



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 6, 2009

Ms. J. Middlebrooks
Assistant City Attorney
Criminal Law and Police Section
1400 South Lamar
Dallas, Texas 75215

OR2009-04475

Dear Ms. Middlebrooks:

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# 338963 (DPD Public Information Requests # 09-0344; 09-0361; 09-0364).

The Dallas Police Department (the "department") received four requests for information pertaining to a named officer, as well as information pertaining to a particular internal affairs investigation. One of the requestors also sought information pertaining to another named individual.¹ You claim that portions of the submitted information are excepted from disclosure under sections 552.101, 552.103, 552.108, 552.111, 552.117, 552.130, and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

First, section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

¹You informed this office by letter dated March 9, 2009 that the information responsive to this request, received by the department on February 6, 2009, is encompassed by the earlier requests.

²We 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.

Gov't Code § 552.101. Section 552.101 encompasses chapter 560 of the Government Code, which provides that a governmental body may not release fingerprint information except in certain limited circumstances. *See id.* §§ 560.001 (defining "biometric identifier" to include fingerprints), .002 (prescribing manner in which biometric identifiers must be maintained and circumstances in which they can be released), .003 (providing that biometric identifiers in possession of governmental body are exempt from disclosure under Act). You do not inform us, and the submitted information does not indicate, that section 560.002 permits the disclosure of the fingerprint information in the submitted information. Therefore, the department must withhold the fingerprint information you have marked under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code.

Section 552.101 also encompasses the doctrine of common-law privacy. Common-law privacy 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. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type 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. 540 S.W.2d at 683. Information also excepted from required public disclosure under common-law privacy includes some kinds of medical information or information indicating disabilities or specific illnesses. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Further, this office has found that personal financial information not relating to a financial transaction between an individual and a governmental body is excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 600 (1992), 545 (1990). Additionally, this office has determined that a compilation of a private individual's criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person, and is generally not of legitimate concern to the public. *Cf. United States 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 courthouse files and local police stations and compiled summary of information and noted that individual has significant privacy interest in compilation of one's criminal history).

We find that the portions of the submitted information you have marked are intimate or embarrassing and of no legitimate public concern. Accordingly, the department must withhold the information you have marked under section 552.101 in conjunction with common-law privacy. We have marked additional information that must be withheld under section 552.101 in conjunction with common-law privacy.

Next, section 552.103 provides:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The department has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, *writ ref'd n.r.e.*); Open Records Decision No. 551 at 4 (1990). The city must meet both prongs of this test for information to be excepted under section 552.103(a).

You state, and provide documentation showing, that prior to the department's receipt of the present request for information an individual filed a lawsuit against the officer at issue, as well as other department officers. You state that the litigation is still pending. Based on your representations and our review of the submitted information, we conclude that litigation was pending when the department received the present request. We also agree that the information you have marked is related to the litigation for purposes of section 552.103. Therefore, the department may withhold the information you have marked pursuant to section 552.103 of the Government Code.³

We note that once the information at issue has been obtained by all parties to the pending litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to the information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Further, the applicability of section 552.103(a) ends once the litigation has concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

³As our ruling is dispositive regarding Attachment A, we need not address your remaining argument against its disclosure.

Next, 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.” This section 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, 327 (Tex. App.—Austin 2002, no pet.). This office has concluded that this provision protects certain kinds of information, the disclosure of which might compromise the security or operations of a law enforcement agency. *See, e.g.*, Open Records Decision Nos. 531 (1989) (detailed guidelines regarding police department’s use of force policy), 508 (1988) (information relating to future transfers of prisoners), 413 (1984) (sketch showing security measures for forthcoming execution). To claim this aspect of section 552.108 protection, however, 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). Further, commonly known policies and techniques may not be withheld under section 552.108. *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 are not protected under section 552.108), 252 at 3 (1980) (governmental body did not meet burden because it did not indicate why investigative procedures and techniques requested were any different from those commonly known with law enforcement and crime prevention). To prevail on its claim that section 552.108(b)(1) excepts information from disclosure, a law-enforcement agency must do more than merely make a conclusory assertion that releasing the information would interfere with law enforcement. 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 inform us that a portion of the submitted information pertains to covert vehicles and argue that “release of this type information would interfere with law enforcement because it would interfere with the ability of [department] officers to discreetly and safely perform their jobs.” Based on your representations and our review of the submitted information, we agree that release of the covert vehicle information would interfere with law enforcement. Thus, the department may withhold the covert vehicle information you have marked under section 552.108(b)(1).⁴

Further, you claim that the marked officers’ cellular telephone numbers are excepted from disclosure under section 552.108. In Open Records Decision No. 506 (1988), this office determined that the statutory predecessor to section 552.108(b) excepted from disclosure “cellular mobile phone numbers assigned to county officials and employees with specific law

⁴As our ruling is dispositive regarding the covert vehicle information, we need not address your remaining argument against its disclosure.

enforcement responsibilities.” ORD 506 at 2. We noted that the purpose of the cellular telephones was to ensure immediate access to individuals with specific law enforcement responsibilities and that public access to these numbers could interfere with that purpose. *Id.* You inform us the marked officers’ cellular telephone numbers are “used by [department] officers in the field to carry out their law enforcement responsibilities.” You assert that release of the cellular telephone numbers would interfere with law enforcement. Based on your representations and our review of the information at issue, we conclude that the department may withhold the cellular telephone numbers you have marked under section 552.108(b)(1) of the Government Code.

Next, you claim that portions of the information at issue are excepted under section 552.117 of the Government Code. Section 552.117(a)(2) excepts the home addresses and telephone numbers, social security numbers, and family member information of a peace officer as defined by Article 2.12 of the Code of Criminal Procedure, regardless of whether the officer made an election under section 552.024 of the Government Code. Gov’t Code § 552.117(a)(2); *see* Open Records Decision No. 622 (1994). Accordingly, the department must withhold the information you have marked, in addition to the information we have marked, under section 552.117(a)(2).

Next, section 552.130 of the Government Code excepts from disclosure information relating to a Texas motor vehicle driver’s license and registration information. Gov’t Code § 552.130. The department must withhold the Texas driver’s license and license plate information you have marked under section 552.130 of the Government Code.

Finally, you assert that the employee identification number you have marked is confidential under section 552.136(b) of the Government Code, which states that “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” *Id.* § 552.136. You inform us that an employee’s identification number is also used as the employee’s credit union bank account number. Thus, the department must withhold the information you have marked, in addition to the information we have marked, under section 552.136 of the Government Code.

In summary, (1) the department must withhold the fingerprint information you have marked under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code; (2) the department must withhold the information you have marked, and the additional information we have marked, under section 552.101 of the Government Code in conjunction with common-law privacy; (3) the department may withhold the information you have marked pursuant to section 552.103 of the Government Code; (4) the department may withhold the covert vehicle information and the cellular telephone information you have marked under section 552.108(b)(1); (5) the department must withhold the information you have marked, in addition to the information we have marked, under section 552.117(a)(2); (6) the department must withhold the Texas driver’s license and license plate information

you have marked under section 552.130 of the Government Code; and (7) the department must withhold the information you have marked, in addition to the information we have marked, under section 552.136 of the Government Code. The remaining information must be released to the requestors.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, 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 at (512) 475-2497.

Sincerely,



Christopher D. Sterner
Assistant Attorney General
Open Records Division

CDSA/eeg

Ref: ID# 338963

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁵We note that the information being released contains a social security number. 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 a decision from this office under the Act.