



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 9, 2013

Ms. Donna L. Johnson
Counsel for the City of Jersey Village
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2727 Allen Parkway, Suite 600
Houston, Texas 77019

OR2013-07702

Dear Ms. Johnson:

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# 486811 (Ref No. JV13-069).

The City of Jersey Village (the "city"), which you represent, received a request for all investigation files, including information pertaining to performance, of a named former police officer. You state the city will redact information as permitted by Open Records Decision No. 684 (2009) and sections 552.130 and 552.147 of the Government Code.¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.108, 552.117, 552.1175, and 552.130 of the Government Code. Additionally, you state release of this information may implicate the interests of a

¹Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including L-2 and L-3 declarations under section 552.101 of the Government Code in conjunction with section 1701.306(b) of the Occupations Code and Texas license plate numbers under section 552.130(a)(2) of the Government Code, without the necessity of requesting an attorney general decision. Section 552.130(c) of the Government Code allows a governmental body to redact the information described in subsections 552.130(a)(1) and (a)(3) without the necessity of seeking a decision from the attorney general. *See* Gov't Code § 552.130(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). *See id.* § 552.130(d), (e). 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 an attorney general decision under the Act. *See id.* § 552.147(b).

third party. Accordingly, you have notified the interested third party of the request for information and of his right to submit arguments to this office as to why the information should not be released.² *See* Gov't Code § 552.304 (providing interested party may submit comments stating why information should or should not be released). We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. This section encompasses information protected by other statutes, such as section 261.201(a) of the Family Code, which provides:

(a) Except as provided by Section 261.203, the following information is confidential, is not subject to public release under chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

- (1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and
- (2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a). You assert some of the submitted information is confidential under section 261.201 of the Family Code. Upon review, we find the information we have marked was used or developed in an investigation of alleged or suspected child abuse under chapter 261 of the Family Code, so as to fall within the scope of section 261.201(a). *See id.* § 261.001(1)(E) (defining "abuse" for purposes of chapter 261 of the Family Code as including offense of sexual assault under section 22.011 of the Penal Code); *see also* Penal Code § 22.011 (defining "child" for purposes of sexual assault of a child as person under 17 years of age). You have not indicated the investigating agency has adopted a rule that governs the release of this type of information. Therefore, we assume no such regulation exists. Given that assumption, the information we have marked is confidential under section 261.201 of the Family Code and must be withheld under section 552.101 of the Government Code.³ However, you have failed to demonstrate any portion of the remaining information was used or developed in an investigation of alleged or suspected child abuse

²As of the date of this letter, we have not received comments from any third party.

³As our ruling is dispositive for this information, we need not address your remaining arguments against its disclosure.

under chapter 261. Thus, we conclude that no portion of the remaining information is confidential under section 261.201 of the Family Code and none of the remaining information may be withheld under section 552.101 of the Government Code on that basis.

Section 552.101 of the Government Code also encompasses section 1701.454 of the Occupations Code, which governs the public availability of information submitted to the Texas Commission on Law Enforcement Officer Standards and Education (“TCLEOSE”) under subchapter J of chapter 1701 of the Occupations Code. Section 1701.454 provides as follows:

(a) All information submitted to the [TCLEOSE] under this subchapter is confidential and is not subject to disclosure under Chapter 552, Government Code, unless the person resigned or was terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses.

(b) Except as provided by this subchapter, a [TCLEOSE] member or other person may not release information submitted under this subchapter.

Occ. Code § 1701.454. The remaining information includes an F-5 form that was submitted to TCLEOSE pursuant to subchapter J of chapter 1701 of the Occupations Code. You state the information at issue is not subject to release under this section. Further, the information at issue does not indicate the named officer resigned or was terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses. Based on your representation and our review, the city must withhold the submitted F-5 form, which we have marked, under section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code.⁴ However, none of the remaining information is confidential under section 1701.454 and the city may not withhold it under section 552.101 on that ground.

Section 552.101 of the Government Code also encompasses section 159.002 of the Occupations Code. Access to medical records is governed by the Medical Practice Act (the “MPA”), subtitle B of title 3 of the Occupations Code. *See id.* §§ 151.001-168.202. Section 159.002 of the MPA provides, in part:

(a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.

