



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 14, 2012

Ms. Linda Pemberton
Paralegal
City of Killeen
P.O. Box 1329
Killeen, Texas 76540-1329

OR2012-03796

Dear Ms. Pemberton:

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# 447686 (City of Killeen ID No. W006990).

The City of Killeen (the "city") received a request for all information pertaining to a specified automobile collision. You state you have released some of the requested information. We note you have redacted social security numbers under section 552.147 of the Government Code.¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we must address the city's procedural obligations. Section 552.301 of the Government Code describes the procedural obligations placed on a governmental body that receives a written request for information it wishes to withhold. Pursuant to section 552.301(b), a governmental body must request a ruling from this office and state the exceptions to disclosure that apply within ten business days after receiving the request. *See* Gov't Code § 552.301(b). You inform us the city received the request on December 19, 2011. You also inform our office the city was closed December 23 and 26, 2011, and January 2, 2012. This office does not count the date the request was received or holidays as business days for the purpose of calculating a governmental body's

¹Section 552.147 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 a decision from this office. *See* Gov't Code § 552.147(b).

deadlines under the Act. Thus, the city was required to raise the exceptions to disclosure that apply to this information by January 5, 2012. While the city raised section 552.103 for this information within the ten-business-day time period as required by subsection 552.301(b), the city did not raise sections 552.101 and 552.108 within the ten-business-day deadline.

A governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). The presumption that information is public under section 552.302 can generally be overcome by demonstrating the information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630, 325 at 2 (1982). Section 552.108 is a discretionary exception that protects a governmental body's interests and may be waived by a governmental body's failure to comply with the procedural requirements of the Act. *See* Gov't Code § 552.007; Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 177 at 3 (1977) (statutory predecessor to Gov't Code § 552.108 subject to waiver). In failing to comply with section 552.301(b), the city has waived its claim under section 552.108. Therefore, the city may not withhold any of the submitted information under section 552.108. However, because section 552.101 of the Government Code can provide a compelling reason to overcome this presumption, we will consider the applicability of this section to the submitted information. We will also consider the applicability of your timely-raised exception.

Next, we note the submitted information consists of a completed investigation, which is subject to section 552.022(a)(1) of the Government Code. Section 552.022(a)(1) provides for required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body," unless the information is excepted from disclosure under section 552.108 of the Government Code or made confidential under the Act or other law. Gov't Code § 552.022(a)(1). Although you raise section 552.103 of the Government Code, this section is discretionary and does not make information confidential under the Act. *See id.*; *see also id.* § 552.007; *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 section 552.103); Open Records Decision No. 665 at 2 n.5 (discretionary exceptions generally), 663 (1999) (governmental body may waive section 552.103). Therefore, the city may not withhold the submitted information under section 552.103 of the Government Code. However, section 552.101 of the Government Code protects information made confidential by law. Therefore, we will consider the applicability of section 552.101 to 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. Section 552.101 encompasses information made confidential by statute, such as section 773.091 of the Health and Safety Code, which provides in part:

(b) Records of the identity, evaluation, or treatment of a patient by emergency medical services personnel or by a physician providing medical supervision that are created by the emergency medical services personnel or physician or maintained by an emergency medical services provider are confidential and privileged and may not be disclosed except as provided by this chapter.

...

(g) The privilege of confidentiality under this section does not extend to information regarding the presence, nature of injury or illness, age, sex, occupation, and city of residence of a patient who is receiving emergency medical services.

Health & Safety Code § 773.091(b), (g). Except for the information specified in section 773.091(g), emergency medical services (“EMS”) records are deemed confidential and may be released only in accordance with chapter 773 of the Health & Safety Code. *See id.* §§ 773.091, .094. You argue portions of the submitted information consist of records created by EMS personnel. Upon review, we agree section 773.091 is applicable to portions of the submitted information. However, we note the requestor is the attorney for the individuals whose EMS records are at issue. We note records that are confidential under section 773.091 may be disclosed to “any person who bears a written consent of the patient or other persons authorized to act on the patient’s behalf for the release of confidential information[.]” *Id.* §§ 773.092(e)(4), .093. Section 773.093 provides a consent for release of EMS records must be written and signed by the patient, authorized representative, or personal representative and must specify: (1) the information or records to be covered by the release; (2) the reasons or purpose for the release; and (3) the person to whom the information is to be released. *Id.* § 773.093(a). Thus, if the city does not receive consent that complies with section 773.093 of the Health and Safety Code, then with the exception of the information subject to section 773.091(g), which must be released, the city must withhold the submitted EMS records, which we have marked, under section 552.101 of the Government Code in conjunction with section 773.091(b) of the Health and Safety Code. However, if the city receives proper consent, the marked EMS records must be released in their entirety in accordance with chapter 773 of the Health and Safety Code.

