



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 2, 2014

Mr. Mark G. Mann
Assistant City Attorney
City of Garland
P.O. Box 469002
Garland, Texas 75046-9002

OR2014-21780

Dear Mr. Mann:

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# 545105 (City ID Nos. GCA14-0703 GCA14-0798).

The Garland Police Department (the "department") received two requests from different requestors for a specified incident report. You claim portions of the submitted information are excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we must address the department's obligations under the Act. Section 552.301 of the Government Code describes the procedural obligations placed on a governmental body that receives a written request for information it wishes to withhold. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. *See* Gov't Code § 552.301(b). Additionally, under section 552.301(e), a governmental body receiving an open records request for information that it wishes to withhold pursuant to one of the exceptions to public disclosure is required to submit to this office within fifteen business days of receiving the request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written

request, and (4) 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, the department received the first request for information on August 28, 2014. You inform us the department was closed on September 1, 2014, in observance of Labor Day. This office does not count the date the request was received or holidays for the purpose of calculating a governmental body's deadlines under the Act. Accordingly, the department's ten-business-day deadline under section 552.301(b) was September 12, 2014, and the department's fifteen-business-day deadline under section 552.301(e) was September 19, 2014. However, this office did not receive the department's first request for a ruling until September 25, 2014. In addition, the envelope containing the department's request for a ruling was meter-marked twice, once on September 12, 2014, and again on September 23, 2014. *See id.* § 552.308(a) (deadline under the Act is met if document is sent by first class United States mail with postage prepaid and bears post office mark indicating time within the deadline period). Because of this conflicting information, we are unable to determine whether the department requested a ruling from this office within ten business days of receiving the request for information or if the department submitted the information required by section 552.301(e) to this office within fifteen business days of receiving the request for information. Accordingly, we find the department failed to comply with section 552.301 of the Government Code in regards to the first request. You inform us the department received the second request on October 2, 2014. We note the information the department submitted in response to the second request includes information that was created after the first request was received. Accordingly, for this additional information, the department's ten-business-day deadline was October 16, 2014. However, this office did not receive the department's second request for a ruling until October 20, 2014. In addition, the envelope containing the department's request for a ruling was meter-marked twice, once on October 9, 2014, and again on October 17, 2014. Because of this conflicting information, we also find the department failed to comply with section 552.301 of the Government Code in regard to the additional information submitted in response to the second request.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *Id.* § 552.302; *see also 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 (Tex. App.—Austin 1990, no writ). This statutory presumption can generally be overcome when information is confidential by law or third-party interests are at stake. *See Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982).* Although you raise section 552.108 of the Government Code, this section is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See Gov't Code § 552.007; Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions in general), 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions), 177 at 3 (1997) (statutory predecessor to section 552.108 subject to*

waiver). Thus, in failing to comply with section 552.301, the department has waived its argument under section 552.108, and may not withhold any of the information on this basis. However, section 552.101 of the Government Code can provide a compelling reason to overcome the presumption of openness. Furthermore, some of the submitted information is subject to section 552.130 of the Government Code, which also provides a compelling reason to overcome the presumption of openness.¹ Accordingly, we will consider the applicability of sections 552.101 and 552.130 to the submitted information.

Section 552.101 of the Government Code excepts “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) 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 demonstrated. *See id.* at 681-82.

In Open Records Decision No. 393 (1983), this office concluded, generally, only information that either identifies or tends to identify a victim of sexual assault or other sex-related offense may be withheld under common-law privacy; however, because the identifying information was inextricably intertwined with other releasable information, the governmental body was required to withhold the entire report. ORD 393 at 2; *see* Open Records Decision No. 339 (1982); *see also Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied) (identity of witnesses to and victims of sexual harassment was highly intimate or embarrassing information and public did not have a legitimate interest in such information); Open Records Decision No. 440 (1986) (detailed descriptions of serious sexual offenses must be withheld). The second requestor in this case knows the identity of the alleged victim. We believe in this instance, withholding only identifying information from the second requestor would not preserve the victim’s common-law right to privacy. Therefore, we conclude the department must withhold the submitted information in its entirety from the second requestor under section 552.101 of the Government Code in conjunction with common-law privacy. However, we note the first requestor is the individual whose privacy interests are at issue, and this requestor has a right of access to her own private information pursuant to 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 to information held by governmental body that relates to person and that is protected from public disclosure by laws intended to protect person’s privacy interests); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning herself). Accordingly, the department may not withhold any of the submitted information from the first requestor under section 552.101 of the Government Code in conjunction with common-law privacy.

¹The 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 552.130 of the Government Code provides information relating to a motor vehicle operator's license, driver's license, motor vehicle title or registration, or a personal identification document issued by an agency of this state or another state or country is excepted from public release. Gov't Code § 552.130(a). Upon review, we find the department must withhold from the first requestor the information we have marked under section 552.130 of the Government Code.

In summary, the department must withhold the submitted information in its entirety from the second requestor under section 552.101 of the Government Code in conjunction with common-law privacy. In releasing the submitted information to the first requestor, the department must withhold the information we have marked under section 552.130 of the Government Code.

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,



Brian E. Berger
Assistant Attorney General
Open Records Division

BB/bhf

Ref: ID# 545105

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)