



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 11, 2012

Mr. Mark G. Mann
Assistant City Attorney
City of Garland
P.O. Box 469002
Garland, Texas 75046-9002

OR2012-05206

Dear Mr. Mann:

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# 450358 (GCA12-0064 and GCA12-0113).

The Garland Police Department (the "department") received two requests from the same requestor for the arrest report, drug test results, and video recording pertaining to a specified incident. You state you have released some of the requested documents. You claim that portions of the submitted information are excepted from disclosure under sections 552.108, 552.130, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, we note you have not submitted results of the drug test related to the specified incident. To the extent information responsive to this aspect of the first request exists and was maintained by the department on the date the department received the first request, we assume it has been released. If the department has not released such information, it must do so at this time. *See* Gov't Code § 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

Second, we address the department's argument that portions of the second request require the department to answer questions. The Act does not require a governmental body to answer factual questions, conduct legal research, or create new information in responding to a request. *See* Open Records Decision Nos. 563 at 8 (1990), 555 at 1-2 (1990). However, a governmental body must make a good faith effort to relate a request to information held by the governmental body. *See* Open Records Decision No. 561 at 8 (1990). We assume the department has made a good faith effort to do so.

Next, we must address the department's obligations under the Act. Section 552.301(b) requires that a governmental body ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. *See* Gov't Code § 552.301(b). You state the department received the first request for information on January 20, 2012. Thus, the department's ten-business-day deadline for the first request was February 3, 2012. However, the envelope in which you requested a ruling from this office has two postmarks: the first is postmarked February 3, 2012, and the second is postmarked February 4, 2012. *See id.* § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail). Because of this conflicting information, we are unable to determine whether the department requested a ruling from this office within ten business days of receiving the request for information. *See id.* § 552.301(b). We therefore find, with respect to the first request, that the department has failed to establish that it complied with the procedural requirements of section 552.301 in requesting a ruling from this office. *See id.*

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the information is public and must be released unless the governmental body overcomes this presumption by demonstrating a compelling reason to withhold the information. *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, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 630 (1994). A compelling reason generally exists when information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3, 325 at 2 (1982). You claim an exception to disclosure under section 552.108 of the Government Code, which is a discretionary exception that may be waived. *See* Gov't Code § 552.007; Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions in general), 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions), 177 at 3 (1977) (statutory predecessor to section 552.108 subject to waiver). Because the department failed to comply with the requirements of the Act with respect to the first request, it has waived its claimed exception under section 552.108 of the Government Code with respect to that information. Accordingly, the department may not withhold information responsive to the first request on that basis. We note portions of the information responsive to the first request are subject to section 552.101 of the Government Code, and you raise

section 552.130 of the Government Code for portions of the information at issue.¹ Because sections 552.101 and 552.130 can provide compelling reasons to withhold information, we will address the applicability of these exceptions to the submitted information. We will also consider your argument under section 552.108 of the Government Code against disclosure of information responsive to the second request.

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 that information responsive to the second request relates to a pending criminal case and release of the information would interfere with the detection, investigation, and prosecution of a crime. Based on this representation and our review, we conclude that section 552.108(a)(1) is applicable to the information that is responsive to the second request. *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). Accordingly, the department may withhold the submitted video recording under section 552.108(a)(1) of the Government Code.

Section 552.101 of the Government Code excepts “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses the doctrine of common-law privacy. Common-law privacy 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. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Common-law privacy encompasses 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 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 the information we have marked is highly intimate or embarrassing and not a matter of legitimate public interest.

¹The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987)*.

Therefore, the department must generally withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.130 of the Government Code excepts from disclosure information that relates 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. Gov't Code § 552.130(a)(1), (2). Accordingly, the department must generally withhold the motor vehicle record information you have marked under section 552.130 of the Government Code.

Section 552.147 of the Government Code provides that "[t]he social security number of a living person is excepted from" required public disclosure under the Act. *Id.* § 552.147(a). Therefore, the department may generally withhold the social security number you have marked under section 552.147(a).

However, we note common-law privacy and sections 552.130 and 552.147 of the Government Code protect personal privacy. In this instance, the requestor is the uncle of the person whose information is at issue in the submitted information and appears to be requesting the report on his behalf as his authorized representative. As such, he may have a right of access under section 552.023 of the Government Code to the marked information that would otherwise be withheld to protect the individual's privacy. *See id.* § 552.023(a) (person or person's authorized representative has special right of access, beyond right of general public, to information held by governmental body that relates to person and is protected from public disclosure by laws intended to protect person's privacy interests); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individuals request information concerning themselves). Because we cannot determine whether the requestor is the authorized representative of the individual at issue, we rule conditionally. If the requestor is not the authorized representative of his nephew, the department may withhold the submitted video recording under section 552.108(a)(1) of the Government Code, and must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy, and the information you have marked under section 552.130 of the Government Code, and may withhold the information you have marked under section 552.147 of the Government Code. If the requestor is the authorized representative of his nephew, then the department may withhold the submitted video recording pursuant to section 552.108(a)(1) of the Government Code and 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 black ink, appearing to read "Charles Galindo Jr.", written in a cursive style.

Charles Galindo Jr.
Assistant Attorney General
Open Records Division

CG/em

Ref: ID# 450358

Enc. Submitted documents

c: Requestor
(w/o enclosures)