



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

January 30, 1995

Ms. Mary Mishtal  
Davidson & Troilo  
613 N.W. Loop 410, Suite 1000  
San Antonio, Texas 78216-5584

OR95-012

Dear Ms. Mishtal:

On behalf of the City of Pearsall (the "city"), you ask whether certain information is subject to required public disclosure under the Texas Open Records Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 27083. We have received and reviewed your submission of records that you claim to be excepted from required disclosure.

The open records request at issue is for copies of "the employment application[s] of [certain] individuals who work at the Police Department in Pearsall, Frio County, Texas," and "any information concerning any employment applications, promotions, awards, training, reprimands, complaints, disciplinary actions, qualifications, educational background and other information relating to these individuals." Your June 17, 1994, request for an attorney general decision reads in part as follows:

We believe specific exemptions in the Open Records Act may apply to exempt all or certain portions of the requested documents. Certainly, [the] request for "other information relating to these individuals" would fall within numerous specific exemptions of the Open Records Act.

Your request letter lacks any suggestion of which exceptions you intended to assert.

Sections 552.301 and 552.302 of the Government Code require a governmental body to request a decision from the attorney general within ten days of receiving a request for information the governmental body wishes to withhold. Section 552.301 requires that the governmental body specify in its request letter which exception or exceptions it asserts as applicable to information it wishes to withhold. Your request

letter, although apparently timely sent, did not comply with that section because the mere references to "specific exemptions" contained therein do not specify any exceptions under the Open Records Act.

When a governmental body fails to request a decision within ten days of receiving a request for information, the information at issue is presumed public. Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ); *City of Houston v. Houston Chronicle Publishing Co.*, 673 S.W.2d 316, 323 (Tex. App.--Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). The governmental body then must show a compelling interest to withhold the information to overcome this presumption. See Open Records Decision No. 319. A governmental body bears the same burden when it asserts a new exception after the ten-day deadline. Open Records Decision No. 515 (1988) at 6. Therefore, your noncomplying request letter was ineffective to avoid the presumption that the requested information is "public," that is, subject to required public disclosure.

Two months after your request letter, however, you did supplement your request with a letter brief containing assertions of specific exceptions under the act. We will deal with your arguments in the order in which you presented them in your letter brief.

You first note in your subsequent letter that part of the open records request is for "other information relating to these individuals," and state that "[t]he Open Records Act does not require governmental bodies to conduct extensive reviews and compilations or provide answers to general inquiries." It appears that the city has ignored this part of the request for information as being overbroad. Such a response--or nonresponse--is not permitted under the act.

Numerous opinions of this office have addressed situations in which a governmental body has received either an "overbroad" written request for information or a written request for information that the governmental body is unable to identify. In Open Records Decision No. 561 (1990), this office summarized the policy of this office with respect to requests for unidentifiable information and "overbroad" requests:

We have stated that a governmental body must make a good faith effort to relate a request to information held by it. Open Records Decision No. 87 (1975). It is nevertheless proper for a governmental body to require a requestor to identify the records sought. Open Records Decision Nos. 304 (1982); 23 (1974). For example, where governmental bodies have been presented with broad requests for information rather than specific records we have stated that the governmental body may advise the requestor of the types of information available so that he may properly narrow his request. Open Records Decision No. 31 (1974).

Open Records Decision No. 561, at 8-9.

In response to the request at issue here, then, the city must make a good-faith effort to relate the request to information in its possession and must help the requestor to clarify his request by advising him of the types of information available. Beyond these requirements, however, the city need not generate new information to comply with the request. The act does not require a governmental body to perform general research. *See, e.g.,* Open Records Decision Nos. 563 (1990) at 8; 555 (1990) at 1; 379 (1983) at 4; 347 (1982) at 1.

You submitted as Document No. 1 a representative sample of the requested police officers' training certificates. You agree that this information is subject to required public disclosure, so we need not address it further.

