



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 9, 2013

Mr. Norman Ray Giles
Chamberlain, Hrdlicka, White, Williams, & Aughtry
1200 Smith Street, Suite 1400
Houston, Texas 77002

OR2013-11591

Dear Mr. Giles:

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# 492536.

The City of Santa Fe (the "city"), which you represent, received a request complaints against and information pertaining to the termination of the named individual. You claim 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 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. This section encompasses information other statutes make confidential, such as section 1701.454 of the Occupations Code, which governs the public availability of information submitted to the Texas Commission on Law Enforcement Officer Standards and Education ("TCLEOSE") under subchapter J of chapter 1701 of the Occupations Code. Section 1701.454 provides as follows:

- (a) All information submitted to the [TCLEOSE] under this subchapter is confidential and is not subject to disclosure under Chapter 552, Government Code, unless the person resigned or was terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses.
- (b) Except as provided by this subchapter, a [TCLEOSE] member or other person may not release information submitted under this subchapter.

Occ. Code § 1701.454. You contend Exhibit B, which consists of an F-5 ("Report of Resignation of Separation of License Holder") report pertaining to the named individual, is

confidential under section 1701.454 of the Occupations Code. You indicate this information was submitted to TCLEOSE pursuant to subchapter J of chapter 1701 of the Occupations Code. However, in this instance, it is unclear whether the named individual resigned due to a substantiated incident of excessive force or violations of the law other than traffic offenses. Thus, if the named individual did not resign due to a substantiated incident of excessive force or violations of the law other than traffic offenses, then the city must withhold Exhibit B under section 552.101 in conjunction with section 1701.454 of the Occupations Code. However, if the named individual did resign due to a substantiated incident of excessive force or violations of the law other than traffic offenses, the city may not withhold Exhibit B under section 552.101 on this basis.

Section 552.101 of the Government Code also encompasses article 20.02 of the Code of Criminal Procedure, which provides, “[t]he proceedings of the grand jury shall be secret.” Crim. Proc. Code art. 20.02(a). In construing article 20.02 of the Code of Criminal Procedure, the types of “proceedings” Texas courts have generally stated are secret are testimony presented to the grand jury and the deliberations of the grand jury. *See In re Reed*, 227 S.W.3d 273, 276 (Tex. App.—San Antonio 2007, orig. proceeding). Upon review, we find you have not explained how any of the information in Exhibit D reveals grand jury testimony or deliberations of the grand jury. Therefore, we conclude the city may not withhold any of the information in Exhibit D under section 552.101 in conjunction with article 20.02(a) of the Code of Criminal Procedure. *Cf.* Open Records Decision No. 513 at 4 (1988) (fact that information collected or prepared by another person or entity is submitted to grand jury does not necessarily mean that such information is confidential in possession of district attorney).

Section 552.101 of the Government Code also encompasses the common-law informer’s privilege, which Texas courts have long recognized. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969). The informer’s privilege protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided the subject of the information does not already know the informer’s identity. *See* Open Records Decision No. 208 at 1-2 (1978). The informer’s privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to “administrative officials having a duty of inspection or of law enforcement within their particular spheres.” Open Records Decision No. 279 at 1-2 (1981) (citing 8 John H. Wigmore, *Evidence in Trials at Common Law*, § 2374, at 767 (J. McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. *See* Open Records Decision Nos. 582 at 2 (1990), 515 at 4 (1988). However, individuals who provide information in the course of an investigation but do not make the initial report of the violation are not informers for the purposes of claiming the informer’s privilege. The privilege excepts the informer’s statement only to the extent necessary to protect that informer’s identity. Open Records Decision No. 549 at 5 (1990).

You contend the information in Exhibit C identifies a person who reported an alleged violation of law to the city’s police department (the “department”). However, upon review,

we find the information at issue does not contain any identifying information of an informer for the purposes of the informer's privilege. Accordingly, the city may not withhold any portion of Exhibit C under section 552.101 on that basis.

Section 552.101 of the Government Code also encompasses the common-law right to privacy, which protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information 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. The type of information considered intimate and 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 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. 455 (1987) (information pertaining to prescription drugs, specific illnesses, operations and procedures, and physical disabilities protected from disclosure), 422 (1984), 343 (1982). 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) (when considering prong regarding individual's privacy interest, court recognized distinction between public records found in courthouse files and local police stations and compiled summary of information and noted that individual has significant privacy interest in compilation of one's criminal history). Furthermore, we find a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. Upon review, we find the information we have marked is highly intimate or embarrassing and not of legitimate public concern. Accordingly, the city must withhold the information we have marked under section 552.101 in conjunction with common-law privacy.¹

Section 552.102 of the Government Code excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). The Texas Supreme Court held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). Upon review, we find the city must withhold the date of birth we have marked under section 552.102(a) of the Government Code.

