



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 22, 2009

Mr. Floyd M. Akers
City Attorney
Pflugerville Police Department
P.O. Box 679
Pflugerville, Texas 78691-0679

OR2009-07007

Dear Mr. Akers:

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# 343904.

The Pflugerville Police Department (the "department") received a request for information pertaining to the requestor. You state that you have released some of the requested information. You claim that the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we note that you have redacted portions of the submitted information. Pursuant to section 552.301 of the Government Code, a governmental body that seeks to withhold requested information must submit to this office a copy of the information, labeled to indicate which exceptions apply to which parts of the copy, unless the governmental body has received a previous determination for the information at issue. *See* Gov't Code § 552.301(a), (e)(1)(D). You do not assert, nor does our review of our records indicate, that you have been authorized to withhold any of the redacted information without seeking a ruling from this office. *See id.* § 552.301(a); Open Records Decision No. 673 (2000). As such, the information must be submitted in a manner that enables this office to determine whether the information comes within the scope of an exception to disclosure. In this instance, we can discern the nature of the redacted information; thus, being deprived of that information does not inhibit our ability to make a ruling. In the future, however, the

department should refrain from redacting any information that it submits to this office in seeking an open records ruling. Failure to do so may result in the presumption that the redacted information is public. See Gov't Code § 552.302.

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. Section 552.101 encompasses the doctrine of common-law privacy, which protects information if (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, or (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type 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. Generally, however, the public has a legitimate interest in information that relates to public employment and public employees, and information that pertains to an employee's actions as a public servant generally cannot be considered beyond the realm of legitimate public interest. See Open Records Decisions Nos. 562 at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs, but in fact touches on matters of legitimate public concern); 542 (1990); 470 at 4 (1987) (public has legitimate interest in job qualifications and performance of public employees); 444 at 5-6 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees); 423 at 2 (1984) (scope of public employee privacy is narrow). Upon review, we determine the information we have marked is highly intimate or embarrassing and not of legitimate public concern. Therefore, the department must withhold the information we have marked under section 552.101 in conjunction with common-law privacy. However, although some of the remaining information may be highly intimate or embarrassing, we find there is a legitimate public interest in this information. Therefore, none of the remaining information may be withheld under section 552.101 on the basis of common-law privacy.

Section 552.101 also encompasses the doctrine of constitutional privacy. The constitutional right to privacy protects two types of interests. See Open Records Decision No. 600 at 4 (1992) (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985)). The first is the interest in independence in making certain important decisions related to the "zones of privacy" recognized by the United States Supreme Court. *Id.* The zones of privacy recognized by the United States Supreme Court are matters pertaining to marriage, procreation, contraception, family relationships, and child rearing and education. See *id.* The second interest is the interest in avoiding disclosure of personal matters. The test for whether information may be publicly disclosed without violating constitutional privacy rights involves a balancing of the individual's privacy interests against the public's need to know information of public concern. See Open Records Decision No. 455 at 5-7 (1987) (citing *Fadjo v. Coon*, 633 F.2d 1172, 1176 (5th Cir. 1981)). The scope of information considered private under the constitutional doctrine is far narrower than that under the common-law

right to privacy; the material must concern the "most intimate aspects of human affairs." *See id.* at 5 (citing *Ramie*, 765 F.2d at 492).

In Open Records Decision No. 430 (1985), our office determined that a list of inmate visitors is protected by constitutional privacy because people have a First Amendment right to correspond with inmates, and that right would be threatened if their names were released. *See also* Open Records Decision Nos. 428 (1985), 185 (1978) (public's right to obtain an inmate's correspondence list is not sufficient to overcome the First Amendment right of the inmate's correspondents to maintain communication with inmate free of the threat of public exposure). We have determined that the same principles apply to an inmate's recorded conversations from a telephone at a jail. Therefore, the submitted audio recordings of an inmate's telephone conversations, which we have marked, are subject to constitutional privacy and must be withheld under section 552.101.

Section 552.101 also encompasses information made confidential by other statutes. The submitted information includes polygraph information. Information relating to a polygraph examination is confidential under section 1703.306 of the Occupations Code. Section 1703.306 of the Occupations Code provides in relevant part:

(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[.]

Occ. Code § 1703.306. We have marked information in the submitted documents that was acquired from polygraph examinations. The marked information is confidential under section 1703.306 of the Occupations Code. To the extent that the submitted videos of the polygraph examinations also contain the same types of information as we have marked, those types of information are also confidential under section 1703.306 and must be withheld from the videos. We note that a portion of the information at issue consists of the polygraph examination results of the requestor. Although the information that was acquired from the requestor's polygraph examination is confidential under section 1703.306, the department has the discretion to release that information to the requestor pursuant to section 1703.306(a)(1).¹ *See* Open Records Decision No. 481 at 9 (1987) (statutory predecessor to Occ. Code § 1703.306 permitted, but did not require, examination results to be disclosed to polygraph examinees). Otherwise, the department must withhold this

¹We note that the department must withhold the entire video of the requestor's polygraph examination if it has no means of redacting the information that may not be released under section 1703.306.

information, and the other polygraph information we have noted, under section 552.101 in conjunction with section 1703.306 of the Occupations Code.