Document No. 2 is a representative sample of written tests given two of the subject police officers to assess their knowledge of traffic radar. We understand you to claim that these tests are excepted from required disclosure by the "law enforcement" exception, section 552.108 of the Government Code. (You cited section 552.118, the exception for information on or derived from a triplicate prescription form, which clearly is not applicable.) You claim that release of these test records, which "indicate[] how radar equipment should be used and should be employed," would interfere with law enforcement because such release would make "crime prevention techniques readily available to the public at large" and "would tend to interfere with a police officer's attempts to catch individuals speeding on the highways and would constitute a safety risk to the public." Your argument does not support invocation of the law enforcement exception in that it does not show what information, if any, in these records is not already available to the public or how public knowledge of the workings of traffic radar could be exploited to interfere with law enforcement efforts. In any event, you have not shown compelling reasons why this information should not be released. Therefore, Document No. 2 must be released.

Document No. 3 is a certain police officer's high school academic record. You claim this record is excepted by code section 552.114, which excepts "information in a student record *at an educational institution* funded wholly or partly by state revenue" (*emphasis added*). The City of Pearsall, which has possession of Document No. 3, is not an educational institution; so the record is not a "record at an educational institution." *See* Open Records Decision No. 390 (1983). (Nor is the City of Pearsall an "educational agency" within the meaning of the Family Educational and Privacy Rights Act of 1974, 20 U.S.C. § 1232g. *See* Open Records Decision No. 390, at 2-3.) Therefore, Document No. 3 is not excepted by section 552.114 and must be released.

Documents Nos. 4 through 6 are intra-agency memoranda or correspondence of the Pearsall Police Department. You claim that each of these documents is excepted by section 552.108(b), which excepts "[a]n internal record or notation of a law enforcement agency . . . that is maintained for internal use in matters relating to law enforcement or prosecution." You have not overcome the presumption of section 552.302 by showing compelling reasons why this information should not be released. Therefore, Documents Nos. 4 through 6 must be released.

Documents Nos. 7 and 8 are two police officers' resumes. You contend that the officers' addresses and telephone numbers reflected on the resumes are excepted from disclosure by Government Code section 552.117. This provision excepts

(1) the home address or home telephone number of:

....

(B) a peace officer as defined by Article 2.12, Code of Criminal Procedure . . . .

The purpose of this provision is to protect peace officers from harassment by telephone or mail while they are at home. *See* Open Records Decision No. 532 (1989) at 3. Therefore, the subject police officers have an interest in keeping this information closed to the public. We believe that the interest of these third parties is compelling and overcomes the presumption arising under the ten-day rule of section 552.302. *See, e.g.*, Open Records Decision No. 150 (1977) (presumption can be overcome by compelling demonstration, including that exception is designed to protect interest of third party). You therefore must release Documents Nos. 7 and 8 with the addresses and telephone numbers redacted.

Documents Nos. 9 through 12 are personal history statements of the subject police officers. Except insofar as we determine below that portions of Documents Nos. 9 through 12 are excepted from disclosure, you must release these documents.

Documents Nos. 9 and 10 contain the current and former home addresses of peace officers, and Document No. 10 also contains the telephone number of a peace officer. You contend that this information is excepted by section 552.117(1)(B). For the reasons stated above in regard to Documents Nos. 7 and 8, we agree that this information is excepted by that section and must be redacted. *Cf.* Open Records Decision No. 622 (1994) at 6 (section 552.117(1)(A) protects public employees' former, as well as current, addresses and telephone numbers).

You contend that information in Documents Nos. 9 and 10 concerning the height, weight, eye and hair color, and distinguishing marks of the subject police officers is excepted from disclosure by code sections 552.101 and 552.102(a). Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.102(a) excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The facts before us do not show that this information concerning the height, weight, eye and hair color, and distinguishing marks of the subject police officers is protected by common-law or constitutional privacy. *See* Open Records Decision No. 455 (1987).

You also contend that this information is excepted by section 552.108 because release of this identifying information would interfere with law enforcement by making these officers "subject to harassment and retaliation if their identities out of uniform were ascertainable." We do not see how information about height, weight, eye and hair color,

or other publicly visible distinguishing marks can compromise any law enforcement interest. You have not shown that release of any of this information would unduly interfere with law enforcement. In any event, you also have shown no compelling reasons to overcome the presumption in favor of required public disclosure arising under the ten-day rule of section 552.302. Therefore, you must release this information.

