



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 28, 2013

Mr. John Ohnemiller
First Assistant City Attorney
City of Midland
P.O. Box 1152
Midland, Texas 79702

OR2013-03437

Dear Mr. Ohnemiller:

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# 479937.

The City of Midland (the "city") received three requests from different requestors for (1) e-mails regarding the 2012 Show of Support, Hunt for Heroes parade; (2) several categories of information related to certain parade permits, certain written and electronic communications, a specified accident report, the establishment of a specified quiet zone, and the National Transportation Safety Board ("NTSB"); and (3) information related to discussions about issuing permits for the city's annual veterans' parade, including permits requested by Show of Support, Hunt for Heroes during a specified time period.¹ You state the city has released some information to the requestors. You claim the submitted information is excepted from disclosure under sections 552.101, 552.108, 552.111, 552.117, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note the request whose clarification was received on December 4, 2012 excludes e-mail addresses of members of the public from the scope of the request. Accordingly, such

¹You state the city sought and received clarification of the information requested. See Gov't Code § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request).

e-mail addresses are not responsive to that request for information. Further, we note some of the submitted information, which we have marked, is not responsive to the instant requests for information because it was created after the date the city received the clarified requests. This ruling does not address the public availability of non-responsive information, and the city is not required to release such information in response to the requests.

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(a)(1) must reasonably explain how and why this exception is applicable to the information at issue. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state the information in Exhibit C relates to a pending criminal investigation by the city’s police department and release of the information will interfere with the investigation. *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, we find the city may withhold the information in Exhibit C under section 552.108(a)(1) of the Government Code.²

Section 552.111 of the Government Code excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” Gov’t Code § 552.111. Section 552.111 encompasses information protected by civil discovery privileges. *See Open Records Decision Nos. 647 at 3 (1996), 251 at 2-4 (1980)*. You claim the information in Exhibit E is excepted from disclosure under section 552.111 because it would be privileged from discovery under section 409 of title 23 of the United States Code. Section 409 provides:

Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 148 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

²As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

23 U.S.C. § 409. Federal courts have stated section 409 excludes from evidence data compiled for purposes of highway and railroad crossing safety enhancement and construction for which a state receives federal funding, in order to facilitate candor in administrative evaluations of highway safety hazards and to prevent federally required record-keeping from being used for purposes of private litigation. *See Harrison v. Burlington N. R.R.*, 965 F.2d 155, 160 (7th Cir. 1992); *Robertson v. Union Pac. R.R.*, 954 F.2d 1433, 1435 (8th Cir. 1992); *see also Pierce County v. Guillen*, 123 S.Ct. 720 (2003) (upholding constitutionality of 23 U.S.C. § 409, relied on by county in denying request under state's Public Disclosure Act).

You state the responsive information in Exhibit E consists of e-mails from the NTSB. We understand you to assert the information at issue was collected and compiled by the city for the purpose of evaluating the safety of a railway-highway crossing. We note state railway-highway crossing are eligible for federal aid under section 103 of title 23 of the United States Code and are therefore federal-aid highways for the purposes of section 409 of title 23. You contend the responsive information in Exhibit E would be privileged from discovery in civil litigation under section 409, and is, therefore, excepted from disclosure under section 552.111 of the Government Code. Based on your representations and our review, we conclude the city may withhold the responsive information in Exhibit E under section 552.111 of the Government Code.³

Section 552.101 of the Government Code exempts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section 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 establish the applicability of common-law privacy, both prongs of this test must be demonstrated. *Id.* at 681-82. You generally assert Exhibits D and G contain information protected by common-law privacy. You state the information in Exhibit F is protected by common-law privacy because it was marked as privileged. However, information is not confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. *See Indus. Found.*, 540 S.W.2d at 677. In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. *See Attorney General Opinion JM-672* (1987); *Open Records Decision Nos. 541 at 3* (1990) ("[T]he obligations of a governmental body under [the predecessor to the Act] cannot be 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 information falls within an exception to disclosure, it must be released, notwithstanding any expectations or agreement specifying otherwise. Upon review, we find you have failed to provide any arguments explaining how

³As our ruling is dispositive, we need not address your remaining argument against disclosure.

the information at issue constitutes highly intimate or embarrassing information that is not of legitimate concern to the public. Consequently, the city may not withhold this information under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, social security number, emergency contact information, and family member information of a current or former employee of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(1). Section 552.117 is also applicable to cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (statutory predecessor to section 552.117 of the Government Code not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *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. Therefore, if the individuals whose cellular telephone numbers we have marked in Exhibits B, D, and F timely requested confidentiality under section 552.024 and the cellular telephone service is not paid for by a governmental body, the city must withhold the marked information under section 552.117(a)(1) of the Government Code. If the individuals whose information is at issue did not make timely elections under section 552.024 or the cellular telephone service is paid for by a governmental body, the city may not withhold the information at issue under section 552.117(a)(1) of the Government Code.

Section 552.117(a)(2) of the Government Code excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security number, and family member information of a peace officer, regardless of whether the peace officer made an election under sections 552.024 or 552.1175 of the Government Code to keep such information confidential. Gov't Code § 552.117(a); *see also id.* § 552.024. Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. Upon review, we find the city must withhold the information we have marked in Exhibit G under section 552.117(a)(2) of the Government Code. However, we find none of the remaining information you seek to withhold under section 552.117(a)(2) consists of a peace officer's home address, home telephone number, emergency contact information, social security number, or family member information. Thus, the city may not withhold any of the remaining information under section 552.117(a)(2).

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). *Id.* § 552.137(a)-(c). The e-mail

addresses we have marked are not a type specifically excluded by section 552.137(c). Accordingly, the city must withhold the e-mail addresses we have marked in Exhibits B, D, F, and G under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their release under section 552.137(b).⁴

In summary, the city may withhold the information in Exhibit C under section 552.108(a)(1) of the Government Code and the information in Exhibit E under section 552.111 of the Government Code. If the individuals whose cellular telephone numbers we have marked in Exhibits B, D, and F timely requested confidentiality under section 552.024 of the Government Code and the cellular telephone service is not paid for by a governmental body, the city must withhold the marked information under section 552.117(a)(1) of the Government Code. The city must withhold the information we have marked in Exhibit G under section 552.117(a)(2) of the Government Code. The city must withhold the e-mail addresses we have marked in Exhibits B, D, F, and G under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their release under section 552.137(b) of the Government Code. The city must release the remaining responsive information in Exhibits B, D, F, and G.

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,



Jennifer Burnett
Assistant Attorney General
Open Records Division

JB/tch

⁴Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

Ref: ID# 479937

Enc. Submitted documents

c: Three Requestors
(w/o enclosures)