



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 25, 2009

Ms. Denika Caruthers
Assistant District Attorney
Dallas County, Texas
411 Elm Street, 5th Floor
Dallas, Texas 75202

OR2009-08798

Dear Ms. Caruthers:

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# 345586.

The Dallas County Constable's Office, Precinct 5 (the "constable") received a request for twelve items regarding the constable's Special Response Team. You state that the constable does not have any dispatch records responsive to item number eight.¹ You also indicate that you are releasing a portion of the requested information. You claim that the submitted 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.² We have also received and considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit written comments regarding availability of requested information).

¹We note that the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. *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), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

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.

Initially, we note the constable states it does not have dispatch records in response to item eight of the request. However, item eight of the request also seeks administrative reviews of critical incidents, use of force reports, after-incident reports, and offense reports that detail how often the unit has been used operationally. You have not submitted information responsive to the remainder of item eight for our review. Therefore, to the extent information responsive to the remaining portion of item eight of the request existed on the date of this request, we assume that you have released it to the requestor. If you have not released any such information, you must release it at this time. See Gov't Code §§ 552.301(a), .302; Open Records Decision No. 664 (2000) (nothing that if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible under circumstances).

Section 552.108(b)(1) of the Government Code provides:

(b) An internal records or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement of prosecution is exception from [required public disclosure] if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution[.]

Gov't Code § 552.108(b)(1). Section 552.108(b)(1) protects information the public disclosure of which would interfere with law enforcement and crime prevention. See *City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.) (section 552.108(b)(1) protects information that, if released, would permit private citizens to anticipate weaknesses in police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate state laws); Open Records Decision Nos. 562 at 10 (1990), 531 at 2 (1989). A governmental body claiming section 552.108(b)(1) must reasonably explain how and why the release of the requested information would interfere with law enforcement. See Gov't Code §§ 552.108(b)(1), .301(e)(1)(A); see also *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977).

You assert that disclosing the submitted information would “permit private citizens to know what kind of training is utilized, and equipment, weapons and ammunition the deputies carry and permit them to anticipate weaknesses in the Response Team.” Based on your representations, we conclude that you have demonstrated how release of portions of the inventories of equipment contained in Exhibit A would interfere with law enforcement and crime prevention. Thus, you may withhold the equipment inventory information we have marked under section 552.108(b)(1). However, the constable has failed to demonstrate how the remainder of the submitted information would interfere with law enforcement for section 552.108 purposes. Consequently, no portion of the remaining information may be withheld on that basis.

We now turn to your argument under section 552.101 of the Government Code for the remaining information. Section 552.101 of the Government Code 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 doctrine of common-law privacy, which protects information that (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 satisfied. *Id.* at 681-82.

You claim that the submitted information is confidential pursuant to common-law privacy and “special circumstances.” You argue that release of the remaining submitted information “would create an imminent threat of physical danger for its deputies” and therefore a special circumstance exists under common-law privacy to withhold the submitted information. However, the Third Court of Appeals recently ruled that the “special circumstances” exception found in past Attorney General Open Records Decisions directly conflicts with Texas Supreme Court precedent regarding common-law privacy. *Tex. Dep’t of Pub. Safety v. Cox Tex. Newspapers, L.P. and Hearst Newspapers, L.L.C.*, No. 03-08-00516-CV, 2009 WL 1491880 (Tex. App.—Austin May 29, 2009, no pet. h.). The court of appeals ruled that the two-part test set out in *Industrial Foundation* is the “sole criteria” for determining whether information can be withheld under common-law privacy. *Id.*; see also *Indus. Found.*, 540 S.W.2d at 686. In this instance, portions of the submitted information consist of uniform and vehicle inventory, as well as payment, donation, and training information. None of this information is intimate or embarrassing. As you have failed to meet the first prong of the *Industrial Foundation* test for privacy, we find that none of the submitted information may be withheld under section 552.101 on this basis.

The 81st Legislature recently enacted section 552.151 of the Government Code which relates to a public employee or officer’s safety. This section provides:

Information in the custody of a governmental body that relates to an employee or officer of the governmental body is excepted from the requirements of Section 552.021 if, under the specific circumstances pertaining to the employee or officer, disclosure of the information would subject the employee or officer to a substantial threat of physical harm.

Added by Act of June 3, 2009, 81st. Leg., R.S., S.B. 1068, § 4 (to be codified at Tex. Gov’t Code § 552.151). In this instance, you explain that release of the remaining information at issue would “compromise the Team’s ability to respond to calls and would create an imminent threat of physical danger for its deputies.” Upon our review, however, we find the constable has not demonstrated that release of the remaining information at issue would subject the Special Response Team to a substantial threat of physical harm. Accordingly, the

constable may not withhold any of the remaining information at issue under section 552.151 of the Government Code.

In summary, the constable may withhold the equipment inventory information we have marked in Exhibit A under section 552.108(b)(1) of the Government Code. The remaining information must be released to the requestor.

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,



Sarah Casterline
Assistant Attorney General
Open Records Division

SEC/rl

Ref: ID# 345586

Enc. Submitted documents

c: Requestor
(w/o enclosures)