



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 21, 2012

Ms. Sylvia McClellan  
Assistant City Attorney  
City of Dallas  
1400 South Lamar  
Dallas, Texas 75215

OR2012-07651

Dear Ms. McClellan:

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# 454129 (DPD Request Number: 2012-02526).

The Dallas Police Department (the "department") received a request for all e-mails sent to or from a named official during a specified time period. You claim portions of the submitted information are excepted from disclosure under sections 552.101, 552.107, 552.108, 552.117, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>1</sup>

We must first address the department's obligations under section 552.301 of the Government Code, which prescribes the procedural obligations that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(b) requires that a governmental body ask for a decision from this office and state which exceptions apply to the requested information by the tenth business day after receiving the request. *See* Gov't Code § 552.301(b). You state, and the submitted request for information reflects, the department received the instant request on

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<sup>1</sup>We assume the "representative sample" of records 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.

February 29, 2012; therefore, the ten-business-day deadline was March 14, 2012. Your letter requesting a decision from this office was submitted to this office in an envelope postmarked March 15, 2012. *See id.* § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Consequently, the department failed to request a decision from this office within the ten-business-day period prescribed by subsection 552.301(b).

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption that the information is public and must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *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, 381-82 (Tex. App.—Austin 1990, no writ); Open Records Decision No. 630 (1994). Generally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). We note sections 552.107 and 552.108 of the Government Code are discretionary in nature. They serve only to protect a governmental body's interests, and may be waived; as such, they do not constitute compelling reasons to withhold information for purposes of section 552.302. *See* Open Records Decision Nos. 676 at 11-12 (2002) (attorney-client privilege under section 552.107 or Texas Rule of Evidence 503 constitutes compelling reason to withhold information under section 552.302 only if information's release would harm third party), 665 at 2 n.5 (2000) (discretionary exceptions in general), 663 at 5 (1999) (waiver of discretionary exceptions), 177 at 3 (1977) (statutory predecessor to section 552.108 subject to waiver). Thus, no portion of the submitted information may be withheld under either section 552.107 or section 552.108. However, because sections 552.101, 552.117, and 552.137 of the Government Code can provide compelling reasons to withhold information, we will consider the applicability of your claims under these exceptions. Further, we note a portion of the submitted information is subject to section 552.1175 of the Government Code, which can also provide a compelling reason to withhold information.<sup>2</sup> Accordingly, we will also consider the applicability of section 552.1175.

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 that other statutes make confidential. You raise section 552.101 in conjunction with section 418.177 of the Government Code for information you have marked in the submitted information. This

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<sup>2</sup>The 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).

section was added to chapter 418 of the Government Code as part of the Texas Homeland Security Act (the "HSA"). Section 418.177 provides as follows:

Information is confidential if the information:

(1) is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, or investigating an act of terrorism or related criminal activity; and

(2) relates to an assessment by or for a governmental entity, or an assessment that is maintained by a governmental entity, of the risk or vulnerability of persons or property, including critical infrastructure, to an act of terrorism or related criminal activity.

*Id.* § 418.177. The fact that information may relate to a governmental body's security concerns does not make the information *per se* confidential under the HSA. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provisions controls scope of its protection). Furthermore, the mere recitation by a governmental body of a statute's key terms is not sufficient to demonstrate the applicability of a claimed provision. As with any exception to disclosure, a governmental body asserting one of the confidentiality provisions of the HSA must adequately explain 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); ORD 649 at 3.

You state the intelligence bulletins you have marked relate to terrorism and homeland security and their release "could jeopardize law enforcement by revealing the methods and techniques and strategies being used to identify terrorism suspects." Based on your representations and our review, we find the intelligence security alert bulletins you have marked constitute assessments by a governmental entity of the risk or vulnerability of persons to an act of terrorism or related criminal activity. We therefore conclude the department must withhold the marked information under section 552.101 of the Government Code in conjunction with section 418.177 of the Government Code.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that (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 satisfied. *See 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 medical

information or information indicating disabilities or specific illnesses is 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 information of no legitimate public interest. Accordingly, the department must withhold this information under section 552.101 in conjunction with common-law privacy. However, none of the remaining information you have marked is highly intimate or embarrassing information of no legitimate public concern. Therefore, the department may not withhold any of the remaining information under section 552.101 on the basis of common-law privacy.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). We note section 552.117 encompasses a personal cellular telephone number, provided that a governmental body does not pay for the cellular telephone service. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. The information at issue contains a City of Dallas employee's cellular telephone number, which we have marked. Accordingly, to the extent this employee timely elected confidentiality under section 552.024 and pays for the cellular telephone service with personal funds, the department must withhold the marked cellular telephone number under section 552.117(a)(1). If the employee did not timely elect to keep his cellular telephone number confidential or does not pay for the cellular telephone service with personal funds, the marked cellular telephone number may not be withheld under section 552.117(a)(1).

Section 552.117(a)(2) of the Government Code excepts from disclosure the home address, home telephone number, emergency contact information, social security number, and family member information of a peace officer, regardless of whether the peace officer complies with sections 552.024 or 552.1175 of the Government Code. Gov't Code § 552.117(a)(2). Section 552.117(a)(2) adopts the definition of peace officer found at article 2.12 of the Code of Criminal Procedure. Upon review, we agree the information you have marked constitutes the personal information of peace officers. Accordingly, the department must withhold this information under section 552.117(a)(2).

Section 552.1175 of the Government Code provides in part:

(b) Information that relates to the home address, home telephone number, or social security number of [a criminal investigator of the United States as described by article 2.122(a) of the Code of Criminal Procedure], 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.

*Id.* § 552.1175(a)(7), (b). The remaining information includes information of an individual identified as an employee of the United States Marshals Service. If this individual is a criminal investigator of the United States as described by article 2.122(a) of the Code of Criminal Procedure who elects to restrict access to the information we have marked in accordance with section 552.1175(b), then the department must withhold the information we have marked under section 552.1175; however, the marked cellular telephone number may not be withheld if the cellular service is paid for with public funds. If this individual is not a criminal investigator or does not properly elect to restrict access to the information at issue, the department may not withhold the marked information under section 552.1175.

Section 552.137 of the Government Code 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 addresses you have marked are not specifically excluded by section 552.137(c). Accordingly, the department must withhold the marked e-mail addresses under section 552.137, unless the owners of the addresses affirmatively consent to their release.

In summary, the department must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 418.177 of the Government Code. The department 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 employee whose cellular telephone number we have marked timely elected confidentiality under section 552.024 of the Government Code to withhold his cellular telephone number, the department must withhold the marked cellular telephone number under section 552.117(a)(1) of the Government Code as long as the employee pays for the cellular telephone service with personal funds. The department must withhold the information you have marked under section 552.117(a)(2) of the Government Code. If the individual whose information we have marked is a criminal investigator of the United States as described by article 2.122(a) of the Code of Criminal Procedure who elects to restrict

access to the marked information in accordance with section 552.1175(b) of the Government Code, then the department must withhold the information we have marked under section 552.1175 of the Government Code; however, the marked cellular telephone number may not be withheld if the cellular service is paid for with public funds. The department must withhold the e-mail addresses you have marked under section 552.137 of the Government Code, unless the owners of the addresses affirmatively consent to their 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](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,



Ana Carolina Vieira  
Assistant Attorney General  
Open Records Division

ACV/ag

Ref: ID# 454129

Enc. Submitted documents

c: Requestor  
(w/o enclosures)