



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 24, 2012

Mr. Thomas P. Karlok
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City of Galveston
P.O. Box 779
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OR2012-11464

Dear Mr. Karlok:

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# 459853 (ORR # 12-276).

The Galveston Police Department (the "department") received a request for information concerning (1) traffic citations, (2) warrants, (3) booking photos and mugshots, (4) jail logs, and (5) other entities who have also requested such information, all during a specified time period. You state the department does not have any information responsive to parts one, two, four or five of the request.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 your arguments and reviewed the submitted information.

Initially, we note the requestor has expressly excluded from his request information concerning juveniles and the home address, telephone number, social security number, and family information of peace officers and corrections officers. Thus, any such information is not responsive to the request. This ruling does not address the public availability of non-responsive information, nor is the department required to release non-responsive information in response to this request.

¹The Act does not require a governmental body to release information that did not exist when it received a request or to 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).

You first argue that the request is "over broad and should be more specific." We note a governmental body must make a good-faith effort to relate a request to information that is within its possession or control. Open Records Decision No. 561 at 8-9 (1990). We also note section 552.222 of the Government Code authorizes a governmental body to ask the requestor to clarify or narrow requests for information that are unclear or burdensome. See Gov't Code § 552.222(b). However, a governmental body may not refuse to comply with the requirements of the Act on the ground of administrative inconvenience. See *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 687 (Tex. 1976); see also Open Records Decision No. 497 at 4 (1988) (fact that submitting copies for review may be burdensome does not relieve governmental body of its responsibility to do so). Therefore, although you argue that the volume of information at issue prevents the department from determining what information pertains to pending criminal investigations, the department may not refuse to comply with the Act on that basis. Thus, the department must release the submitted information unless it falls within the scope of an exception to disclosure. As you have submitted information you state is responsive to the request, we will address your arguments against its disclosure under the Act.

Next, you assert the submitted information should not be released because portions of the information are of no concern to the requestor because he is not from Texas, the requestor will use the information at issue in a misleading way, and the requestor is not seeking the information "for the education of the public." The identity of the requestor is generally not a factor to be considered when a governmental body receives a request for information. See Gov't Code § 552.223 (requiring uniform treatment of all requests for information). Further, when responding to open records requests, the Act does not permit a governmental body or this office to consider a requestor's intended use of information. See *id.* § 552.222(a) (stating governmental body may not inquire into purpose for which information will be used); see also Open Records Decision Nos. 508 (1988) at 2 (motives of a person seeking information under the Act are irrelevant), 51 (1974). A governmental body must release the information to which a requestor seeks access unless the information falls within the scope of an exception to public disclosure under the Act. See Gov't Code § 552.221; Open Records Decision No. 664 (2000). We note that a governmental body is not responsible for the use that may be made of information that it releases to the public. See Gov't Code § 552.204; Open Records Decision No. 508 at 3 (1988) (use that may be made of information does not control whether it falls within exception to disclosure).

You next argue that because you believe the requestor intends to use the submitted information for commercial purposes, and based on his use of previously requested information, he may be in violation of section 17.46 of the Business and Commerce Code, and the requested information should therefore not be released. Section 17.46 makes unlawful false, misleading, or deceptive acts in the conduct of trade or commerce. See Bus. & Com. Code 17.46. As discussed above, an individual's intended use of public information does not affect whether such information is subject to release under the Act. See Gov't Code § 552.204; Open Records Decision No. 660 at 4 (1999) (use that may be made of information does not control whether it falls within exception to disclosure, even if intended use is commercial in nature). In addition, the determination of whether the use of previously

requested information is in violation of the Deceptive Trade Practices Act is beyond the scope of this office's authority. *See* Gov't Code § 552.301(a) (open records division's authority is limited to determining, upon a governmental body's request, whether requested information falls within an exception to disclosure). Further, for information to be confidential under section 552.101, the provision of law must explicitly require confidentiality. A confidentiality requirement will not be inferred from a provision's structure. *See* Open Records Decision Nos. 658 at 4 (1998) (stating that statutory confidentiality provision must be express and confidentiality requirement will not be implied from statutory structure), 478 at 2 (1987) (stating that, as general rule, statutory confidentiality requires express language making information confidential), 465 at 4-5 (1987). Because section 17.46 does not explicitly provide that information is confidential and because a determination of whether the requestor has violated section 17.46 is beyond the scope of this office's authority, the department may not withhold any information under section 17.46 of the Business and Commerce Code.