⁴As our ruling is dispositive for this information, we need not address your remaining arguments against its disclosure.

(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(a)-(c). Information subject to the MPA includes both medical records and information obtained from those medical records. *See id.* § 159.002, .004; Open Records Decision No. 598 (1991). This office has concluded the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). Upon review, we find none of the remaining information consists of records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that were created by a physician or someone under the supervision of a physician or information obtained from those records. Therefore, none of the remaining information constitutes confidential medical records and none of it may be withheld under section 552.101 in conjunction with the MPA.

Section 552.102(a) of the Government Code 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 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.*, 354 S.W.3d 336 (Tex. 2010). Having carefully reviewed the information at issue, we find the date of birth we have marked must be withheld under section 552.102(a) of the Government Code.

Section 552.108(b)(1) of the Government Code excepts from disclosure "[a]n internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution . . . if . . . release of the internal record or notation would interfere with law enforcement or prosecution[.]" Gov't Code § 552.108(b)(1); *see also* Open Records Decision No. 531 at 2 (1989) (quoting *Ex parte Pruitt*, 551 S.W.2d 706, 710 (Tex. 1977)). Section 552.108(b)(1) is intended to protect "information which, if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate the laws of this State." *City of Fort Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no pet.). To demonstrate the applicability of this exception, a governmental body must meet its burden of explaining how and why release of the requested information would interfere with law enforcement and crime prevention. Open Records Decision No. 562 at 10 (1990). This office has concluded section 552.108(b) excepts from

public disclosure information relating to the security or operation of a law enforcement agency. *See, e.g.*, Open Records Decision Nos. 531 (release of detailed use of force guidelines would unduly interfere with law enforcement), 252 (1980) (section 552.108 designed to protect investigative techniques and procedures used in law enforcement), 143 (1976) (disclosure of specific operations or specialized equipment directly related to investigation or detection of crime may be excepted). Section 552.108(b)(1) is not applicable, however, to generally known policies and procedures. *See, e.g.*, ORDs 531 at 2-3 (Penal Code provisions, common law rules, and constitutional limitations on use of force not protected), 252 at 3 (governmental body failed to indicate why investigative procedures and techniques requested were any different from those commonly known). The determination of whether the release of particular records would interfere with law enforcement is made on a case-by-case basis. Open Records Decision No. 409 at 2 (1984).

You state the information you have marked reveals the location of a company that employs off-duty police officers for security. You state the release of such information would unduly interfere with law enforcement and may jeopardize officer safety. Upon review, we find the city has not established the release of the information at issue would interfere with law enforcement; therefore, the city may not withhold any of it under section 552.108(b)(1).

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of current or former officials or employees of a governmental body who request this information be kept confidential under section 552.024 of the Government Code. *See Gov't Code* §§ 552.024, .117. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See Open Records Decision No. 530 at 5 (1989)*. Thus, information may be withheld under section 552.117(a)(1) only 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 under section 552.024 the information be kept confidential. We have marked personal information pertaining to the named former police officer. You state, and the submitted information indicates, this individual is no longer a licensed peace officer. The city has submitted the individual's election form in which he timely requested confidentiality of his home address and telephone number, social security number, and information that reveals whether he has family members. Therefore, we conclude the city must withhold the information we have marked under section 552.117(a)(1) of the Government Code.⁵ However, none of the remaining information constitutes the home address and telephone number, social security number, or family member information of a current or former official

⁵As our ruling is dispositive for this information, we need not address your remaining arguments against its disclosure.

or employee of the city. Accordingly, none of the remaining information may be withheld under section 552.117(a)(1) of the Government Code.

Section 552.117(a)(2) of the Government Code excepts from public disclosure the home address, home telephone number, emergency contact information, 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 and 552.1175 of the Government Code. *See* Gov't Code § 552.117(a)(2). Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. Some of the remaining information pertains to a licensed peace officer. Accordingly, the city must withhold the information we have marked under section 552.117(a)(2) of the Government Code. However, none of the remaining information constitutes the home address and telephone number, emergency contact information, social security number, or family member information of a peace officer. Accordingly, none of the remaining information may be withheld under section 552.117(a)(2) of the Government Code.

