



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 7, 2013

Mr. Matthew B. Cross
Assistant City Attorney
City of El Paso
P.O. Box 1890
El Paso, Texas 79950-1890

OR2013-09571

Dear Mr. Cross:

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# 489417.

The City of El Paso (the "city") received a request for all information concerning two named individuals, with 19 specified categories including all arrest records for the individuals. You state the city will release some information. You state the city does not maintain information responsive to several of the requested categories.¹ You claim the remaining requested information is excepted from disclosure under sections 552.101 and 552.130 of the

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).

Government Code.² We have considered the exceptions you claim and reviewed the submitted representative sample of information.³

Initially, we note some of the information, which we have marked, was created after the date the city received the request for information. Thus, this information is not responsive to the request. The city is not required to release information that is not responsive to a request, and our office will not address the public availability of information that is not responsive.

Next, we 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. *See* Gov't Code § 552.301(a), (e)(1)(D). You do not state the city is authorized to withhold the information it has redacted without first seeking a ruling from this office. *See id.* § 552.301(a); Open Records Decision No. 673 (2000). Therefore, the city must submit this information in a manner that enables this office to determine whether it falls within the scope of an exception to disclosure. Because we are unable to discern the nature of the redacted information, the city has failed to comply with section 552.301 of the Government Code, and such information is presumed public under section 552.302 of the Government Code. *See* Gov't Code § 552.302. Accordingly, the city may not withhold the information you have redacted and the city must release it.

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. Section 552.101 encompasses the doctrine of common-law privacy, which protects information if it (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). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681–82. A compilation of an individual's criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *Cf. U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (when considering prong regarding individual's privacy interest, court recognized distinction between public records found in courthouses files and

²Although you do not argue section 552.130 of the Government Code, we base our statement on the markings in the submitted documents.

³We assume 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 those records contain substantially different types of information than those submitted to this office.

local police stations and compiled summary of information and noted that individual has significant privacy interest in compilation of one's criminal history). Furthermore, we find a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. We agree a portion of the request requires the city to compile unspecified criminal history records concerning the individuals named in the request, and thus, implicates these individuals' right to privacy. Therefore, to the extent the city maintains law enforcement records depicting these named individuals as suspects, arrestees, or criminal defendants, the city must withhold any such information under section 552.101 in conjunction with common-law privacy.

We note you have submitted records that do not list either of the named individuals as a suspect, arrestee, or criminal defendant. This information does not require the city to compile a criminal history, and it may not be withheld under section 552.101 of the Government Code as a criminal history compilation. However, this office has found some kinds of medical information or information indicating disabilities or specific illnesses is protected by 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 the medical information we marked is highly intimate or embarrassing and of no legitimate public interest. The city must withhold this information under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.101 of the Government Code also encompasses the doctrine of constitutional privacy. The constitutional right to privacy protects two types of interests. *See* Open Records Decision No. 600 at 4 (1992) (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985)). The first is the interest in independence in making certain important decisions related to the "zones of privacy" recognized by the United States Supreme Court. *Id.* The zones of privacy recognized by the United States Supreme Court are matters pertaining to marriage, procreation, contraception, family relationships, and child rearing and education. *See id.* The second interest is the interest in avoiding disclosure of personal matters. The test for whether information may be publicly disclosed without violating constitutional privacy rights involves a balancing of the individual's privacy interests against the public's need to know information of public concern. *See* Open Records Decision No. 455 at 5-7 (1987) (citing *Fadjo v. Coon*, 633 F.2d 1172, 1176 (5th Cir. 1981)). The scope of information considered private under the constitutional doctrine is far narrower than under the common-law right to privacy; the material must concern the "most intimate aspects of human affairs." *See id.* at 5 (citing *Ramie*, 765 F.2d at 492). Although you raise constitutional privacy, you have not submitted any arguments to support this exception. Accordingly, the city may not withhold the remaining information under section 552.101 of the Government Code in conjunction with constitutional privacy.

Section 552.101 of the Government Code also encompasses section 772.318 of the Health and Safety Code. Section 772.318 applies to an emergency 9-1-1 district established in accordance with chapter 772 of the Health and Safety Code, and makes confidential the originating telephone numbers and addresses of 9-1-1 callers that are furnished by a service supplier. *See* Open Records Decision No. 649 (1996). You state the city has marked the information that is subject to section 772.318. However, upon review, we have not found any such marked information. Accordingly, the city may not withhold any information under section 552.101 of the Government Code in conjunction with section 772.318 of the Health and Safety Code.

Section 552.130 of the Government Code excepts from disclosure information relating to a motor vehicle title or registration issued by an agency of this state or another state or country. Gov't Code § 552.130(a)(2). Accordingly, the city must withhold the license plate information you marked, and the additional information we marked, under section 552.130 of the Government Code.⁴

In summary, to the extent the city maintains law enforcement records depicting the named individual as a suspect, arrestee, or criminal defendant, the city must withhold any such information under section 552.101 in conjunction with common-law privacy. The city must withhold the medical information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. The city must withhold the license plate information you marked, and the additional information we marked, under section 552.130 of the Government Code. The city must release the remaining responsive information, including the information you have redacted.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,

⁴We note section 552.130(c) of the Government Code allows a governmental body to redact the information described in section 552.130(a) without the necessity of seeking a decision from the attorney general. *See* Act of May 6, 2013, 83rd Leg., R.S., S.B. 458, § 1 (to be codified as an amendment to 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* Gov't Code § 552.130(d), (e).

⁵We note the remaining information contains a social security number. Section 552.147 of the Government Code permits a governmental body to redact the social security number of a living person without requesting a decision from this office. *See* Gov't Code § 552.147(b).

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, appearing to read "Neal Falgoust". The signature is fluid and cursive, with a large initial "N" and a long, sweeping underline.

Neal Falgoust
Assistant Attorney General
Open Records Division

NF/ag

Ref: ID# 489417

Enc. Submitted documents

c: Requestor
(w/o enclosures)