Next, we must address the department's procedural obligations under section 552.301 of the Government Code when requesting a decision from this office under the Act. Pursuant to section 552.301(e), within fifteen business days of receipt of the request the governmental body must submit to this office, among other items, written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld and a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See id.* § 552.301(e). In this instance, you state the department received the request for information on May 7, 2012. Accordingly, the fifteen-business-day deadline was May 29, 2012. The department submitted the required information, however, in an envelope postmarked June 4, 2012. *See id.* § 552.308(a) (deadline under the Act is met if document bears post office mark indicating time within the deadline period). Consequently, we find the department failed to comply with section 552.301 of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption that the requested information is public and must be released unless a compelling reason exists 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, 381-82 (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); *see also* 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). Although you raise sections 552.103 and 552.108 of the Government Code, these are discretionary exceptions to disclosure that protect only a governmental body's interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions in general), 663 at 5 (1999) (waiver of discretionary exceptions), 586 (1991) (governmental body may waive

section 552.108), 473 (1987) (section 552.103 may be waived). As such, sections 552.103 and 552.108 do not constitute compelling reasons to withhold information for purposes of section 552.302, and the department may not withhold any of the submitted information on those bases. However, you also raise section 552.101 of the Government Code, which can provide a compelling reason to withhold information. Therefore, we will address your arguments under section 552.101 for 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 the common-law right to 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 met. *Id.* at 681-82. A compilation of an individual's criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *Cf. U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (finding significant privacy interest in compilation of individual's criminal history by recognizing distinction between public records found in courthouse files and local police stations and compiled summary of criminal history information). Furthermore, we find a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. You argue the instant request requires the department to compile unspecified law enforcement records concerning individuals. However, we find the requestor is not seeking information pertaining to any specified individual. Thus, the instant request does not require the department to compile any named individual's criminal history and does not implicate any individual's right to privacy. Accordingly, the submitted information may not be withheld under section 552.101 of the Government Code as a compilation of any individual's criminal history.

Section 552.101 of the Government Code also encompasses information made confidential by other statutes, such as section 261.201 of the Family Code. Section 261.201 provides, in relevant part:

(a) [T]he following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under

this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a). Upon review, we find portions of the submitted information were used or developed in an investigation under chapter 261. *See id.* § 261.001(1), (4) (defining “abuse” and “neglect” for purposes of chapter 261 of the Family Code); *see also id.* § 101.003(a) (defining “child” for purposes of section 261.201 as person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes). Therefore, this information is within the scope of section 261.201. You do not indicate the department has adopted a rule governing the release of this type of information; therefore, we assume no such regulation exists. Given that assumption, we conclude the information we have marked and indicated is confidential pursuant to section 261.201 of the Family Code and must be withheld in its entirety under section 552.101 of the Government Code.

Section 552.101 of the Government Code in conjunction with common-law privacy, discussed above, also protects the types of information held to be intimate or embarrassing in *Industrial Foundation*. *See* 540 S.W.2d 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). You assert portions of the remaining information are protected by common-law privacy, because they are minor crimes for which any public concern does not outweigh the individual’s privacy interest in the information. However, the *Industrial Foundation* common-law privacy test is not a balancing test. As noted above, information is considered private under *Industrial Foundation* if it both (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.*, 540 S.W.2d at 685. To demonstrate the applicability of common-law privacy, both prongs of this test must be met. *Id.* at 681-82. We find the information at issue is not highly intimate or embarrassing, and that there is legitimate public interest in the information because it pertains to the details of crime. *See* Open Records Decision No. 400 at 4 (1983); *see Lowe v. Hearst Communications, Inc.*, 487 F.3d 246, 250 (5th Cir. 2007) (noting “legitimate public interest in facts tending to support an allegation of criminal activity” (citing *Cinel v. Connick*, 15 F.3d 1338, 1345-46 (1994))). Accordingly, the department may not withhold any of the remaining information under section 552.101 of the Government Code on the basis of common-law privacy.

Finally, you argue the submitted information is protected by constitutional privacy, which is also encompassed by section 552.101 of the Government Code. Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual’s interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual’s autonomy within “zones of privacy,” which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual’s privacy interests and the public’s need to know information of public concern. *Id.* The scope of information

protected is narrower than under the common-law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). We find you have failed to demonstrate how any of the submitted information falls within the zones of privacy or implicates an individual's privacy interests with respect to the "most intimate aspects of human affairs" for purposes of constitutional privacy. Accordingly, the department may not withhold any of the submitted information under section 552.101 on the basis of constitutional privacy.

In summary, the department must withhold the information we have marked and indicated under section 552.101 of the Government Code in conjunction with section 261.201(a) of the Family Code. The remaining submitted information must be released to the requestor.

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,



Misty Haberer Barham
Assistant Attorney General
Open Records Division

MHB/som

Ref: ID# 459853

Enc. Submitted documents

c: Requestor
(w/o enclosures)