



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 17, 2005

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

OR2005-01465

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# 219035.

The City of El Paso Police Department (the "department") received three requests for information related to a named police officer. You state that you are providing most of the requested information to the requestors. However, you claim that the submitted information, or portions thereof, is excepted from disclosure under sections 552.101, 552.117, 552.1175, 552.130 and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, you acknowledge that the department has not sought an open records decision from this office with regard to the first request within ten business days as required by section 552.301(b) of the Government Code. *See* Gov't Code § 552.301(b). 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 requested information is public and must be released unless the governmental body

¹ We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

demonstrates a compelling reason to withhold the information from disclosure. See Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). Generally speaking, a compelling reason for non-disclosure exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). Because you raise sections 552.101, 552.117, and 552.1175 for this information, we will consider your arguments.

Second, we note that Exhibit F contains a complaint affidavit. Article 15.04 of the Code of Criminal Procedure provides that “[t]he affidavit made before the magistrate or district or county attorney is called a ‘complaint’ if it charges the commission of an offense.” Crim. Proc. Code art. 15.04. Case law indicates that a complaint can support the issuance of an arrest warrant. See *Janecka v. State*, 739 S.W.2d 813, 822-23 (Tex. Crim. App. 1987); *Villegas v. State*, 791 S.W.2d 226, 235 (Tex. App.—Corpus Christi 1990, pet. ref'd); *Borsari v. State*, 919 S.W.2d 913, 918 (Tex. App.—Houston [14th Dist.] 1996, pet. ref'd) (discussing well-established principle that complaint in support of arrest warrant need not contain same particularity required of indictment). The submitted complaint affidavit reflects that it was presented to the magistrate to support the issuance of an arrest warrant.

The 78th Legislature amended article 15.26 of the Code of Criminal Procedure to add language providing:

The arrest warrant, and any affidavit presented to the magistrate in support of the issuance of the warrant, is public information, and beginning immediately after the warrant is executed the magistrate's clerk shall make a copy of the warrant and the affidavit available for public inspection in the clerk's office during normal business hours. A person may request the clerk to provide copies of the warrant and affidavit on payment of the cost of providing the copies.

Crim. Proc. Code art. 15.26 (emphasis added). Thus, article 15.26 of the Code of Criminal Procedure makes an arrest warrant and supporting complaint public. As a general rule, the exceptions found in chapter 552 of the Government Code do not apply to information that is made public by other statutes. See Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Therefore, the complaint affidavit in Exhibit F must be released.

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 protected by other statutes. Juvenile law enforcement records relating to conduct that occurred on or after September 1, 1997 are

confidential under section 58.007 of the Family Code. Section 58.007(c) provides in pertinent part 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). You raise section 58.007 for the information in Exhibit B(1). A portion of the information in Exhibit B(1) involves juvenile conduct that occurred after September 1, 1997. Accordingly, the department must withhold this marked information from disclosure under section 552.101 of the Government Code in conjunction with section 58.007(c) of the Family Code. However, the remaining information in Exhibit B(1) includes a recommendation for and letter of commendation. These documents do not constitute law enforcement records of juvenile offenders for the purposes of section 58.007 of the Family Code. Further, although the department has marked additional information in Exhibit B(1), it has not explained how section 58.007 applies to this information. Accordingly, the remaining information in Exhibit B(1) is not confidential under section 58.007, and may not be withheld under section 552.101 on that basis.

Section 552.101 also encompasses section 261.201 of the Family Code. Section 261.201(a) provides as follows:

(a) The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

- (1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201. The information submitted as Exhibit C relates to a report of alleged or suspected abuse or neglect made under this chapter. Thus, we find that the information in Exhibit C is within the scope of section 261.201 of the Family Code. You state that the department has not adopted any rules that would permit access to this record. Accordingly, the department must withhold the information in Exhibit C from disclosure under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code.

Section 552.101 further encompasses confidential criminal history record information ("CHRI") generated by the National Crime Information Center ("NCIC") or by the Texas Crime Information Center ("TCIC"). Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety ("DPS") maintains, except that the DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov't Code § 411.083. Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090 - .127. Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. *See* Gov't Code § 411.082(2)(B) (term CHRI does not include driving record information). Therefore, to the extent the submitted information contains any CHRI that is confidential under federal law or subchapter F of chapter 411 of the Government Code, the department must withhold any such information under section 552.101 of the Government Code. We note, however, that DPS has the authority to release an individual's own CHRI to that individual. Gov't Code § 411.083(b)(3).

