



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 29, 1994

Mr. John R. Stevens
Mease & Rorick
4008 Vista, Suite 200
Pasadena, Texas 77504

OR94-836

Dear Mr. Stevens:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, Government Code chapter 552. We assigned your request ID# 28230.

The City of Shoreacres (the "city"), which you represent, has received a request for information relating to an incident that occurred May 9, 1994, at city hall. Specifically, the requestor seeks "copies of the statements of the Police Chief and three policeman; plus the Court Clerk and City Secretary; concerning the incident of May 9, 1994 [*sic*]." You have submitted the requested information to us for review and claim that sections 552.108, 552.109, and 552.111 of the Government Code except the requested information from required public disclosure.

Section 552.108 provides that:

(a) A record of a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure].

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [required public disclosure].

Gov't Code § 552.108. When applying section 552.108, this office distinguishes between cases that are still under active investigation and those that are closed. Open Records Decision No. 611 (1992) at 2. In cases that are still under active investigation, section 552.108 excepts from disclosure all information except that generally found on the first

page of the offense report. *See generally* Open Records Decision No. 127 (1976). Otherwise, when the "law enforcement" exception is claimed, the agency claiming it must reasonably explain, if the information does not supply the explanation on its face, how release would unduly interfere with law enforcement. Open Records Decision No. 434 (1986) (citing *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977)). Whether information falls within the section 552.108 exception must be determined on a case-by-case basis. Open Records Decision Nos. 434, at 2; 287 (1981) at 1-2.

You do not indicate that the requested information relates to an on-going investigation or prosecution. In addition, you have not reasonably explained, nor does the information supply an explanation on its face, how release of the requested information would unduly interfere with law enforcement. Accordingly, we conclude that the city may not withhold the requested information under section 552.108 of the Government Code.

You also claim that section 552.109 of the Government Code excepts the requested information from required public disclosure. Section 552.109 excepts from required public disclosure:

[P]rivate correspondence or communications of an elected office holder relating to matters the disclosure of which would constitute an invasion of privacy

This section protects the same privacy interests as section 552.101 of the Government Code, which excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Decisions of this office under section 552.109 rely on the same tests applicable under section 552.101 for common-law and constitutional privacy. *See, e.g.*, Open Records Decision Nos. 506 (1988) at 3; 241 (1980); 212 (1978). Section 552.109 protects the privacy interests only of elected office holders. Open Records Decision No. 473 (1987). It does not protect the privacy interests of their correspondents. Open Records Decision No. 332 (1982).

Information may be withheld under common-law privacy if it meets the criteria the Texas Supreme Court articulated for section 552.101 in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Under *Industrial Foundation*, a governmental body must withhold information on common-law privacy grounds only if the information is highly intimate or embarrassing *and* it is of no legitimate concern to the public. The right to privacy guaranteed under the United States Constitution protects two related interests: (1) the individual's interest in independence in making certain kinds of important decisions, and (2) the individual's interest in avoiding disclosure of personal matters. *See* Open Records Decision No. 478 (1987) at 4. The first interest applies to the traditional "zones of privacy," *i.e.*, marriage, procreation, contraception, family relationships, and child rearing and education. *See* Open Records Decision No. 447 (1986) at 4. The second protects information by employing a balancing test that weighs the privacy interest against the

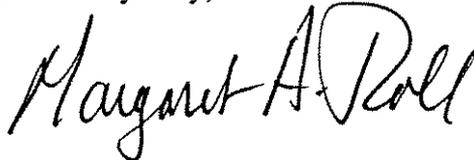
public interest. Open Records Decision No. 478, at 4. It protects against “invasions of privacy involving the most intimate aspects of human affairs.” Open Records Decision No. 455 (1987) at 5 (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490, 492 (5th Cir. 1985)).

We have examined the information submitted to us for review. Some of the submitted records are not excepted by section 552.109 because they do not constitute the communication or correspondence of an elected officeholder. In addition, we conclude that the remaining information does not include information that is intimate or embarrassing. Finally, we conclude that the submitted information does not contain any information that falls within any of the “zones of privacy” recognized under constitutional privacy doctrine, nor do we believe that release of the submitted information would cause “invasions of privacy involving the most intimate aspects of human affairs.” Accordingly, we conclude that the city may not withhold the requested information under section 552.109 of the Government Code.

Finally, we address your contention that section 552.111 of the Government Code excepts the requested information from required public disclosure. We note that you did not assert section 552.111 within the ten days permitted under section 552.301 of the Government Code. A governmental body may not raise additional exceptions after the ten-day deadline absent a showing of compelling interest. Open Records Decision No. 515 (1988). We conclude that you have not made a showing of compelling interest in this instance and therefore may not withhold the requested information under section 552.111 of the Government Code. The city must make the requested information available to the requestor in its entirety.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink that reads "Margaret A. Roll". The signature is written in a cursive, flowing style.

Margaret A. Roll
Assistant Attorney General
Open Government Section

MAR/GCK/rho

Ref.: ID# 28230

Enclosures: Submitted documents

cc: Mr. Dick Herb
201 South Brook
Shoreacres, Texas 77571
(w/o enclosures)