



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 29, 2004

Mr. John T. Patterson
Assistant City Attorney
City of Waco
P. O. Box 2570
Waco, TX 76702-2570

OR2004-10039

Dear Mr. Patterson:

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# 213569.

The Waco Police Department (the "department") received a request for information pertaining to a police report, warrant and an arrest form for a named individual. You state that the department will release some of the requested information, but claim that some of the submitted information is excepted from disclosure under sections 552.101, 552.108, 552.117 and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we address your assertion that the information submitted as Exhibit 6 is a portion of the requested police report that was also the subject of a previous ruling issued by this office as Open Records Letter No. 2004-6523 (2004). In that ruling, this office concluded that, with the exception of basic information, section 552.108 authorized the department to withhold the information at issue from disclosure. This office also concluded that the department must withhold some of the basic information at issue on common law privacy grounds. However, you inform this office that the department "released the entire report (with certain redactions) instead of just releasing the basic information with certain redactions required by common-law privacy." We note that if the department has previously voluntarily released the information at issue to the public, it may not now withhold such information under section 552.108. *See* Gov't Code § 552.007 (prohibiting selective disclosure of information); Open Records Decision Nos. 490 (1988), 463 (1987) (if governmental body voluntarily releases information to one member of public, the

predecessor to the Act's exceptions to disclosure are waived unless information is deemed confidential), 177 (1977) (governmental body may waive statutory predecessor to section 552.108). Therefore, as relevant facts have changed since the issuance of Open Records Letter No. 2004-6523, we conclude that the department may not continue to rely on that ruling with respect to the applicability of section 552.108 to the information in Exhibit 6. We note, however, that section 552.101 may be applicable to some of the information in Exhibit 6. Accordingly, we will address the applicability of this exception.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses the common law right of 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), *cert. denied*, 430 U.S. 931 (1977). The submitted information pertains to an alleged sexual assault. In Open Records Decision No. 339 (1982), this office determined that a sexual assault victim has a common law privacy interest which prevents disclosure of information that would identify the victim. *See also Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, *writ denied*) (identity of witnesses to and victims of sexual harassment was highly intimate or embarrassing information and public did not have legitimate interest in such information). You claim that Exhibit 6, which pertains to a sexual assault, is confidential in its entirety under common law privacy. You base this argument on the fact that the victim in this instance knew the alleged perpetrator. However, this office has found that a governmental body must withhold the entire report when the *requestor* knows the identity of the alleged victim. Open Records Decisions Nos. 393 (1983), 339 (1982); *see Morales v. Ellen*, 840 S.W.2d 519 (Tex.App.—El Paso 1992, *writ denied*); Open Records Decision No. 440 (1986). Here, there is no indication that the requestor knows the name of the alleged victim; thus, the report may not be withheld in its entirety under section 552.101 in conjunction with common law privacy. However, we have marked identifying information of the victim that must be withheld in Exhibit 6 under section 552.101 and common law - privacy.

You also claim that Exhibit 8 is confidential in its entirety. However, as previously addressed, a governmental body must withhold an entire report when the *requestor* knows the identity of the alleged victim, of which there is no indication in this instance. Therefore, Exhibit 8 may not be withheld in its entirety under section 552.101 in conjunction with common law privacy.

You state that Exhibit 8 consists of additional information that has been added to the original police report subsequent to the date of the request that was the subject of Open Records Letter No. 2004-6523. You claim that the information submitted as Exhibit 8 is excepted from disclosure pursuant to section 552.108 of the Government Code, which excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would

interfere with the detection, investigation, or prosecution of crime.” Gov’t Code § 552.108(a)(1). Generally, a governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See* Gov’t Code §§ 552.108(a)(1), (b)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state that the information submitted as Exhibit 8 relates to an open and pending investigation, and that release of this information would interfere with the department’s investigation. Based upon your representations, we conclude that release of Exhibit 8 would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases). Thus, section 552.108(a)(1) is applicable to this information.

Section 552.108 does not, however, except from disclosure “basic information about an arrested person, an arrest, or a crime.” Gov’t Code § 552.108(c). Section 552.108(c) refers to the basic front-page information held to be public in *Houston Chronicle*. *See* Open Records Decision No. 127 at 3-4 (1976) (summarizing types of information deemed public by *Houston Chronicle*). However, in this case, some of the basic information is excepted from disclosure pursuant to section 552.101 of the Government Code, which 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. Information is protected from disclosure by the common law right to privacy when (1) it is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities and (2) there is no legitimate public interest in its disclosure. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976) (concluding that, among other things, 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 is protected by common law privacy). We have marked the types of basic information that must not be released to the requestor pursuant to section 552.101 of the Government Code in conjunction with the common law right to privacy. With the exception of the remaining basic information that must be released to the requestor, we conclude that the department may withhold under section 552.108(a)(1) the information submitted in Exhibit 8 not previously released or in existence on the date of the request that was the subject of Open Records Letter No. 2004-6523.

