



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 3, 2011

Mr. John Batoon
Assistant City Attorney
City of El Paso
2 Civic Center Plaza, 9th Floor
El Paso, Texas 79901

OR2011-01793

Dear Mr. Batoon:

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# 408002.

The City of El Paso (the "city") received a request for an arrest affidavit pertaining to a specified incident and the entire internal affairs file for a named officer. You state that the requested arrest affidavit does not exist.¹ You claim that the submitted 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 acknowledge that the city failed to meet the deadline prescribed by section 552.301(b) of the Government Code in requesting an open records decision from this office. *See Gov't Code* § 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 information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See 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, 381-82 (Tex. App.—Austin 1990, no writ) (must make compelling demonstration to overcome presumption of openness pursuant to

¹We note the 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).

statutory predecessor to section 552.302 of the Government Code); *see also* Open Records Decision No. 630 (1994). Generally, a compelling reason to withhold information may be demonstrated by showing the information is made confidential by another source of law or third party interests are affected. *See* ORD 630. In acknowledging your failure to comply with section 552.301, you state that a third party's interests provide a compelling reason to withhold the submitted information from disclosure. However, the third party you identify is the El Paso Police Department, which is a department of the city. Because the city is the governmental entity that initially received the request and subsequently failed to comply with section 552.301(b), the city's own interests cannot provide a compelling reason to overcome the presumption that the information at issue is public. Further, although you raise section 552.108 of the Government Code as an exception to disclosure of the information that was not timely submitted, this exception is discretionary in nature. It serves only to protect a governmental body's interests and may be waived; as such, it does not constitute a compelling reason to withhold information for purposes of section 552.302. *See* Open Records Decisions Nos. 665 at 2 n.5 (2000) (discretionary exceptions in general), 177 (1977) (statutory predecessor to section 552.108 discretionary). Accordingly, the city may not withhold the submitted information under section 552.108. However, because section 552.101 can provide a compelling reason for non-disclosure, we will address your argument under this exception for the submitted information. Further, we will address the applicability of sections 552.102, 552.117, and 552.130 to the submitted information.²

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 the doctrine of common-law privacy, which 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). You argue the submitted information should be withheld in its entirety under section 552.101 in conjunction with common-law privacy. The submitted information pertains to an alleged sexual assault. Generally, only information that either identifies or tends to identify a victim of sexual assault or other sex-related offense must be withheld under common-law privacy. *See* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). However, a governmental body is required to withhold all of the information at issue when the requestor knows the identity of the alleged sexual assault victim. *See* ORD 393. Although you seek to withhold the submitted information in its entirety, you have not demonstrated, nor does the information reflect, the requestor knows the identity of the alleged sexual assault victim. Thus, the city may not withhold the submitted information in its entirety under common-law privacy. However, the city must withhold the identifying information of the victim, which we have marked, under section 552.101 in conjunction with common-law privacy. You have failed to demonstrate how any of the remaining information

²The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

is highly intimate or embarrassing and not of legitimate public interest. Therefore, none of the remaining information may be withheld on the basis of common-law privacy.

We note the submitted information contains medical records, access to which is governed by the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. *See* Occ. Code §§ 151.001-165.160. Section 159.002 of the MPA provides in relevant part:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Id. § 159.002(b), (c). This office has concluded that, when a file is created as the result of a hospital stay, all the documents in the file that relate to diagnosis and treatment constitute either physician-patient communications or records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician. *See* Open Records Decision No. 546 (1990). We have marked medical records in the submitted information that may only be released in accordance with the MPA. *See* Open Records Decision No. 598 (1991).

We note the submitted information includes information that is excepted from disclosure under section 552.102(a) of the Government Code. Section 552.102(a) excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). The Texas Supreme Court recently held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex. & The Dallas Morning News, Ltd.*, No. 08-0172, 2010 WL 4910163 (Tex. Dec. 3, 2010) (Dec. 20, 2010, motions for reconsideration and rehearing pending). Having carefully reviewed the information at issue, we have marked the information that must be withheld under section 552.102(a) of the Government Code.

Section 552.117(a)(2) of the Government Code 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 peace officer complies with sections 552.024 or 552.1175 of the Government Code. 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. The city must withhold the information we have marked under section 552.117(a)(2).

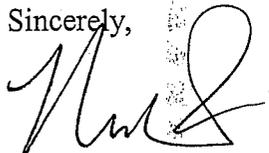
Section 552.130 of the Government Code excepts from disclosure "information [that] relates to . . . a motor vehicle operator's or driver's license or permit issued by an agency of this state[.]" *Id.* § 552.130(a)(1). Accordingly, the city must withhold the Texas driver's license information we have marked pursuant to section 552.130.³

In summary, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The marked medical records may only be released in accordance with the MPA. The city must withhold the information we have marked under section 552.102(a) of the Government Code. The city must withhold the information we have marked under section 552.117(a)(2) of the Government Code. The city must withhold the information we have marked under section 552.130 of the Government Code. The remaining information must be released.⁴

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,



Nneka Kanu
Assistant Attorney General
Open Records Division

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³We note that Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including a Texas driver's license number under section 552.130 of the Government Code, without the necessity of requesting an attorney general decision.

⁴We note that the remaining information includes 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. Gov't Code § 552.147(b).

Ref: ID# 408002

Enc. Submitted documents

c: Requestor
(w/o enclosures)