You point out that items 9 through 12 of Documents Nos. 9 and 10 contain information about certain officers' families and contend that this information is excepted by section 552.108 because, "[i]f disclosed, this information could put the safety of [their] . . . family members in jeopardy and thus could inhibit or interfere with their duties as police officers." This explanation is generalized and does not show how an undue interference with law enforcement would likely occur. *See, e.g.*, Open Records Decision No. 444 (1986) at 4-5 ("where it is not readily apparent that the release of investigative information would unduly interfere with law enforcement or prosecution, the governmental body must show how this would likely occur"). In any event, you have not shown compelling reasons to overcome the presumption in favor of required public disclosure arising under the ten-day rule of section 552.302.

You also claim, however, that this information is excepted by sections 552.101 and 552.102(a) because release of this information would constitute an invasion of the private affairs of the officers' and their families. For information to be protected from public disclosure under the common-law right of privacy as section 552.101 incorporates it, the information must meet the criteria set out in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The *Industrial Foundation* court stated that

information . . . is excepted from mandatory disclosure under Section 3(a)(1) [(now section 552.101)] as information deemed confidential by law 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.

540 S.W.2d at 685; Open Records Decision No. 142 (1976) at 4 (construing former V.T.C.S. art. 6252-17a, § 3(a)(1)). This test is applicable also to the privacy right recognized in section 552.102(a). *E.g.*, Open Records Decision No. 400 (1983) at 5. In *Industrial Foundation*, the Texas Supreme Court considered to be intimate and embarrassing information such as that 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. *Industrial Found.*, 540 S.W.2d at 683.

None of the information contained in items 9 through 12 of Documents Nos. 9 and 10 is "highly intimate or embarrassing," *id.* at 685. Therefore, release of this information would not constitute an invasion of privacy under the *Industrial Foundation* test. You must release this information.

You assert that the two telephone numbers at the bottom of the first page of Document No. 9 are excepted by common-law privacy under section 552.101 and 552.102(a). This information is not "highly intimate or embarrassing," *id.* Therefore, release of this information would not constitute an invasion of privacy under the *Industrial Foundation* test. You must release this information.

Question No. 19 of Documents Nos. 9 and 10 inquires about the officer's arrest history. You contend that information responsive to that question would be excepted from required public disclosure because prior arrests would be highly embarrassing facts made confidential by law pursuant to sections 552.101 and 552.102(a). None of the information passes both prongs of the *Industrial Foundation* test. *See id.*; compare *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989) (criminal history of private citizen protected by privacy) with *Plante v. Gonzalez*, 575 F.2d 1119, 1135 (5th Cir.), *cert. denied*, 439 U.S. 1129 (1979) (privacy right of public employee not as broad as those of private citizen). Therefore you must release the information.

In Document No. 11, the response to Question No. 2 reflects a peace officer's present address. For the reasons stated above in regard to Documents Nos. 7 and 8, we agree with you that this information is excepted by section 552.117(1)(B) and must be redacted.

Question No. 10 of Document No. 11 asks whether the subject police officer has ever been arrested. You contend that the response to this question involves a "highly embarrassing incident" that is protected by the officer's common-law right of privacy and is therefore excepted from required disclosure under section 552.101 and 552.102(a). The public has a legitimate interest in this information, so the *Industrial Foundation* test is not satisfied. *Industrial Found.*, 540 S.W.2d at 685. Therefore, you must release this information.

Document No. 12 contains the subject officer's home telephone number and home address. We agree with you that this information is confidential under Government Code section 552.117(1)(B) and must be redacted.

Documents Nos. 13 through 15 are written complaints against certain police officers. These documents contain information about certain citizens being in a state of alcohol intoxication or having open beer containers in a moving automobile or not restraining a small child in a car safety seat system, all of which information you contend is confidential under sections 552.101 and 552.102(a) because it is "highly embarrassing" and is therefore protected by common-law privacy. We disagree. The facts before us do not satisfy the two-prong test of *Industrial Foundation* as to any of this information. Therefore, you must release these documents without redactions.

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,



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Open Government Section

JBP/MAR/rho

Ref.: ID# 27083

Enclosures: Submitted documents

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