You also claim that the arrest report submitted as Exhibit 10 submitted information contains information subject to section 552.117 of the Government Code. Section 552.117(a)(2) excepts from public disclosure a peace officer’s home address and telephone number, social security number, and family member information regardless of whether the peace officer made an election under section 552.024 of the Government Code. We note, however, that the protections of section 552.117 only apply to information that the governmental body holds in its capacity as an employer. *See* Gov’t Code § 552.117 (providing that employees of governmental entities may protect certain personal information in the hands of their

employer); *see also* Gov't Code § 552.024 (establishing election process for Gov't Code § 552.117). In this instance, the submitted information is not held by the department in its capacity as an employer. Consequently, we find that the none of the information in Exhibit 10 may be withheld under section 552.117.

However, some of the information in Exhibit 10 may be subject to section 552.1175 of the Government Code. Section 552.1175, which applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure, provides in pertinent part:

(b) Information that relates to the home address, home telephone number, or social security number of an individual to whom this section applies, or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

- (1) chooses to restrict public access to the information; and
- (2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Gov't Code § 552.1175(b). Thus, if the peace officer to whom the information in Exhibit 10 pertains elects to restrict access to this information in accordance with section 552.1175, the department must withhold this information.

Even if section 552.1175 is not applicable, the social security number in Exhibit 10 may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that the social security numbers in the file are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Public Information Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the department pursuant to any provision of law, enacted on or after October 1, 1990.

Exhibit 10 also contains fingerprint information that is subject to sections 560.001, 560.002, and 560.003 of the Government Code. These provisions provide as follows:

Sec. 560.001. DEFINITIONS. In this chapter:

(1) "Biometric identifier" means a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry.

(2) "Governmental body" has the meaning assigned by Section 552.003 [of the Government Code], except that the term includes each entity within or created by the judicial branch of state government.

Sec. 560.002. DISCLOSURE OF BIOMETRIC IDENTIFIER. A governmental body that possesses a biometric identifier of an individual:

(1) may not sell, lease, or otherwise disclose the biometric identifier to another person unless:

(A) the individual consents to the disclosure;

(B) the disclosure is required or permitted by a federal statute or by a state statute other than Chapter 552 [of the Government Code]; or

(C) the disclosure is made by or to a law enforcement agency for a law enforcement purpose; and

(2) shall store, transmit, and protect from disclosure the biometric identifier using reasonable care and in a manner that is the same as or more protective than the manner in which the governmental body stores, transmits, and protects its other confidential information.

Sec. 560.003. APPLICATION OF CHAPTER 552. A biometric identifier in the possession of a governmental body is exempt from disclosure under Chapter 552.

Gov't Code §§ 560.001, 560.002, 560.003. It does not appear to this office that section 560.002 permits the disclosure of the submitted fingerprint information. We have marked the fingerprint information in Exhibit 10 that the department must withhold under section 552.101 in conjunction with section 560.003 of the Government Code.

Lastly, you also assert that some of the information in Exhibit 10 is excepted from disclosure under section 552.130 of the Government Code. This section prohibits the release of information that relates to a motor vehicle operator's or driver's license or permit issued by an agency of this state or a motor vehicle title or registration issued by an agency of this state. *See* Gov't Code § 552.130. Accordingly, the department must withhold the driver's license information we have marked in Exhibit 10 pursuant to section 552.130 of the Government Code.

In summary, the department must withhold the information we have marked in Exhibit 6 pursuant to section 552.101 and common law privacy. With the exception of those portions of the basic information which are not confidential, the department may withhold under section 552.108(a)(1) the information in Exhibit 8 not previously released or in existence on the date of the request that was the subject of Open Records Letter No. 2004-6523. We have marked the types of basic information in Exhibit 8 which must be withheld under section 552.101 in conjunction with common law privacy. Within Exhibit 10 1) the department must withhold the submitted fingerprint information under section 552.101 in conjunction with section 560.003; 2) the department must withhold the information we have marked in Exhibit 10 under section 552.1175 if the peace officer to whom the information pertains elects to restrict access to this information; 3) the social security number may be excepted under section 552.101 in conjunction with federal law; and 4) the department must withhold the marked information under section 552.130. The remaining information must be released.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

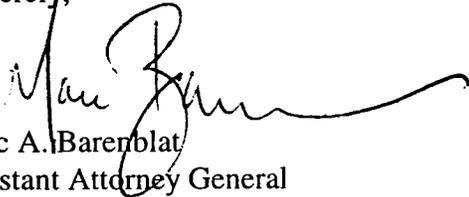
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental

body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Marc A. Barenblat
Assistant Attorney General
Open Records Division

MAB/krl

Ref: ID# 213569

Enc. Submitted documents

c: Ms. Jennifer Kent
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(w/o enclosures)