Section 552.101 also encompasses laws that make criminal history record information (“CHRI”) confidential. CHRI generated by the National Crime Information Center or by the Texas Crime Information Center is confidential under federal and state law. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 at 7 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates.

Id. Section 411.083 of the Government Code deems confidential CHRI the Department of Public Safety (“DPS”) maintains, except DPS may disseminate this information as provided in subchapter F of chapter 411 of the Government Code. *See* Gov’t Code § 411.083. Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090-.127. Similarly, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with subchapter F of chapter 411 of the Government Code. However, upon review, we find none of the remaining information consists of CHRI for purposes of chapter 411, and it may not be withheld under section 552.101 of the Government Code on that basis.

Section 552.101 of the Government Code also encompasses the doctrine of common-law 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 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 established. *Id.* at 681–82. The type of information considered highly 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. This office also has found personal financial information not relating to a financial transaction between an individual and a governmental body is generally excepted from required public disclosure under common-law privacy. *See* Open Records Decision No. 600 (1992) (personal financial choices concerning insurance generally confidential). Upon review, we find portions of the remaining information, which we have marked, are highly intimate or embarrassing and not of legitimate public interest. Therefore, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. Upon review, however, we find the remaining information at issue is either not highly intimate or embarrassing, or it is of legitimate public interest. Therefore, the remaining information is not confidential under common-law privacy, and the city may not withhold it under section 552.101 on that ground.

Some of the remaining information may be subject to section 552.1175 of the Government Code.² Section 552.1175 provides in part:

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

(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.

Gov't Code § 552.1175(a)(1), (b). Some of the remaining information, which we have marked, relates to an officer of the city's police department but the information is not held in an employment capacity. Accordingly, to the extent the officer at issue elects to restrict access to his personal information in accordance with section 552.1175(b), the city must withhold the marked information under section 552.1175 of the Government Code. Conversely, if the officer at issue does not elect to restrict access to his personal information in accordance with section 552.1175(b), the marked information may not be withheld under section 552.1175.

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 an agency of this state or another state or country is excepted from public release. Gov't Code § 552.130. The city must generally withhold the motor vehicle record information we have marked in the submitted documents under section 552.130. The city must also generally withhold the portions of the submitted photographs and videos depicting a discernable Texas license plate number and registration sticker under section 552.130 of the Government Code. However, we note section 552.130 protects personal privacy. In this instance, it is not clear whether some of the information at issue belongs to the requestor's clients. As such, the requestor may have a right of access to this marked information, and we must rule conditionally. *See id.* § 552.023(b) (governmental body may not deny access to person to whom information relates on ground that information is considered confidential by privacy principles); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individuals request information concerning themselves). To the extent the requestor has a right of access under section 552.023 to the marked motor vehicle record information, the city must release such information to the requestor. To the extent the requestor does not

have a right of access under section 552.023, the city must withhold the marked motor vehicle record information under section 552.130 of the Government Code.

Section 552.136(b) of the Government Code provides, “[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136(b); *see id.* § 552.136(a) (defining “access device”). This office has concluded insurance policy numbers constitute access device numbers for purposes of section 552.136. Accordingly, the city must withhold the insurance policy number we have marked under section 552.136 of the Government Code.

The remaining information includes an e-mail address subject to section 552.137 of the Government Code, which 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 id.* § 552.137(a)-(c). The e-mail address at issue is not specifically excluded by section 552.137(c). As such, this e-mail address, which we have marked, must be withheld under section 552.137 of the Government Code, unless the owner of the address has affirmatively consented to its release.

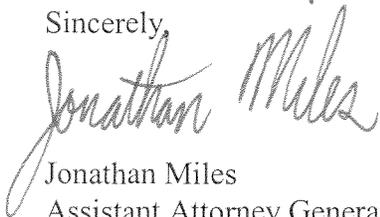
In summary, if the city does not receive consent that complies with section 773.093 of the Health and Safety Code, then with the exception of the information subject to section 773.091(g), which must be released, the city must withhold the marked EMS records under section 552.101 of the Government Code in conjunction with section 773.091(b) of the Health and Safety Code. The city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. To the extent the officer elects to restrict access to his personal information in accordance with section 552.1175(b), the city must withhold the marked information under section 552.1175 of the Government Code. To the extent the requestor does not have a right of access under section 552.023, the city must withhold the marked motor vehicle record information and the portions of the submitted photographs and videos depicting a discernable Texas license plate number and registration sticker under section 552.130 of the Government Code. The city must withhold the insurance policy number we have marked under section 552.136 of the Government Code. The city must withhold the e-mail address we have marked under section 552.137 of the Government Code, unless the owner of the address has affirmatively consented to its release. The remaining 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 cursive script that reads "Jonathan Miles". The signature is written in black ink and is positioned to the right of the word "Sincerely,".

Jonathan Miles
Assistant Attorney General
Open Records Division

JM/em

Ref: ID# 447686

Enc. Submitted documents

c: Requestor
(w/o enclosures)