



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 8, 2009

Mr. Juan R. Molina  
Attorney at Law  
P.O. Box 190  
Weslaco, Texas 78596

OR2009-04689

Dear Mr. Molina:

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# 339267.

The City of Mercedes (the "city"), which you represent, received two requests for a specified affidavit. You claim the requested information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we must address the city's obligations under section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow in asking this office to decide whether information is excepted from public disclosure. Pursuant to section 552.301(b) of the Government Code, a governmental body must ask for the attorney general's decision and state the exceptions that apply within ten business days after receiving the request. *See* Gov't Code § 552.301(a), (b). Section 552.308 states:

(a) When this subchapter requires a request, notice, or other document to be submitted or otherwise given to a person within a specified period, the requirement is met in a timely fashion if the document is sent to the person by first class United States mail or common or contract carrier properly addressed with postage or handling charges prepaid and:

- (1) it bears a post office cancellation mark or a receipt mark of a common or contract carrier indicating a time within that period; or
- (2) the person required to submit or otherwise give the document furnishes satisfactory proof that it was deposited in the mail or common or contract carrier within that period.

*Id.* § 552.308(a). The city received the requests for information on January 13, 2009. We received the city's claimed exceptions and the requested information on February 2, 2009. The envelopes in which the submitted information was provided to this office do not contain postmark dates. Further, the city has not furnished satisfactory proof that the submitted information was deposited in the mail within the ten business day deadline. Thus, we are unable to determine that the city mailed its claimed exceptions within the ten business day deadline. *See id.* § 552.308(a) (prescribing standards for timeliness of action by United States or common or contract carrier). Consequently, we find the city failed to comply with the procedural requirements mandated by section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption that the information is public. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See 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). A compelling reason exists when third-party interests are at stake, or when information is confidential by law. Open Records Decision No. 150 (1977). Although you raise section 552.108 of the Government Code as an exception to disclosure of the submitted information, this exception is discretionary in nature. You also claim the informer's privilege in conjunction with section 552.101 of the Government Code. However, because the purpose of the informer's privilege is to protect the flow of information to a governmental body, rather than to protect a third person, the informer's privilege, unlike other claims under section 552.101 of the Government Code, can be waived. *See* Open Records Decision No. 549 at 6 (1990). Accordingly, section 552.108 and the informer's privilege are not compelling reasons to overcome the presumption of openness under section 552.302. *See* Open Records Decisions Nos. 665 at 2 n.5 (2000) (discretionary exceptions in general), 177 (1977) (statutory predecessor to section 552.108 subject to waiver), 549 at 6 (1990) (governmental body may waive informer's privilege). Consequently, the city may not withhold the submitted information pursuant to section 552.108 or section 552.101 in conjunction with the informer's privilege. However, because your remaining claims under section 552.101 of the Government Code can provide a compelling reason for non-disclosure, we will address your arguments under this exception.

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, such as section 58.007 of the Family Code, which makes confidential juvenile law enforcement records relating to conduct that occurred on or after September 1, 1997. For purposes of section 58.007, "child" means a person who is ten years of age or older and under seventeen years of age at the time of the reported conduct. *See* Fam. Code § 51.02(2). The relevant language of section 58.007 reads:

(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.

*Id.* § 58.007(c). You claim the submitted information is subject to section 58.007. Section 58.007(c), however, is not applicable to information that relates to a juvenile as a complainant, victim, witness, or other involved party and not as a suspect, offender, or defendant. The submitted information does not relate to a juvenile as a suspect, offender, or defendant. Therefore, the submitted information is not confidential under section 58.007 of the Family Code and it may not be withheld under section 552.101 of the Government Code.

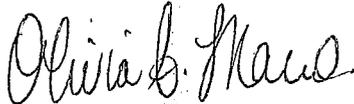
Section 552.101 also encompasses the common-law right of privacy, which protects information that is 1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and 2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (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. You claim the requested information is private. However, upon review, we find you have failed to explain how any portion of the submitted information constitutes highly intimate or embarrassing information that is not of legitimate public interest. Therefore, you may not withhold any portion of the submitted information

pursuant to section 552.101 of the Government Code in conjunction with common-law privacy. As you claim no further exceptions to the disclosure of the submitted information, it must be released.

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](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,



Olivia A. Maceo  
Assistant Attorney General  
Open Records Division

OM/eeg

Ref: ID# 339267

Enc. Submitted documents

c: Requestor  
(w/o enclosures)