We now turn to the information you seek to withhold under section 552.101 in conjunction with section 772.318 of the Health and Safety Code. Chapter 772 of the Health and Safety Code authorizes the development of local emergency communications districts. Sections 772.118, 772.218, and 772.318 of the Health and Safety Code apply only to an emergency 9-1-1 district established in accordance with chapter 772. *See* Open Records Decision No. 649 (1996). These statutes make confidential the originating telephone numbers and addresses of 9-1-1 callers that are furnished by a service supplier. *Id.* at 2. Section 772.318 applies to an emergency communication district for a county with a population of more than 20,000. You indicate that the emergency communication district involved here is subject to section 772.318. Therefore, we agree that the 9-1-1 caller's originating phone number and

address that you have marked in Exhibit B(2) are excepted from public disclosure based on section 552.101 as information deemed confidential by statute.

We next address your argument for the fingerprints in Exhibit F. 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. The department has marked fingerprints in Exhibit F 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.

The department raises common law privacy for portions of the information in Exhibits B(2) and D. 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). Having reviewed the information in Exhibits B(2) and D, we agree that portions of it, which we have marked, are protected by common law privacy and must be withheld under section 552.101 on that basis.

Section 552.117(a)(2) excepts from disclosure the home address and telephone number, social security number, and family member information of a peace officer, regardless of whether the peace officer complies with sections 552.024 or 552.1175 of the Government Code.² *See* Gov't Code § 552.117(a)(2). If the individuals whose information is contained in the submitted documents are currently licensed peace officers, the department must withhold the information we have marked under section 552.117(a)(2). If the individuals at issue are not currently licensed peace officers, the department must withhold the home address, home telephone number, social security number, and the family member information of the individuals if they are current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Gov't Code § 552.117(a)(1). This includes *former* home addresses and telephone information. *See* Open Records Decision No. 622 (1994). The department may not withhold this information under section 552.117(a)(1) if the employees did not make a timely election to keep the information confidential. We note, however, that the first requestor has a special right of access to his own section 552.117 information. *See* Gov't Code § 552.023 (person has special right of access to information held by governmental body

² Section 552.117(a)(2) adopts the definition of peace officer found at article 2.12 of the Code of Criminal Procedure. *See* Crim. Proc. Code art. 2.12.

that relates to person and is protected from disclosure by laws intended to protect that person's privacy interests).³

In the event that section 552.117 of the Government Code does not apply, the employees' social security numbers may still be excepted from required public disclosure. Additionally, you note that Exhibits B(2) and F include the social security numbers of members of the public. Section 552.101 of the Government Code in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I) makes social security numbers confidential if they were obtained or are maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 (1994). Prior to releasing any social security number, you should ensure that no such information was obtained or is maintained by the department pursuant to any provision of law, enacted on or after October 1, 1990.

The department raises section 552.130 of the Government Code. 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, the department raises section 552.136 of the Government Code. Section 552.136 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. Having reviewed the remaining submitted information, we find that you have not provided any arguments explaining how any of this information constitutes a credit card, debit card, charge card, or access device number for purposes of section 552.136. Thus, none of the submitted information may be withheld pursuant to this exception.

In summary, the department must withhold the following information pursuant to section 552.101: (1) the marked information in Exhibit B in conjunction with section 58.007 of the Family Code; (2) the marked information in Exhibit C in conjunction with section 261.201 of the Family Code; (3) any criminal history record information; (4) the 9-1-1 caller's originating phone number and address in Exhibit B(2); (5) the marked fingerprints pursuant to section 560.003; and (6) the information we have marked under common law privacy. We have marked the information the department must withhold under section 552.117 of the Government Code, if that exception applies. The social security numbers in the submitted information may be confidential under federal law. The department must withhold the

³ As our ruling on this issue is dispositive, we need not address your arguments under section 552.1175 of the Government Code.

marked Texas driver's license numbers and motor vehicle information pursuant to section 552.130. The remaining information must be released.⁴

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

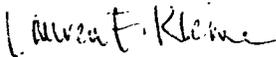
Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or

⁴ We note that some of the information specifically responsive to the first request also includes personal information related to the first requestor that would ordinarily be excepted from disclosure under provisions designed to protect his privacy. In accordance with section 552.023 the first requestor in this instance has a special right of access to this information. *See* Gov't Code § 552.023; *see also* Open Records Decision No. 481 (1987). However, if the department receives another request for this particular information from a different requestor, the department should again seek a decision from this office.

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/jev

Ref: ID# 219035

Enc. Submitted documents

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