



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 25, 2005

Ms. Luz E. Sandoval Walker
Assistant City Attorney
City of El Paso
2 Civic Center Plaza- 9th Floor
El Paso, Texas 79901

OR2005-00704

Dear Ms. Walker:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 216514.

The El Paso Police Department (the “department”) received a request for information related to the El Paso bar and nightclub “sweep” conducted by both the police department and fire department in September 2004, as well as the El Paso Police Department Policy and Procedure Manual (the “manual”). The department received a second request from the same requestor additionally requesting the documents that reflect the copy costs to the department for production of the manual. You state that you have provided the requestor with a portion of the requested information. You claim, however, that the remaining requested information is excepted from disclosure under sections 552.101, 552.108, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov’t Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, we address your assertion that the requestor’s response of October 14, 2004 can be considered a withdrawal of his request pursuant to section 552.2615 in that he has failed to clarify his request regarding the manual, or accept the estimated charges for the information the department is willing to release. Section 552.2615 provides in part that

“A request . . . is considered to have been withdrawn by the requestor if the requestor does not respond in writing to the itemized statement by informing the governmental body within 10 business days after the date the statement is sent to the requestor that

- (1) the requestor will accept the estimated charges;
- (2) the requestor is modifying the request in response to the itemized statement; or
- (3) the requestor has sent to the Texas Building and Procurement Commission a complaint alleging that the requestor has been overcharged for being provided with a copy of the public information.

See Gov't Code § 552.2615(b). Under section 552.2615 a governmental body is required to inform the requestor of the duties imposed on him by this section and provide the requestor the information needed to respond. *Id.* In this instance, we note that the requestor has responded to the department's notice in writing within the ten day period, and he has clarified that he does indeed wish to copy the entire manual, although he asserts that the department is over-charging him, and he is unwilling to pay the itemized costs. Although an unwillingness to accept the charges for providing information can constitute a withdrawal, we note in this instance that the department, in its numerous correspondences with the requestor regarding this issue, has never informed him of his option to discuss his complaint of over-charging with the Texas Building and Procurement Commission as required by section 552.2615(a). We therefore find that the department has failed to fulfill its obligations under section 552.2615, and that the requestor's request is not withdrawn.

Next, you inform us that some of the requested information is subject to previous rulings by this office. In Open Records Letter Nos. 2004-10508 (2004), 2001-0657 (2001), 2000-3794 (2000), 2000-0491 (2000), 1999-2173 (1999), 1999-0733 (1999), and 1991-519 (1991), we concluded that the department may withhold portions of its policy manuals under section 552.108(a)(1) of the Government Code. It appears that the four criteria for a "previous determination" established by this office in Open Records Decision No. 673 (2001) have been met.¹ Accordingly, we conclude that the department may continue to rely on our decisions in Open Records Letter Nos. 2004-10508, 2001-0657, 2000-3794, 2000-0491, 1999-2173, 1999-0733, and 1991-519 with respect to the information requested in this instance that was previously ruled upon in those decisions.² See Gov't Code § 552.301(f); Open Records Decision No. 673 (2001).

¹ The four criteria for this type of "previous determination" are 1) the records or information at issue are precisely the same records or information that were previously submitted to this office pursuant to section 552.301(e)(1)(D) of the Government Code; 2) the governmental body which received the request for the records or information is the same governmental body that previously requested and received a ruling from the attorney general; 3) the attorney general's prior ruling concluded that the precise records or information are or are not excepted from disclosure under the Act; and 4) the law, facts, and circumstances on which the prior attorney general ruling was based have not changed since the issuance of the ruling. See Open Records Decision No. 673 (2001).

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

We now turn to the procedural requirements of section 552.301 of the Government Code. In accordance with section 552.301(b), a governmental body seeking a ruling from this office must assert the exceptions to disclosure that apply to the requested information no later than the tenth business day after receiving the written request. *See* Gov't Code § 552.301(b). In addition, within fifteen business days of receiving the request, the governmental body is required to submit (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* Gov't Code § 552.301(e)(1)(A). You state that the department received the requestor's request for information on September 29, 2004. You also state, and provide documentation showing, that the department asked the requestor to clarify a portion of his request regarding the manual on October 4, 2004. *See* Gov't Code § 552.222; *see also* Open Records Decision No. 31 (1974) (stating that when governmental bodies are presented with broad requests for information rather than for specific records, governmental body may advise requestor of types of information available so that request may be properly narrowed). Thus, the ten business day time period to request a decision from us under section 552.301(b) with regard to the manual was tolled on the date that the department sought clarification of the request from the requestor. *See* Gov't Code § 552.301(b); *see also* Open Records Decision No. 663 at 5 (1999) (providing that ten-day period is tolled during the clarification process). We note, however, that although section 552.222 tolls the deadlines for seeking a ruling from this office with regard to that portion of a request for which clarification is sought, section 552.222 does not relieve the department of its obligation to timely request a decision from the office in compliance with section 552.301 with regard to those portions of the request for which it does not seek clarification. Gov't Code § 552.222. Accordingly, the deadline for submitting a request for decision regarding the information for which the department did not seek clarification was October 13, 2004.

In addition, you state, and provide documentation showing, that the requestor clarified his request regarding the manual on October 14, 2004. Accordingly, we conclude that the ten business day time period for requesting a decision from our office regarding the manual resumed on October 15, 2004. Thus, the deadline for submitting a request for decision regarding the manual to our office was October 25, 2004. You submitted your request for decision regarding the entire request for information to our office on October 28, 2004. Consequently, we conclude that the department failed to comply with the procedural requirements of section 552.301 of the Government Code in requesting this decision from us.

