2.12 of the Code of Criminal Procedure. Therefore, based on your representations and our review of the information at issue, we conclude that to the extent the officers depicted in the submitted photographs are peace officers under article 2.12, the city must withhold their photographs under section 552.119 of the Government Code.

In summary, the city must withhold (1) the marked medical information under section 552.101 of the Government Code in conjunction with common-law privacy; (2) the marked birth date under section 552.102(a) of the Government Code; and (3) the police officers' photographs to the extent the officers concerned are peace officers as defined by article 2.12 of the Code of Criminal Procedure. The rest of the submitted information must be released.

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 "James W. Morris III". The signature is written in a cursive style with a large, stylized initial "J" and a long horizontal flourish extending to the right.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/em

Ref: ID# 441359

Enc: Submitted documents

c: Requestor
(w/o enclosures)