



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 27, 2012

Ms. Lisa D. Mares
Counsel for the City of Southlake
Taylor Olson Adkins Sralla Elam L.L.P.
6000 Western Place, Suite 200
Fort Worth, Texas 76107

OR2012-19004

Dear Ms. Mares:

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# 472228.

The City of Southlake (the "city"), which you represent, received a request for information pertaining to a disciplinary action involving a named police officer. You state the city is releasing some of the requested information. You claim portions of the submitted information are excepted from disclosure under sections 552.101, 552.107,¹ and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note the requested information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2012-09223 (2012). In that ruling, we noted that the city was releasing certain responsive information, and found the city must withhold some of the submitted information under section 552.101 of the Government Code in conjunction with common-law privacy and under

¹Although you raise section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503, this office has concluded section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Furthermore, we note the proper exception to raise when asserting the attorney-client privilege for information not subject to section 552.022 of the Government Code is section 552.107 of the Government Code. *See* ORD 676 at 1-2.

sections 552.117(a)(2) and 552.137 of the Government Code. We also ruled the city may withhold some of the information under 552.108(a)(2), but must release the remaining information. Thus, except as noted herein, we conclude, as we have no indication the law, facts, and circumstances on which the prior ruling was based have changed, the city must continue to rely on that ruling as a previous determination and withhold or release the requested information in accordance with Open Records Letter No. 2012-09223.² *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

We note, however, you now raise section 552.107 of the Government Code for some of the submitted information that the city either indicated it was releasing in response to the earlier request, or that was ordered in the previous ruling to be released to the requestor. Section 552.007 of the Government Code provides if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential under law. *See* Gov't Code § 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Accordingly, pursuant to section 552.007, the city may not now withhold any previously released information unless its release is expressly prohibited by law or the information is confidential under law. Although you raise section 552.107 for some of the responsive information, this section does not prohibit the release of information or make information confidential. *See* Open Records

²We note that in Open Records Letter No. 2012-09223, footnote 5 noted that a portion of the information at issue was excepted from disclosure under section 552.117, but that because section 552.117 protects privacy, the requestor in that ruling, to whom the information at issue pertained, had a right of access to his own private information under section 552.023 of the Government Code. *See* Gov't Code § 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). Footnote 5 further noted Open Records Decision No. 670 (2001) authorizes all governmental bodies to withhold the personal information of currently licensed peace officers under section 552.117(a)(2) of the Government Code without the necessity of requesting an attorney general decision. *See* ORD 670 at 5-6. Accordingly, footnote 5 stated that if the city received another request for this information from an individual other than that requestor, and that requestor is still a currently licensed peace officer, the city may withhold the personal information relating to that requestor pursuant to section 552.117(a)(2) and Open Records Decision No. 670 without requesting another ruling. Accordingly, the city is now authorized by Open Records Decision No. 670 to withhold personal information of the requestor in the previous ruling if he is still a currently licensed peace officer under section 552.117(a)(17) without seeking a ruling from this office. In addition, we further note that in Open Records Letter No. 2012-09223, this office ruled that certain information pertaining to the current requestor's client was excepted from disclosure under section 552.117(a)(2). The requestor has a right of access to this information of his client under section 552.023 and it must be released to him on that basis.

Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Thus, the city may not now withhold such information under section 552.107 and it must be released to the requestor.

In addition, we note you also raise section 552.101 of the Government Code for a portion of the submitted information in Exhibit B that we understand was either previously voluntarily released by the city, or that the city was ordered to release in response to the previous request. As section 552.101 makes information confidential in conjunction with other law, we will address your arguments under section 552.101 for this information.³

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 of 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 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 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). However, this office has noted the public has a legitimate interest in information that relates to public employees and their conduct in the workplace. *See, e.g.*, Open Records Decision Nos. 562 at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs but in fact touches on matters of legitimate public concern), 470 at 4 (1987) (job performance does not generally constitute public employee's private affairs), 444 at 5 (1986) (public has legitimate interest in knowing reasons for public employee's dismissal, demotion, or promotion), 405 at 2 (1983) (manner in which public employee's job was performed cannot be said to be of minimal public interest), 392 (1982) (reasons for employee's resignation ordinarily not private).

Upon review, we find that the information at issue we have marked is highly intimate or embarrassing and not of legitimate public concern. Therefore, the city must withhold the

³We note the information at issue for which you raise section 552.101 is contained in Exhibit B and consists of a four page "Statement of Complaint" and a five page memorandum dated 11/23/11, with the subject "11SP059149."

information we have marked pursuant to section 552.101 of the Government Code in conjunction with common-law privacy. However, we find that none of the remaining information at issue you have marked is highly intimate or embarrassing and not of legitimate public concern. Therefore, the city may not withhold the remaining information at issue you have marked under section 552.101 on this basis.

To summarize, the city must continue to rely on Open Records Letter No. 2012-09223 as a previous determination and withhold or release the requested information in accordance with Open Records Letter No. 2012-09223. However, the information we have marked must be withheld under section 552.101 in conjunction with common law privacy.

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,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/som

Ref: ID# 472228

Enc. Submitted documents

c: Requestor
(w/o enclosures)