Section 552.117(a)(2) of the Government Code excepts from public disclosure the home addresses, home telephone numbers, emergency contact information, social security number, and family member information of a peace officer, as defined by article 2.12 of the

¹As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

Code of Criminal Procedure, regardless of whether the peace officer complies with section 552.024 of the Government Code or section 552.1175 of the Government Code.² Gov't Code § 552.117(a)(2). Section 552.117 also applies to a personal cellular telephone number, provided the cellular telephone service is not paid for by a governmental body. *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). We have marked the personal information of an individual who was employed as a police officer with the department. It is unclear whether this individual is a currently licensed peace officer as defined by article 2.12. Accordingly, if the individual whose information we have marked is currently a licensed peace officer, then the city must withhold the information we have marked under section 552.117(a)(2) of the Government Code; however, the city may only withhold the marked cellular telephone number if the cellular telephone service is not paid for by a governmental body.

In the event the individual whose information we have marked is no longer a licensed peace officer, then the information we have marked may be subject to section 552.117(a)(1) of the Government Code. Section 552.117(a)(1) 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 that this information be kept confidential under section 552.024 of the Government Code. 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* ORD 506 at 5-6. Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, a governmental body must withhold information under section 552.117(a)(1) on behalf of current or former officials or employees only if these individuals made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. To the extent the individual whose information we have marked timely elected to keep such information confidential under section 552.024, the city must withhold the marked information under section 552.117(a)(1) of the Government Code; however, the city may only withhold the marked cellular telephone number if the cellular telephone service is not paid for by a governmental body. If the individual did not make a timely election under section 552.024, the city may not withhold the marked information under section 552.117(a)(1) of the Government Code.³

Section 552.1175 of the Government Code protects the home address, home telephone number, emergency contact information, date of birth, social security number, and family

²The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

³Regardless of the applicability of section 552.117 of the Government Code, we note section 552.147(b) of the Government Code permits a governmental body to redact a living person's social security number without the necessity of requesting a decision from this office. *See* Gov't Code § 552.147(b).

member information of certain individuals, when that information is held by a governmental body in a non-employment capacity and the individual elects to keep the information confidential. *See* Act of May 26, 2013, 83rd Leg., R.S., H.B. 1632, § 3 (to be codified as an amendment to Gov't Code § 552.1175). Section 552.1175 applies, in part, to "peace officers as defined by Article 2.12, Code of Criminal Procedure." Gov't Code § 552.1175(a)(1). Section 552.1175 is also applicable to cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* ORD 506 at 5-6. We have marked information pertaining to the named individual not held in an employment capacity that may be subject to section 552.1175. It is unclear whether this individual is a currently licensed peace officer as defined by article 2.12. Accordingly, if the individual whose information we have marked is currently a licensed peace officer and elects to restrict access to the information pertaining to her in accordance with section 552.1175(b), the city must withhold the marked information under section 552.1175 of the Government Code; however, the city may only withhold the marked cellular telephone number if the cellular telephone service is not paid for by a governmental body. If the individual is not currently licensed or did not elect to restrict access to the information pertaining to her in accordance with section 552.1175(b), the city may not withhold the information at issue under section 552.1175.

Section 552.130 of the Government Code provides information relating to a motor vehicle operator's license or driver's license issued by an agency of this state or another state or country is excepted from public release. *See* Gov't Code. § 552.130(a)(1). Upon review, we find the city must withhold the information we have marked under section 552.130 of the Government Code.

Section 552.136(b) of the Government Code states "[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." *Id.* § 552.136(b); *see also id.* § 552.136(a) ("defining access device"). The city must withhold the cellular telephone account number we have marked under section 552.136 of the Government Code.

In summary, if the named individual did not resign due to a substantiated incident of excessive force or violations of the law other than traffic offenses, then the city must withhold Exhibit B under section 552.101 in conjunction with section 1701.454 of the Occupations Code. The city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy and section 552.102(a) of the Government Code. If the individual whose information we have marked is a currently licensed peace officer, the city must withhold the marked information under section 552.117(a)(2) of the Government Code; however, the city may only withhold the marked cellular telephone number if the cellular telephone service is not paid for by a governmental body. If the individual at issue is no longer a licensed peace officer, then the marked information must be withheld under section 552.117(a)(1) of the Government Code, if this individual timely elected to keep such information confidential under section 552.024 of the Government Code; however, the city may only withhold the marked cellular telephone number if the cellular telephone service is not paid for by a governmental body. If the

individual whose information we have marked is currently a licensed peace officer and elects to restrict access to the information pertaining to her in accordance with section 552.1175(b) of the Government Code, the city must withhold the information we have marked under section 552.1175 of the Government Code; however, the city may only withhold the marked cellular telephone number if the cellular telephone service is not paid for by a governmental body. The city must withhold the information we have marked under section 552.130 and section 552.136 of the Government Code. The remaining information must be released.⁴

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Kathleen J. Santos
Assistant Attorney General
Open Records Division

KJS/som

Ref: ID# 492536

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁴We note, effective May 18, 2013, the Texas legislature amended section 552.130 of the Government Code to allow a governmental body to redact the information described in subsection 552.130(a) without the necessity of seeking a decision from the attorney general. Act of May 6, 2013, 83rd Leg., R.S., S.B. 458, § 1 (to be codified as an amendment to Gov't Code § 552.130(c)). Thus, a governmental body may begin redacting information subject to subsection 552.130(a) with respect to requests for information received by the department on or after May 18, 2013. However, if a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). See Gov't Code § 552.130(d), (e).