Section 552.1175 of the Government Code protects the home address, home telephone number, emergency contact information, social security number, and family member information of certain individuals, when that information is held by a governmental body in a non-employment capacity and the individual elects to keep the information confidential. *See id.* § 552.1175. Section 552.1175 applies, in part, to "peace officers as defined by Article 2.12, Code of Criminal Procedure." *Id.* § 552.1175(a)(1). Upon review, we find none of the remaining information is subject to section 552.1175 and it may not be withheld on that basis.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information if (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *See Indus. Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both elements of the test must be established. *Id.* at 681-82. The type of information considered intimate or 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. *Id.* at 683. In addition, this office has found some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Upon review, we find a portion of the submitted video recording contains information that is highly intimate or embarrassing and of no legitimate public interest. You inform us the city does not have the technological capability to redact

information from the submitted video recording. As such, the city must withhold the submitted video recording in its entirety pursuant to section 552.101 in conjunction with common-law privacy.⁶ See Open Records Decision No. 364 (1983). A portion of the remaining information is also highly intimate or embarrassing and of no legitimate public interest. However, we note that information pertains to an individual who has been de-identified and whose privacy interests are thus protected. Further, the city has failed to demonstrate any of the remaining information is highly intimate or embarrassing and a matter of no legitimate public interest. Therefore, no portion of the remaining information may be withheld under section 552.101 in conjunction with common-law privacy.

Section 552.101 of the Government Code also encompasses the constitutional right to privacy. Constitutional privacy protects two kinds of interests. See *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7. The first is the interest in independence in making certain important decisions relating to the “zones of privacy” pertaining to marriage, procreation, contraception, family relationships, and child rearing and education the United States Supreme Court has recognized. See *Fadjo v. Coon*, 633 F.2d 1172 (5th Cir. 1981); ORD 455 at 3-7. The second constitutionally protected privacy interest is in freedom from public disclosure of certain personal matters. See *Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985); ORD 455 at 6-7. This aspect of constitutional privacy balances the individual’s privacy interest against the public’s interest in the information. See ORD 455 at 7. Constitutional privacy under section 552.101 is reserved for “the most intimate aspects of human affairs” and the scope of information protected is narrower than that under the common-law doctrine of privacy. *Id.* at 5 (internal quotations omitted) (quoting *Ramie*, 765 F.2d at 492). Upon review, we find the city has failed to demonstrate how any of the remaining information falls within the constitutional zones of privacy or implicates an individual’s privacy interests for purposes of constitutional privacy. Therefore, none of the remaining information may be withheld under section 552.101 in conjunction with constitutional privacy.

Section 552.130 of the Government Code excepts from public disclosure information relating to a motor vehicle title or registration issued by an agency of this state or another state or country. See Gov’t Code § 552.130(a)(2). You state, and we agree, the submitted audio recording contains motor vehicle record information excepted from disclosure under section 552.130(a)(2). You state the city does not have the technological ability to redact this information from the recording. However, because the city has the ability to copy the audio recording in order to submit it for our review, we believe the city has the capacity to produce a copy of the audio recording without the motor vehicle record information we have indicated. Therefore, we find the city must withhold the motor vehicle record information we have indicated in the submitted audio recording and the motor vehicle record information

⁶As our ruling is dispositive for this information, we need not address your remaining argument against its disclosure.

we have marked in the remaining information under section 552.130 of the Government Code.

In summary, the city (1) must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code; (2) must withhold the submitted F-5 form we have marked under section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code; (3) must withhold the date of birth we have marked under section 552.102(a) of the Government Code; (4) must withhold the information we have marked under section 552.117 of the Government Code; (5) must withhold the submitted video recording in its entirety under section 552.101 of the Government Code in conjunction with common-law privacy; (6) must withhold the motor vehicle record information we have indicated in the submitted audio recording and we have marked in the remaining information under section 552.130 of the Government Code; and (7) must release the remaining information.

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,



Michelle R. Garza
Assistant Attorney General
Open Records Division

MRG/som

Ref: ID# 486811

Enc. Submitted documents

c: Requestor
(w/o enclosures)