



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 14, 2009

Ms. Cary Grace
Assistant City Attorney
City of Austin
P. O. Box 1088
Austin, Texas 78767-8828

OR2009-11373

Dear Ms. Grace:

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# 354114.

The Austin Police Department (the "department") received a request for information related to grant proposals written, grants received, and statistical data compiled by the department related to gangs during a specified time period. You claim that portions of the submitted information are excepted from disclosure under sections 552.101, 552.117, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, you acknowledge, and we agree, the department did not timely raise section 552.117 or section 552.137 in accordance with section 552.301 of the Government Code. *See* Gov't Code § 552.301(e). The department also acknowledges it failed to meet the deadlines prescribed by section 552.301 of the Government Code in requesting an open records

¹We 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.

decision from this office. *See id.* § 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 demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 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). A compelling reason exists when third-party interests are at stake or when information is confidential under other law. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). Sections 552.101, 552.117, and 552.137 of the Government Code can provide compelling reasons that overcome the presumption of openness; therefore, we will consider your arguments under those sections.

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. You claim that the information at issue is excepted from public disclosure pursuant to section 552.101 in conjunction with article 61.03 of the Code of Criminal Procedure. Chapter 61 of the Code of Criminal Procedure deals with intelligence information pertaining to street gangs. Article 61.02 provides in part that "a criminal justice agency may compile criminal information into an intelligence database for the purpose of investigating or prosecuting the criminal activities of criminal combinations or criminal street gangs." Crim. Proc. Code art. 61.02(a). Article 61.03 provides in relevant part:

(a) A criminal justice agency that maintains criminal information under this chapter may release the information on request to:

- (1) another criminal justice agency;
- (2) a court; or
- (3) a defendant in a criminal proceeding who is entitled to the discovery of the information under Chapter 39.

Id. art. 61.03(a). Further, article 61.05 of the Code of Criminal Procedure provides that release of the information to a person who is not entitled to the information is a Class A misdemeanor. You inform us that portions of the submitted information, which you have marked, constitute criminal gang information originating from, and maintained in, the department's criminal gang database. Furthermore, you assert that the requestor is not entitled to the information at issue under article 61.03. Thus, based on your representations and our review, we conclude that the department must withhold the information you have

highlighted pursuant to section 552.101 of the Government Code in conjunction with article 61.03 of the Code of Criminal Procedure.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that the information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). Furthermore, section 552.117(a)(2) excepts the same information of a peace officer regardless of whether the officer elected under section 552.024 or 552.1175 of the Government Code to keep such information confidential. *Id.* § 552.117(a)(2). Section 552.117 also encompasses a personal cellular telephone number, provided that a governmental body does not pay for the cell phone service. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). You state that the remaining information includes the home addresses, home telephone numbers, and personal cellular telephone numbers of police officers and department employees who timely requested that information be kept confidential. Based on your representation and our review, we conclude the department must withhold the information you have highlighted pursuant to sections 552.117(a)(1) and 552.117(a)(2) of the Government Code.

Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purposes 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). Gov't Code § 552.137 (a)-(c). You have highlighted e-mail addresses in the remaining information that are not a type specifically excluded by subsection (c). Accordingly, the department must withhold the highlighted e-mail addresses under section 552.137 of the Government Code, unless the owners affirmatively consent to their disclosure.

In summary, the department must withhold the information you have marked under section 552.101 of the Government Code in conjunction with article 61.03 of the Code of Criminal Procedure. The department must also withhold the information you have highlighted under sections 552.117(a)(1), 552.117(a)(2), and 552.137 of the Government Code. The remaining information 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.

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,

A handwritten signature in black ink, appearing to read "Jennifer Burnett", with a long horizontal flourish extending to the right.

Jennifer Burnett
Assistant Attorney General
Open Records Division

JB/eeg

Ref: ID# 354114

Enc. Submitted documents

c: Requestor
(w/o enclosures)