



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 8, 2009

Ms. Cheryl K. Byles
Assistant City Attorney
City of Fort Worth
1000 Throckmorton Street, 3rd Floor
Fort Worth, Texas 76102

OR2009-04646

Dear Ms. Byles:

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# 339189 (Fort Worth PIR No 1581-09).

The Fort Worth Police Department (the "department") received a request for information pertaining to a named police officer. You state you will release most of the requested information. You claim a portion of the submitted information is not subject to the Act.¹ You also claim that some of the submitted information is excepted from disclosure under sections 552.101 and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, you state that a portion of the information at issue was obtained pursuant to a grand jury subpoena. The judiciary is expressly excluded from the requirements of the Act. *See* Gov't Code § 552.003(1)(B). This office has determined that a grand jury, for purposes of the Act, is a part of the judiciary and therefore not subject to the Act. *See* Open Records Decision No. 411 (1984). Further, records kept by another person or entity acting as an agent for a grand jury are considered to be records in the constructive possession of the grand jury and therefore are not subject to the Act. *See* Open Records Decisions Nos. 513 (1988), 398 (1983); *but see* Open Records Decision No. 513 at 4 (defining limits of judiciary exclusion). The fact that information collected or prepared by another person or entity is submitted to

¹While you cite to section 552.103 of the Government Code for your argument a portion of the information is not subject to the Act, we understand you to claim section 552.003 of the Government Code, as section 552.003 is the proper section for the substance of your argument.

the grand jury does not necessarily mean that such information is in the grand jury's constructive possession when the same information is also held in the other person's or entity's own capacity. Information held by another person or entity but not produced at the direction of the grand jury may well be protected under one of the Act's specific exceptions to disclosure, but such information is not excluded from the reach of the Act by the judiciary exclusion. *See* ORD 513. Thus, to the extent that the department has possession of the information as an agent of the grand jury, such information is in the grand jury's constructive possession and is not subject to the Act. To the extent that the department does not have possession of the information as an agent of the grand jury, the information is subject to the Act, and we will address your arguments against disclosure of this information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. This exception encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *See 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 established. *Id.* at 681-82. The types of information considered intimate or 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 medical information or information indicating disabilities or specific illnesses is excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). We note the common-law right to privacy is a personal right that lapses at death, and, therefore, it does not encompass information that relates to a deceased individual. *See Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 491 (Tex. App.—Texarkana 1979, writ ref'd n.r.e.); Open Records Decision No. 272 at 1 (1981). Upon review, we agree that some of the submitted information is confidential under common-law privacy. Therefore, the department must withhold this information, which we have marked, under section 552.101 in conjunction with common-law privacy. We have also indicated which types of information must be withheld from the submitted audio recording under section 552.101 in conjunction with common-law privacy. However, we find the remaining information you seek to withhold under common-law privacy pertains to individuals who are either not identified or are deceased. This information does not implicate any individual's privacy interest and may not be withheld under section 552.101 of the Government Code in conjunction with common-law privacy. Further, upon review, we find that the remaining information that does identify living individuals is either not intimate or embarrassing or it is of legitimate public interest. Accordingly, the department may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 1703.306 of the Occupations Code is also encompassed by section 552.101. Section 1703.306 provides as follows:

(a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:

- (1) the examinee or any other person specifically designated in writing by the examinee;
- (2) the person that requested the examination;
- (3) a member, or the member's agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner's activities;
- (4) another polygraph examiner in private consultation; or
- (5) any other person required by due process of law.

(b) The [Polygraph Examiners B]oard or any other governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information.

(c) A polygraph examiner to whom information acquired from a polygraph examination is disclosed under Subsection (a)(4) may not disclose the information except as provided by this section.

Occ. Code § 1703.306. In this instance, the requestor may represent the polygraph examinee. Thus, if the requestor represents the examinee, the department has the discretion to release the polygraph information of the examinee, which we have marked, pursuant to section 1703.306(a)(1). *See* Open Records Decision No. 481 at 9 (1987) (predecessor to section 1703.306 permits, but does not require, examination results to be disclosed to examinees). Otherwise, the department must withhold the marked polygraph examination information under section 552.101 of the Government Code in conjunction with section 1703.306(a) of the Occupations Code.

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. An access device number is one that may be used to (1) obtain money, goods, services, or another thing of value; or (2) initiate a transfer of funds other than a

transfer originated solely by paper instrument. *Id.* Although you assert the federal tax identification number you have marked is an access device number, we find that you have failed to demonstrate how the number at issue constitutes an access device number used to obtain money, goods, services, or another thing of value or initiate a transfer of funds other than a transfer originated solely by paper instrument. We therefore conclude the department may not withhold the marked federal tax identification number under section 552.136 of the Government Code.

We note some of the remaining information is excepted from disclosure under section 552.117 of the Government Code.² Section 552.117(a)(2) excepts from public disclosure a peace officer's home address and telephone number, social security number, and family member information regardless of whether the peace officer made an election under section 552.024 of the Government Code. *Id.* § 552.117(a)(2). We note, however, that the protection afforded by section 552.117 does not extend to information relating to a deceased family member. *Cf.* Attorney General Opinions JM-229, H-917 (1976) ("We are . . . of the opinion that the Texas courts would follow the almost uniform rule of other jurisdictions that the right of privacy lapses upon death."); Open Records Decision No. 272 (1981). We also note that section 552.117(a)(2) encompasses peace officers' cellular telephone and pager numbers if the officer personally pays for the cellular telephone or pager service. *See* Open Records Decision No. 670 at 6 (2001); *see also* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular mobile telephone numbers paid for by governmental body and intended for official use). Accordingly, the department must withhold the information belonging to the officer at issue that we have marked, as well as the types of personal information we have indicated on the submitted audio recordings, under section 552.117(a)(2).

Finally, you inform us that the requestor may be the attorney representing the officer at issue. Section 552.023 of the Government Code provides a person or a person's authorized representative with a special right of access to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect the person's privacy interests. Accordingly, if the requestor is the authorized representative of the officer at issue, pursuant to section 552.023 of the Government Code, the requestor has a special right of access to the information pertaining to his client that we have marked under section 552.101 of the Government Code in conjunction with common-law privacy and under section 552.117(a)(2) of the Government Code.

In summary, to the extent that some of the submitted information is held by the department as an agent of the grand jury, such information is in the grand jury's constructive possession and is not subject to disclosure under the Act. The department may release the polygraph

²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

information of the examinee if the requestor is the examinee's authorized representative; otherwise, the department must withhold the marked polygraph examination information under section 552.101 of the Government Code in conjunction with section 1703.306(a) of the Occupations Code. The department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy and section 552.117(a)(2) of the Government Code. However, if the requestor is the authorized representative of the officer at issue, pursuant to section 552.023 of the Government Code, the requestor has a special right of access to the information pertaining to his client we have marked under section 552.101 of the Government Code in conjunction with common-law privacy and under section 552.117(a)(2) of the Government Code. The remaining information must be released to the requestor.

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.oag.state.tx.us/open/index_orl.php, 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 must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Paige Savoie
Assistant Attorney General
Open Records Division

PS/eeg

Ref: ID# 339189

Enc. Submitted documents

cc: Requestor
(w/o enclosures)