Because the department failed to comply with the procedural requirements of section 552.301 in requesting this decision, the information at issue is now presumed public. *See* Gov't Code § 552.302; *see also* *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.—Austin 1990, no writ); *City of Houston v. Houston Chronicle Publ'g Co.*, 673 S.W.2d 316, 323 (Tex. App.—Houston [1st Dist.] 1984, no writ); Open Records Decision

No. 319 (1982). The department must demonstrate a compelling interest in order to overcome the presumption that the information at issue is now public. *See id.* Normally, a compelling interest is demonstrated when some other source of law makes the information at issue confidential or third party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). Section 552.108 is a discretionary exception to disclosure that protects a governmental body's interests and may be waived by the governmental body. *See* Open Records Decision No. 177 (1977) (governmental body may waive statutory predecessor to section 552.108); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Discretionary exceptions generally cannot provide a compelling reason to withhold information from the public. However, the need of another governmental body to withhold information under section 552.108 can provide a compelling reason to withhold information. *See* Open Records Decision No. 586 at 3 (1991). Although you note the involvement of the District Attorney's Office and the Municipal Court in the prosecution of matters that are part of the remaining submitted information, neither entity has affirmatively represented a need to withhold the information at issue. Accordingly, we conclude that the department may not withhold any portion of the remaining submitted information under section 552.108 of the Government Code. However, since the department also claims that portions of the remaining submitted information are excepted from disclosure pursuant to sections 552.101 and 552.130 of the Government Code, we will address these arguments.

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 made confidential by other statutes. Juvenile law enforcement records relating to conduct that occurred on or after September 1, 1997 are confidential under section 58.007. The relevant language of section 58.007(c) reads as follows:

(c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

- (1) if maintained on paper or microfilm, kept separate from adult files and records;
- (2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and
- (3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapter B.

Fam. Code § 58.007(c). The information in Exhibit F involves juvenile conduct that occurred after September 1, 1997. It does not appear that any of the exceptions in

section 58.007 apply. Therefore, Exhibit F is confidential pursuant to section 58.007(c) of the Family Code, and it must be withheld in its entirety under section 552.101 of the Government Code.

Next, we address your argument for the fingerprints in the remaining submitted information. Sections 560.001, 560.002, and 560.003 of the Government Code provide in pertinent part as follows:

Sec. 560.001. DEFINITIONS. In this chapter:

- (1) "Biometric identifier" means a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry.

....

Sec. 560.002. DISCLOSURE OF BIOMETRIC IDENTIFIER. A governmental body that possesses a biometric identifier of an individual:

- (1) may not sell, lease, or otherwise disclose the biometric identifier to another person unless:

- (A) the individual consents to the disclosure;

- (B) the disclosure is required or permitted by a federal statute or by a state statute other than Chapter 552 [of the Government Code]; or

- (C) the disclosure is made by or to a law enforcement agency for a law enforcement purpose[.]

....

Sec. 560.003. APPLICATION OF CHAPTER 552. A biometric identifier in the possession of a governmental body is exempt from disclosure under Chapter 552.

Gov't Code §§ 560.001-.003. We have marked fingerprints in the remaining submitted information that are confidential under section 560.003. There is no indication that the requestor has a right of access to this information under section 560.002. Therefore, the department must withhold the marked fingerprint information under section 552.101 in conjunction with section 560.003 of the Government Code.

You also note that the remaining submitted documents include social security numbers. Social security numbers may be confidential under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(D). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained or maintained by a state agency or

political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that the social security numbers in the submitted documents are confidential under section 405(c)(2)(C)(viii)(I), and, therefore, excepted from public disclosure under section 552.101 of the Government Code on the basis of that federal provision. We caution, however, that section 552.353 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing any social security numbers, you should ensure that they were not obtained or are not maintained by the department pursuant to any provision of law enacted on or after October 1, 1990.

Section 552.101 also encompasses the common law right of 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). The types 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. In addition, this office has found that the following types of information are excepted from required public disclosure under common law privacy: an individual's criminal history when compiled by a governmental body, *see* Open Records Decision No. 565 (citing *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989)), personal financial information not relating to a financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990), some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). We have marked the information that is protected by common law privacy and must be withheld under section 552.101 on that basis.

Section 552.130 excepts from disclosure "information [that] relates to. . . a motor vehicle operator's or driver's license or permit issued by an agency of this state [or] a motor vehicle title or registration issued by an agency of this state." Gov't Code § 552.130. Therefore, the department must withhold the marked Texas driver's license numbers and motor vehicle information. We note, however, that the out-of-state driver's licenses and motor vehicle information in the remaining submitted information are not excepted from disclosure under section 552.130.

Finally, we note that the remaining submitted information contains an insurance policy number. Section 552.136 of the Government Code states that "[n]otwithstanding any other provision of this chapter, 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." Gov't Code § 552.136. The department must, therefore, withhold the policy number we have marked under section 552.136 of the Government Code.

In summary, the department may continue to rely on our decisions in Open Records Letter Nos. 2004-10508, 2001-0657, 2000-3794, 2000-0491, 1999-2173, 1999-0733, and 1991-519 with respect to the information requested in this instance that was previously ruled upon in those decisions. The department must withhold Exhibit F pursuant to section 552.101 in conjunction with section 58.007 of the Family Code. The social security numbers in the remaining submitted information may be confidential under federal law. The department must also withhold the information we have marked pursuant to section 552.101 in conjunction with common-law privacy, the marked fingerprints pursuant to section 560.003, the marked Texas driver's license numbers and motor vehicle information pursuant to section 552.130, and the marked insurance policy number pursuant to section 552.136. The remaining information must be released to the requestor.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Public Information Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in

compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Lauren E. Kleine
Assistant Attorney General
Open Records Division

LEK/krl

Ref: ID# 216514

Enc. Submitted documents

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