



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

July 22, 2020

Ms. Kelley K. Messer
First Assistant City Attorney
City of Abilene
P.O. Box 60
Abilene, Texas 79604-0060

OR2020-18216

Dear Ms. Messer:

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# 836686 (ORR# 20-825).

The City of Abilene (the "city") received a request for communications involving named city employees regarding test results for a specified disease at two specified locations. You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code. Additionally, you state release of some of the submitted information may implicate the interests of the United States Air Force (the "Air Force"). Accordingly, you state, and provide documentation showing, the city notified the Air Force of the request for information and of its right to submit arguments to this office as to why the submitted information should not be released. *See Gov't Code* § 552.304 (interested party may submit comments stating why information should or should not be released). We have received comments from the Air Force. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note you have not submitted information related to test results at one of the specified locations. To the extent any information responsive to this portion of the request existed on the date the city received the request, we assume the city has released it. If the city has not released any such information, it must do so at this time. *See id.* §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes no exceptions apply to requested information, it must release information as soon as possible).

Next, we note some of the submitted information, which we marked, is not responsive to the instant request for information because it was created after the date of the instant request. This ruling does not address the public availability of any information that is not

responsive to the request and the city is not required to release such information in response to this request.

Section 552.101 of the Government Code excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. The Air Force asserts portions of the responsive information are protected by section 552 of title 5 of the United States Code, the federal Freedom of Information Act (“FOIA”). This office has repeatedly held that the transfer of confidential information between governmental agencies does not destroy the confidentiality of that information. *See* Attorney General Opinions H-917 (1976), H-836 (1974); Open Records Decision Nos. 561 (1990), 414 (1984), 388 (1983), 272 (1981), 183 (1978). These opinions recognize the need to maintain an unrestricted flow of information between state agencies. In Open Records Decision No. 561, we considered whether the same rule applied regarding information deemed confidential by a federal agency. In that decision, we noted the general rule that FOIA applies only to federal agencies and does not apply to records held by state agencies. ORD 561 at 6. Further, we stated information is not confidential when in the hands of a Texas agency simply because the same information is confidential in the hands of a federal agency. *Id.* However, in the interests of comity between state and federal authorities and to ensure the flow of information from federal agencies to Texas governmental bodies, we concluded, “when information in the possession of a federal agency is ‘deemed confidential’ by federal law, such confidentiality is not destroyed by the sharing of the information with a governmental body in Texas. In such an instance, [section 552.101] requires a state agency to respect the confidentiality imposed on the information by federal law.” *Id.* at 7.

The Air Force asserts a portion of the responsive information was provided to the city for official use only. Upon review, we find the information at issue was provided to the city by the Air Force. The Air Force informs this office it considers the information at issue confidential under the provisions found in sections 552(b)(1) and 552(b)(5) of title 5 of the United States Code. *See* 5 U.S.C. §§ 552(b)(1), (5). Therefore, we conclude the city must withhold the information we marked under section 552.101 of the Government Code in conjunction with federal law.¹

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) 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 satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in the *Industrial Foundation* decision. *Id.* at 683. Upon review, we find none of the remaining responsive information satisfies the standard articulated by the Texas Supreme Court in the *Industrial Foundation* decision. Accordingly, the remaining responsive information is not confidential under common-law privacy, and the city may not withhold it under section 552.101 on that ground.

¹ As our ruling is dispositive, we need not address the remaining argument against disclosure of this information.

Section 552.1175 of the Government Code protects the home address, home telephone number, emergency contact information, date of birth, 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.² *See* Gov't Code § 552.1175. Section 552.1175 applies, in part, to “a current or former member of the United States Army, Navy, Air Force, Coast Guard, or Marine Corps, an auxiliary service of one of those branches of the armed forces, or the Texas military forces, as that term is defined by [s]ection 437.001 [.]” *Id.* § 552.1175(a)(15). Section 552.1175 also encompasses a personal cellular telephone number, unless the cellular telephone service is paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 is not applicable to cellular telephone numbers paid for by governmental body and intended for official use).

Thus, to the extent the information we marked pertains to an individual who is subject to section 552.1175(a)(15), the individual elects to restrict access to the information in accordance with section 552.1175(b), and the cellular telephone service is not paid for by a governmental body, the city must withhold the information we marked under section 552.1175 of the Government Code. However, if the individual does not elect to restrict access to his information in accordance with section 552.1175(b) or the cellular telephone service is paid for by a governmental body, the information at issue may not be withheld under section 552.1175 of the Government Code.

We note some of the remaining responsive information may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, the city must withhold the information we marked under section 552.101 of the Government Code in conjunction with federal law. To the extent the information we marked pertains to an individual who is subject to section 552.1175(a)(15) of the Government Code, the individual elects to restrict access to the information in accordance with section 552.1175(b) of the Government Code, and the cellular telephone service is not paid for by a governmental body, the city must withhold the information we marked under section 552.1175 of the Government Code. The city must release the remaining responsive information; however, any information that is subject to copyright may be released only in accordance with copyright law.

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.

² The 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).

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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

Deborah Southerland
Assistant Attorney General
Open Records Division

DS/rm

Ref: ID# 836686

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Third Party
(w/o enclosures)