ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 28, 2009

Ms. Courtney A. Kuykendall
Abernathy, Roeder, Boyd & Joplin, P.C.
Attorneys for the City of Wylie
P.O. Box 1210
McKinney, Texas 75070-1210

OR2009-07303

Dear Ms. Kuykendall:

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# 344391.

The City of Wylie (the "city"), which you represent, received a request for all information, including specified personnel records, regarding any investigation or review that led to the requestor's client's termination from the city's police department. You state the city has provided some of the requested information to the requestor. You claim the submitted internal affairs investigation 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, you state, and have provided documentation showing, after the city sought clarification of the request from the requestor, the requestor agreed to the redaction of certain criminal history record information not related to the investigation at issue. *See* Gov't Code § 552.222 (if request for information is unclear, governmental body may ask requestor to clarify request); *see also* Open Records Decision No. 31 (1974) (when 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). We note you have redacted such information from the submitted investigation documents. Therefore, the redacted information is not responsive to the request for information. This

ruling does not address the public availability of any information that is not responsive to the request, and the city is not required to release this information in response to this request.

Section 552.108(a)(1) of the Government Code excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime." Gov't Code § 552.108(a)(1). A governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). This office has stated a presumption is created regarding the applicability of section 552.108(a)(1) if the criminal matter is pending and the records directly pertain to that matter. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases). In this instance, you assert the submitted internal affairs investigation information relates to a pending criminal investigation. You state the pending criminal investigation involves vehicle vandalism that occurred in August 2008. The submitted information, however, pertains to an internal administrative investigation regarding alleged police officer misconduct that occurred in February 2009. You have not explained how the administrative investigation information directly pertains to the pending criminal investigation regarding vandalism. Furthermore, you have not explained how or why releasing the submitted administrative investigation information would interfere with the detection, investigation, or prosecution of crime. *See* 531 S.W.2d 177. Consequently, you have failed to demonstrate the applicability of section 552.108(a)(1) to the submitted administrative investigation information. Accordingly, the submitted administrative investigation information may not be withheld under section 552.108(a)(1) of the Government Code. We note, however, the submitted information includes an incident report directly pertaining to the vandalism investigation. As you represent the vandalism investigation is a pending criminal investigation, we conclude the release of this report, which we have marked, would interfere with the detection, investigation, or prosecution of crime. *See* 531 S.W.2d 177.

Section 552.108 does not except from disclosure "basic information about an arrested person, an arrest, or a crime." Gov't Code § 552.108(c). Section 552.108(c) refers to the basic information held to be public in *Houston Chronicle*, and includes a detailed description of the offense. *See* 531 S.W.2d at 186-88. Thus, with the exception of basic information, the city may withhold the marked vandalism incident report pursuant to section 552.108(a)(1) of the Government Code. We note you have the discretion to release all or part of this information that is not otherwise confidential by law. Gov't Code § 552.007.

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 exception encompasses information protected by the common-law

informer's privilege, which has long been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App.1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). The informer's privilege protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law enforcement authority, provided the subject of the information does not already know the informer's identity. Open Records Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978). The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 279 at 2 (1981). The report must be of a violation of a criminal or civil statute. *See* Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5.

You contend the remaining information in its entirety, or alternatively, the identifying information of informers, is protected under the informer's privilege. You state the remaining information reveals the name and statement of a person who filed a complaint with the city's police department regarding the requestor's client's misconduct. You further state the complaint was the catalyst for the internal administrative investigation that eventually led to the requestor's client's termination from the police department. The submitted information, however, shows the requestor's client was given a copy of the complaint, thus, revealing the identity of the complainant to the subject of the information at issue. Therefore, you have failed to demonstrate the applicability of the informer's privilege to the remaining information. Consequently, none of the remaining information may be withheld under section 552.101 of the Government Code in conjunction with the common-law informer's privilege.

You assert some of the remaining information is protected by both common-law and constitutional privacy. Section 552.101 also encompasses the doctrines of common-law and constitutional privacy. Common-law privacy protects information that (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). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. Information pertaining to the work conduct and job performance of public employees is subject to a legitimate public interest, and, therefore, generally not protected from disclosure under common-law privacy. *See* Open Records Decision Nos. 405 at 2-3 (1983) (public has interest in manner in which public employee performs job), 329 at 2 (1982) (information relating to complaints against public employees and discipline resulting therefrom is not protected under former section 552.101), 208 at 2 (1978) (information relating to complaint against public employee and disposition of the complaint is not protected under common-law right of privacy); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow). You claim misconduct and discipline information pertaining to a former police officer, other than the requestor's client, in the remaining internal affairs

investigation information is protected by common-law privacy. Although information pertaining to alleged employee misconduct may be embarrassing, such information is of legitimate public interest. *See* Open Records Decision No. 484 a 3-4 (1987) (public's interest in knowing how police departments resolve complaints against police officers ordinarily outweighs officers' privacy interests). Thus, the city may not withhold any of the former officer's information under section 552.101 of the Government Code in conjunction with common-law privacy.

Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy," which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than under the common-law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). Upon review of your arguments and the remaining information, we find you have not demonstrated how any of the information, which pertains to police officer misconduct, falls within the zones of privacy. Moreover, we find the public's need to know information relating to the work performance of government employees generally outweighs an individual's privacy interests for purposes of constitutional privacy. Thus, none of the remaining information may be withheld under section 552.101 in conjunction with constitutional privacy.

We note the remaining information contains Texas driver's license information and a Texas license plate number. Section 552.130 of the Government Code provides information relating to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by a Texas agency is excepted from public release. Gov't Code § 552.130(a)(1), (2).[1] Thus, the city must withhold the Texas driver's license information and license plate number we have marked in the remaining information under section 552.130 of the Government Code.

In summary, the city may withhold the marked incident report under section 552.108(a)(1) of the Government Code. The city must withhold the marked driver's license and license plate information under section 552.130 of the Government Code. The remaining information must be released.

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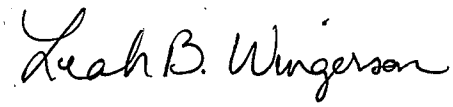
[1]The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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,



Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/dls

Ref: ID# 344391

Enc. Submitted documents

c: Requestor
(w/o enclosures)