



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 10, 2010

Mr. John Ohnemiller
First Assistant City Attorney
City of Midland
P.O. Box 1152
Midland, Texas 79702-1152

OR2010-18533

Dear Mr. Ohnemiller:

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# 402657.

The City of Midland and the Midland Police Department (collectively the "city") received requests from two requestors for personnel information relating to a named city police officer whose employment was terminated. You state some of the requested information has been released. You claim the remaining requested information is excepted from disclosure under sections 552.101 and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the information you submitted.

We first note some of the submitted information was the subject of a previous request, as a result of which this office issued Open Records Letter No. 2010-18171 (2010). In the previous ruling, we concluded the information in question is not protected by common-law privacy under section 552.101 of the Government Code and must be released. You do not indicate there has been any change in the law, facts, and circumstances on which the previous ruling is based. We therefore conclude the city must release the information we have marked in accordance with Open Records Letter No. 2010-18171.¹ See Gov't Code § 552.301(a);

¹As we are able to make this determination, we need not address your arguments against disclosure of the marked information.

Open Records Decision No. 673 at 6-7 (2001) (listing elements of first type of previous determination under Gov't Code § 552.301(a)).

Next, we address your claims for the remaining information at issue. 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 common-law privacy, which protects information that is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and of no legitimate public interest. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Common-law privacy encompasses the specific types of information held to be intimate or embarrassing in *Industrial Foundation*. *See id.* at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). This office has determined other types of information also are private under section 552.101. *See generally* Open Records Decision No. 659 at 4-5 (1999) (summarizing information attorney general has held to be private). You contend some of the remaining information at issue, which you have marked, is protected by common-law privacy. We agree the information in question is highly intimate or embarrassing and not a matter of legitimate public interest. *See* Open Records Decision No. 393 (1983) (common-law privacy protects name of every victim of serious sexual offense). We therefore conclude the city must withhold the remaining information you have marked under section 552.101 of the Government Code in conjunction with common-law privacy.

You also claim section 552.117 of the Government Code. Section 552.117(a)(2) excepts from disclosure the home address, home telephone number, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the officer complies with sections 552.024 or 552.1175 of the Government Code. *See* Gov't Code § 552.117(a)(2). Section 552.117(a)(2) adopts the definition of peace officer found at article 2.12 of the Code of Criminal Procedure. Section 552.117(a)(2) protects a peace officer's personal cellular telephone number if the officer pays for the cellular telephone service with his personal funds. *See* Open Records Decision No. 670 at 6 (2001) (Gov't Code § 552.117(a)(2) excepts from disclosure peace officer's cell phone or pager number if officer pays for cell phone or pager service); *but see* Open Records Decision No. 506 at 5-6 (1988) (statutory predecessor to Gov't Code § 552.117 not applicable to numbers for cellular mobile phones installed in county officials' and employees' private vehicles and intended for official business). We note the submitted information pertains to an individual whose employment as a police officer was terminated. Nevertheless, if the individual concerned is still a peace officer, then the information we have marked under section 552.117 must be withheld under section 552.117(a)(2), including the individual's cellular telephone number if he pays for the cellular telephone service with his personal funds. But if the individual concerned is no longer a peace officer, then the marked information may not be withheld under section 552.117(a)(2).

If the individual concerned is no longer a peace officer, the marked information may be protected by section 552.117(a)(1). Section 552.117(a)(1) excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former employee of a governmental body who requests that this information be kept confidential under section 552.024. *See* Gov't Code §§ 552.117(a)(1), .024. Section 552.117(a)(1) encompasses a current or former employee's personal cellular telephone number if the employee pays for the cellular telephone service with his or her personal funds. *See* ORD 506 at 5-6. Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Information may only be withheld under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee who did not timely request confidentiality under section 552.024. Thus, to the extent the individual concerned timely requested confidentiality under section 552.024, the information we have marked under section 552.117 must be withheld under section 552.117(a)(1), including the personal cellular telephone number if the individual pays for the cellular telephone service with his personal funds. The marked information may not be withheld under section 552.117(a)(1) to the extent confidentiality was not timely requested.

We note the information at issue also includes the individual's personal e-mail address. Section 552.137 of the Government Code provides that "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]," unless the owner of the e-mail address has affirmatively consented to its public disclosure or the e-mail address falls within the scope of section 552.137(c).² Gov't Code § 552.137(a)-(c). The city must withhold the e-mail address we have marked under section 552.137 of the Government Code unless the individual concerned has affirmatively consented to its public disclosure.³

In summary: (1) the city must release the marked information encompassed by Open Records Letter No. 2010-18171 in accordance with the previous ruling; (2) the city must withhold the remaining information you have marked under section 552.101 of the Government Code in conjunction with common-law privacy; (3) the information we have marked under section 552.117 of the Government Code must be withheld under section 552.117(a)(2) if

²Unlike other exceptions to disclosure under the Act, this office will raise section 552.137 on behalf of a governmental body, as this exception is mandatory and may not be waived. *See* Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

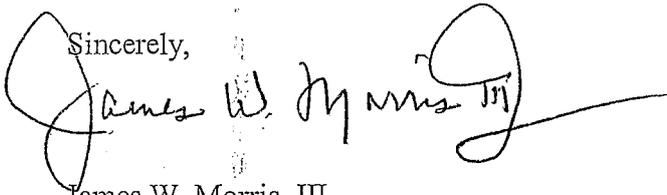
³We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137, without the necessity of requesting an attorney general decision.

the individual concerned is still a peace officer, including his cellular telephone number if he pays for the cellular telephone service with his personal funds; (4) to the extent the individual concerned timely requested confidentiality under section 552.024 of the Government Code, the information we have marked under section 552.117 must be withheld under section 552.117(a)(1), including the cellular telephone number if the individual pays for the cellular telephone service; and (5) the city must withhold the e-mail address we have marked under section 552.137 of the Government Code unless the individual concerned has consented to its disclosure. Any information at issue not protected by sections 552.101, 552.117(a)(2), 552.117(a)(1), or 552.137 of the Government Code 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, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink that reads "James W. Morris, III". The signature is written in a cursive style with a large, looping initial "J" and a long horizontal flourish extending to the right.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/em

Ref: ID# 402657

Enc: Submitted documents

c: Requestors
(w/o enclosures)