



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 24, 2012

Ms. Linda M. Champion
Assistant City Attorney
City of Victoria
P.O. Box 1758
Victoria, Texas 77902-1758

OR2012-05800

Dear Ms. Champion:

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# 451628.

The City of Victoria (the "city") received a request for the personnel records of a named former employee of the city's police department, including all disciplinary records, performance evaluations, and training records. You state some of the requested information will be released to the requestor. You claim that the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.¹

Initially, you claim the submitted information is confidential based on a "Compromise Settlement Agreement and Release" between the city and the officer named in the request. We note that information is not confidential under the Act simply because the party that submits the information anticipates or requests that it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot overrule or repeal provisions of the Act through an agreement or contract. *See* Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) ("[T]he obligations of a governmental body under [the Act] cannot be

¹We assume the "representative sample" of information submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than those submitted to this office.

compromised simply by its decision to enter into a contract.”), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to section 552.110). Consequently, unless the submitted information falls within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

You assert the settlement agreement is excepted under section 552.101 of the Government Code, which excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses information protected by other statutes. Section 154.074 of the Civil Practices and Remedies Code provides in part:

(a) Except as provided by Subsections (c), (d), (e), and (f), a communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure, whether before or after the institution of formal judicial proceedings, is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding.

(b) Any record made at an alternative dispute resolution procedure is confidential, and the participants or the third party facilitating the procedure may not be required to testify in any proceedings relating to or arising out of the matter in dispute or be subject to process requiring disclosure of confidential information or data relating to or arising out of the matter in dispute.

...

(d) A final written agreement to which a governmental body, as defined by Section 552.003, Government Code, is a signatory that is reached as a result of a dispute resolution procedure conducted under this chapter is subject to or excepted from required disclosure in accordance with Chapter 552, Government Code.

Civ. Prac. & Rem. Code § 154.073(a), (b), (d). In this instance, it is not clear, nor have you established, that the settlement agreement at issue was made pursuant to an alternative dispute resolution proceeding in accordance with the Texas Alternative Dispute Resolution Procedures Act. Furthermore, it appears that the submitted “Compromise Settlement Agreement and Release” constitutes a final settlement agreement. Section 154.073 of the Civil Practice and Remedies Code does not except from required public disclosure a governmental body’s mediated final settlement agreement. *See* Civ. Prac. & Rem. Code § 154.073(d). Thus, the submitted settlement agreement is not confidential under section 154.073 of the of the Civil Practice and Remedies Code, and may not be withheld under section 552.101 the Government Code on that ground.

Section 552.101 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. Further, this office has found that common-law privacy generally protects the identifying information of juvenile offenders. *See* Open Records Decision No. 394 (1983); *cf.* Fam. Code § 58.007. Upon review, we find a portion of the submitted information, which we have marked, is highly intimate or embarrassing and not of legitimate concern to the public. Accordingly, the city must withhold this information under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.101 of the Government Code also encompasses section 1324a of title 8 of the United States Code. Section 1324a governs I-9 forms and their attachments. This section provides an I-9 form and “any information contained in or appended to such form, may not be used for purposes other than for enforcement of this chapter” and for enforcement of other federal statutes governing crime and criminal investigations. *See* 8 U.S.C. § 1324a(b)(5); *see also* 8 C.F.R. § 274a.2(b)(4). Release of the form in this instance would be “for purposes other than enforcement” of the referenced federal statutes. Accordingly, we conclude the submitted I-9 form, which we have marked, is confidential for purposes of section 552.101 of the Government Code and may only be released in compliance with the federal laws and regulations governing the employment verification system.

Section 552.1175 of the Government Code protects the home address, home telephone number, emergency contact information, social security number, and family member information of a peace officer when that information is held by a governmental body in a non-employment capacity and the individual elects to keep the information confidential.² *See* Gov’t Code § 552.1175(a)(1); *see also* Crim. Pro. Code art. 2.12 (defining “peace officer”). To the extent the individuals whose information we have marked are currently licensed peace officers who elect to restrict access to the information pertaining to them in accordance with section 552.1175(b), the city must withhold the marked information under section 552.1175 of the Government Code.

We note portions of the submitted information are subject to section 552.137 of the Government Code. Section 552.137 provides, “an e-mail address of a member of the public

²The 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).

that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act],” unless the owner of the e-mail address has affirmatively consented to its release or the e-mail address is specifically excluded by subsection (c). Gov’t Code § 552.137(a)–(c). The city must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses have affirmatively consented to their release.

In summary, the city must withhold the information we have marked under section 552.101 in conjunction with common-law privacy. The city must also withhold the I-9 form we have marked under section 552.101 in conjunction with section 1324a of title 8 of the United States Code. To the extent the individuals whose information we have marked are currently licensed peace officers who elect to restrict access to the information pertaining to them in accordance with section 552.1175(b), the city must withhold the marked information under section 552.1175 of the Government Code. The city must withhold the email addresses we have marked under section 552.137 of the Government Code unless the owner affirmatively consents to its public disclosure. The remaining information must be released.³

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,



Jeffrey W. Giles
Assistant Attorney General
Open Records Division

JWG/dls

³We note the information being released contains confidential information to which the requestor has a right of access. See Gov’t Code § 552.023(a); ORD 481 at 4. If the city receives another request for this information from a different requestor, then the city should again seek a decision from this office.

Ref: ID# 451628

Enc. Submitted documents

c: Requestor
(w/o enclosures)