



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 28, 2006

Ms. Judith Sachitano Rawls
Assistant City Attorney
Beaumont Police Department
P. O. Box 3827
Beaumont, Texas 77704-3827

OR2006-06866

Dear Ms. Rawls:

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# 252875.

The Beaumont Police Department (the "department") received a request for 1) copies of any use of force reports since January 1, 2000; 2) any incident reports since January 1, 2000 in which officers came into contact with individuals on whom weapons were used; 3) custodial death reports; 4) reports of training injuries; and 5) the department's use of force policy guidelines. You state that the department does not possess documents responsive to portions of the request for information. We note that the Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed). You state that you have released some of the requested information to the requestor, but claim that the remaining requested 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 representative sample of information.¹

¹We assume that 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 that those records contain substantially different types of information than that submitted to this office.

Initially, we note that the submitted records include arrest warrant affidavits. Article 15.26 of the Code of Criminal Procedure states that “[t]he arrest warrant, and any affidavit presented to the magistrate in support of the issuance of the warrant, is public information, and beginning immediately when the warrant is executed the magistrate’s clerk shall make a copy of the warrant and the affidavit available for public inspection in the clerk’s office during normal business hours.” Therefore, these documents are made public under article 15.26. Exceptions to disclosure under the Act generally do not apply to information that is made public by other statutes, such as article 15.26 of the Code of Criminal Procedure. See Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Thus, if the arrest warrant affidavits were presented to a magistrate in support of the issuance of an arrest warrant, they are public and must be released to the requestor.

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. This section encompasses information protected by other statutes, such as section 143.089(g) of the Local Government Code. You state that the City of Beaumont is a civil service city under chapter 143 of the Local Government Code. Section 143.089 contemplates two different types of personnel files, a police officer’s civil service file that the civil service director is required to maintain, and an internal file that the police department may maintain for its own use. Local Gov’t Code § 143.089(a), (g). In cases in which a police department investigates a police officer’s misconduct and takes disciplinary action against an officer, it is required by section 143.089(a)(2) to place all investigatory records relating to the investigation and disciplinary action, including background documents such as complaints, witness statements, and documents of like nature from individuals who were not in a supervisory capacity, in the police officer’s civil service file maintained under section 143.089(a). *Abbott v. City of Corpus Christi*, 109 S.W.3d 113, 122 (Tex. App.—Austin 2003, no pet.). All investigatory materials in a case resulting in disciplinary action are “from the employing department” when they are held by or in possession of the department because of its investigation into a police officer’s misconduct, and the department must forward them to the civil service commission for placement in the civil service personnel file. *Id.* Chapter 143 prescribes the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. See Local Gov’t Code §§ 143.051-143.055. Such records are subject to release under chapter 552 of the Government Code. See *id.* § 143.089(f); Open Records Decision No. 562 at 6 (1990). However, information maintained in a police department’s internal file pursuant to section 143.089(g) is confidential and must not be released. *City of San Antonio v. Texas Attorney Gen.*, 851 S.W.2d 946, 949 (Tex. App.—Austin 1993, writ denied).

You state that the information you have marked in Exhibit B is contained in the department’s internal affairs file maintained pursuant to section 143.089(g). You state that the internal affairs investigations to which the submitted information relates have not resulted in disciplinary action against the officers at issue for purposes of section 143.089. Therefore, the information you have marked in Exhibit B under section 143.089(g) is confidential and must be withheld under section 552.101 of the Government Code.

Section 552.101 also encompasses article 49.18(b) of the Code of Criminal Procedure. Article 49.18(b) requires that law enforcement agencies complete custodial death reports and file those reports with the attorney general, who "shall make the report, with the exception of any portion of the report that the attorney general determines is privileged, available to any interested party." In Open Records Decision No. 521, this office held that under article 49.18(b), section one of custodial death reports filed with this office is public information. See Open Records Decision No. 521 at 5 (1989). All remaining portions of the custodial death report, *i.e.* sections two through five, including all attachments, are deemed privileged under article 49.18(b) and must be withheld from the public. *Id.* Therefore, the department must release section one of the submitted custodial death reports to the requestor. The department must withhold sections two through five of the submitted custodial death reports in accordance with article 49.18(b) of the Code of Criminal Procedure.

You contend that portions of the submitted information are protected under common law privacy. 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, such that its release 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 (Tex. 1976). The types of information considered intimate and 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 that 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 conclude that no portion of the submitted information is protected under common law privacy, and therefore, none of it may be withheld under section 552.101 on this basis.

We next address your claim under section 552.108 of the Government Code. Section 552.108(a)(1) 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 *id.* §§ 552.108(a)(1), (b)(1), .301(e)(1)(A); see also *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). In this instance, you provide a letter from the district attorney representing that the incident reports submitted in Exhibit B relate to pending criminal cases. Based upon this representation, we conclude that the release of this information 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.*, 536 S.W.2d 559

(Tex. 1976) (per curiam) (court delineates law enforcement interests that are present in active cases).

However, section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. Gov't Code § 552.108(c). Basic information refers to the information held to be public in *Houston Chronicle*. Thus, with the exception of the basic front page offense and arrest information, you may withhold this information from disclosure based on section 552.108(a)(1). We note that you have the discretion to release all or part of this information that is not otherwise confidential by law. *Id.* § 552.007.

Section 552.108(b)(1) excepts from disclosure the internal records and notations of law enforcement agencies and prosecutors when their release would interfere with law enforcement and crime prevention. *Id.* § 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." *See City of Ft. Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no writ).

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 that 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 (1989) (release of detailed use of force guidelines would unduly interfere with law enforcement), 456 (1987) (release of forms containing information regarding location of off-duty police officers in advance would unduly interfere with law enforcement), 252 (1980) (section 552.108 is 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). The statutory predecessor to section 552.108(b)(1) was not applicable, however, to generally known policies and procedures. *See, e.g.*, Open Records Decision Nos. 531 at 2-3 (1989) (Penal Code provisions, common law rules, and constitutional limitations on use of force not protected), 252 at 3 (1980) (governmental body failed to indicate why investigative procedures and techniques requested were any different from those commonly known).

You explain that the department's Use of Force Written Directive "covers various security and safety measures such as, the circumstances and considerations for use of specialty weapons and speciality munitions" that are used by the SWAT team in high risk situations. You argue that disclosure of the information you have marked in the department's Use of Force Written Directive would compromise the safety and security of the department, particularly the officers on the SWAT team. Having considered your arguments and having

reviewed the information at issue, we find that release of this information would interfere with law enforcement. Accordingly, we determine that the department may withhold the information you have marked in the submitted Use of Force Written Directive under section 552.108(b)(1) of the Government Code.

In summary, if the submitted arrest warrant affidavits were presented to a magistrate in support of the issuance of an arrest warrant, they are public under article 15.26 of the Code of Criminal Procedure and must be released to the requestor. The information you have marked in Exhibit B must be withheld under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code. The department must withhold sections two through five of the submitted custodial death reports under section 552.101 in conjunction with article 49.18(b) of the Code of Criminal Procedure. With the exception of basic information, the department may withhold the submitted incident reports under section 552.108(a)(1) of the Government Code. The department may withhold the information it has marked in the submitted Use of Force Written Directive under section 552.108(b)(1) of the Government Code. 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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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. 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,



Lisa V. Cubriel
Assistant Attorney General
Open Records Division

LVC/krl

Ref: ID# 252875

Enc. Submitted documents

c: Mr. Andrew Branca, UTA
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