Section 552.101 also encompasses chapter 411 of the Government Code, which deems confidential criminal history record information ("CHRI") generated by the National Crime Information Center or by the Texas Crime Information Center. CHRI means "information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions." Gov't Code § 411.082(2). Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI that the Texas Department of Public Safety ("DPS") maintains, except that 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. Upon review, we determine the department must withhold the information we have marked under section 552.101 in conjunction with section 411.083 of the Government Code.²

We note that some of the remaining information may be subject to sections 552.117, 552.1175, 552.130, 552.136, and 552.137 of the Government Code.³ Section 552.117(a)(2) excepts from disclosure the current and former home addresses and telephone numbers, social security numbers, and family member information regarding a peace officer regardless of whether the officer requested confidentiality under section 552.024 or 552.1175 of the Government Code.⁴ *Id.* § 552.117(a)(2). We note that section 552.117 also encompasses personal cellular telephone numbers, provided that the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988)

²We note that the requestor can obtain her own CHRI from DPS. *See* Gov't Code § 411.083 (b)(3).

³The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

⁴Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure.

(section 552.117 not applicable to cellular mobile phone numbers paid for by governmental body and intended for official use). We also note that section 552.117 only applies to records that the governmental body is holding in an employment capacity. Accordingly, to the extent the information at issue is held by the department in its employment capacity, the information we have marked pursuant to section 552.117(a)(2). However, the department must only withhold the cellular telephone number we have marked under section 552.117(a)(2) if the officer at issue paid for the cellular telephone with his own funds. To the extent that the submitted recordings also contain the same types of information, those types of information must also be withheld under section 552.117. In the event that the department does not have technological capacity to redact the types of information we have indicated from the submitted recordings, the department must withhold the audio recordings in their entirety.

Section 552.1175 of the Government Code provides in part:

(a) This section applies only to:

(1) peace officers as defined by Article 2.12, Code of Criminal Procedure;

(b) Information that relates to the home address, home telephone number, or social security number of an individual to whom this section applies, or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

(1) chooses to restrict public access to the information; and

(2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Gov't Code § 552.1175(a), (b). We have marked information in the submitted documents that may be subject to section 552.1175. To the extent this information pertains to a currently licensed peace officer who elects to restrict access to this information in accordance with section 552.1175(b), it must be withheld under section 552.1175(b). To the extent that the submitted recordings also contain the same types of information, those types of information must also be withheld under section 552.1175. In the event that the department does not have technological capacity to redact the types of information we have indicated from the submitted recordings, the department must withhold the audio recordings in their entirety.

Section 552.130 of the Government Code excepts from public disclosure information that relates to:

- (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]
- (2) a motor vehicle title or registration issued by an agency of this state[.]

Id. § 552.130(a). Upon review of the remaining information, we find that the department must withhold the Texas motor vehicle record information we have marked under section 552.130.

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.” *Id.* § 552.136. The department must withhold the information we have marked under section 552.136.

Section 552.137 excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body,” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See id.* § 552.137(a)-(c). Section 552.137 does not apply to a government employee's work e-mail address because such an address is not that of the employee as a “member of the public,” but is instead the address of the individual as a government employee. The e-mail address at issue does not appear to be of a type specifically excluded by section 552.137(c). You do not inform us that a member of the public has affirmatively consented to the release of the e-mail address contained in the submitted materials. Therefore, the department must withhold the e-mail address we have marked under section 552.137.

In summary, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy, and the submitted audio recordings of an inmate's telephone conversations under constitutional privacy. The department must also withhold the information we have marked under section 552.101 in conjunction with section 411.083 of the Government Code. The submitted polygraph information must be withheld under section 552.101 in conjunction with section 1703.306 of the Occupations Code, but the department has the discretion to release the requestor's polygraph information under section 1703.306(a)(1). To the extent the personal information we have marked is held by the department in its employment capacity, it must be withheld pursuant to section 552.117(a)(2). The department must withhold the information we have marked under section 552.1175 if it pertains to currently licensed peace officers who elect to restrict access to this information in accordance with section 552.1175(b). To the extent that the submitted recordings also contain the same types

of information, those types of information also must be withheld under sections 552.117 and 552.1175. In the event that the department does not have technological capacity to redact the types of information we have indicated from the submitted recordings, the department must withhold the submitted recordings in their entirety. The department must withhold the information we have marked under sections 552.130, 552.136, and 552.137 of the Government Code. The remaining information must be released.⁵

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# 343904

Enc. Submitted documents

cc: Requestor
(w/o enclosures)

⁵We note that, because some or all of the information being released is confidential with regard to the general public, if the department receives another request for this information from an individual other than this requestor, the department should again seek our decision. We also note that the information being released contains social security numbers. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act. However, the requestor has a right of access to her own social security number and it must be released to her. *See generally* Gov't Code § 552.023(b).