



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 7, 2010

Mr. Robert E. Hager
Nichols Jackson Dillard Hager & Smith
1800 Lincoln Plaza
500 North Akard
Dallas, Texas 75201

OR2010-04879

Dear Mr. Hager:

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# 375007 (ORR# 41687).

The Allen Police Department (the "department"), which you represent, received a request for (a) any internal affairs investigation of department police officers pertaining to a specified incident; (2) the personnel file of a named officer; and (3) videos or images of the incidents forming the basis of the injuries of the requestor's client. You state the department has no information responsive to the request for internal affairs investigations.¹ You claim the submitted information is excepted from disclosure under sections 552.103, 552.108, 552.117, and 552.130 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted information.

Initially, we must address the department's obligations under section 552.301 of the Government Code, which prescribes the procedures a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. *See Gov't Code § 552.301(b)*. You state the department received the request for information on January 14, 2010. This office received the department's request

¹The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

²Although you also raise section 552.1175 of the Government Code with respect to the information at issue, we note section 552.117 is the proper exception for information the department holds in its capacity as an employer.

for a ruling on February 1, 2010. You do not inform us the department was closed for any business days between January 14, 2010, and February 1, 2010. Accordingly, you were required to request a decision from this office by January 28, 2010. We note the envelope in which the department's request for a ruling was submitted does not bear a discernible post office cancellation mark. *See id.* § 552.308(a)(1) (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Further, you have not provided this office with satisfactory proof the department requested a ruling from this office within the ten business day deadline. *See id.* § 552.308(a)(2). Consequently, we determine the department failed to comply with the procedural requirements mandated by section 552.301 of the Government Code.

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; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); Open Records Decision No. 586 (1991). This office has held a compelling reason exists to withhold information when third party interests are at stake or when information is made confidential by another source of law. *See* Open Records Decision No. 150 (1977) (construing predecessor statute). Although the department claims exceptions to disclosure under sections 552.103 and 552.108 of the Government Code, these sections are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 177 (1977) (governmental body may waive statutory predecessor to section 552.108), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Accordingly, no portion of the submitted information may be withheld under section 552.103 or section 552.108 of the Government Code. However, because sections 552.101, 552.117, and 552.130 can provide compelling reasons to withhold information, we will consider the applicability of these exceptions to the submitted information.

We also note 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. Gov't Code §§ 552.301(a), 301(e)(1)(D). The previous determination issued in Open Records Decision No. 670 (2001) authorizes a governmental body to withhold the home addresses and telephone numbers, social security numbers, and family member information of peace officers, as defined by article 2.12 of the Code of Criminal Procedure, under section 552.117(a)(2) without the necessity of requesting a decision from this office. You do not assert, however, nor does our review of our records indicate, you have been authorized to withhold any of the remaining redacted information without seeking a ruling from this

office. *See* Gov't Code § 552.301(a); Open Records Decision No. 673 (2000). As such, these types of 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 it submits to this office in seeking an open records ruling.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."³ Gov't Code § 552.101. Section 552.101 encompasses common-law privacy. For information to be protected from public disclosure by the common-law right of privacy, the information must meet the criteria set out by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976). In *Industrial Foundation*, the Texas Supreme Court stated information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts, the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. 540 S.W.2d at 685. To demonstrate the applicability of common-law privacy, both prongs of this test must be demonstrated. *See id.* at 681-82. 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. *See id.* at 683. Upon review, we find the information we have marked is highly intimate or embarrassing and not of legitimate public concern. Accordingly, the department must withhold the information we have marked pursuant to section 552.101 in conjunction with common-law privacy.

Section 552.117(a)(2) of the Government Code excepts from public disclosure the home address, home telephone number, social security number, and family member information of a licensed peace officer, regardless of whether the peace officer complies with sections 552.024 and 552.1175 of the Government Code.⁴ *See* Gov't Code § 552.117(a)(2). As noted above, Open Records Decision No. 670 (2001) authorizes a governmental body to withhold these types of information related to licensed police officers under section 552.117(a)(2) without requesting a decision from this office. We note the remaining information contains additional information you have not redacted. Thus, the department must withhold the additional information we have marked under section 552.117(a)(2).

You claim the remaining submitted information contains Texas motor vehicle record information that is excepted from disclosure under section 552.130 of the Government Code.

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

⁴"Peace officer" is defined by Article 2.12 of the Texas Code of Criminal Procedure.

Section 552.130 excepts from disclosure information relating to a Texas motor vehicle driver's license or permit and a Texas motor vehicle title or registration. *Id.* § 552.130. However, section 552.130 is based on privacy principles. In this instance, the requestor is the authorized representative of the individual whose motor vehicle information is at issue. Accordingly, the requestor has a right of access to the Texas motor vehicle information under section 552.023 of the Government Code. *See id.* §552.023(a); Open Records Decision No. 481 at 4 (1987) (governmental body may not deny access to person to whom information relates or person's authorized representative on grounds that information is considered confidential by privacy principles). Therefore, the Texas motor vehicle information in the submitted documents may not be withheld from this requestor under section 552.130 of the Government Code.

In summary, the department must withhold the information we have marked pursuant to section 552.101 in conjunction with common-law privacy. The department must withhold the additional information we have marked under section 552.117(a)(2) 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, toll free at (888) 672-6787.

Sincerely,



Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/jb

⁵We note, however, because portions of the submitted information may be confidential with respect to the general public, if the department receives another request for this information from an individual other than this requestor, the department must again seek a ruling from this office.

Ref: ID# 375007

Enc. Submitted documents

c: Requestor
(w/o enclosures)