



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 7, 2010

Mr. Mack Reinwand
Assistant City Attorney
Arlington Police Department
P.O. Box 1065
Arlington, Texas 76004-1065

OR2010-15319

Dear Mr. Reinwand:

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# 396098 (Arlington PD Reference No. 1533-072610).

The Arlington Police Department (the "department") received a request for all arrest records and incident reports involving a named individual and four specified reports. You claim 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 information.

Initially, we note you did not submit one of the specified reports for our review. You do not inform us whether you released this information, to the extent it exists. We assume, to the extent any additional information responsive to the instant request existed when the department received the request for information, you have released it to the requestor. If not, then you must do so at this time. *See* Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

Next, we note the department did not fully comply with section 552.301 of the Government Code. Subsection (b) of section 552.301 requires a governmental body requesting an open records ruling from this office to "ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the tenth business-day after

the date of receiving the written request.” Gov’t Code § 552.301(b). While the department raised section 552.101 within the ten-business-day time period as required by subsection 552.301(b), the department did not raise section 552.108 until after the ten-business-day deadline had passed. A governmental body’s failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov’t Code § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). The presumption that information is public under section 552.302 can generally be overcome by demonstrating the information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3, 325 at 2 (1982). Section 552.108 is a discretionary exception to disclosure that protects a governmental body’s interests and may be waived. *See* Open Records Decision Nos. 177 (1977) (statutory predecessor to section 552.108 subject to waiver), 665 at 2 n.5 (2000) (discretionary exceptions generally). Thus, the department may not withhold any portion of the submitted information under section 552.108. However, we will address your argument under section 552.101.

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. This section 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. A compilation of an individual’s criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *Cf. U.S. 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). Furthermore, we find a compilation of a private citizen’s criminal history is generally not of legitimate concern to the public.

We understand you to assert the present request requires the department to compile unspecified law enforcement records concerning the named individual. In this instance, the requestor seeks arrest records pertaining to a named individual and information pertaining to specified incident reports. Thus, we agree the request, in part, requires the department to compile the named individual’s criminal history. We find this request for unspecified law enforcement records implicates the named individual’s right to privacy. Therefore, to the extent the department maintains law enforcement records, other than the specified reports,

depicting the named individual as a suspect, arrestee, or criminal defendant, the department must withhold such information under section 552.101 in conjunction with common-law privacy.

However, you have submitted information pertaining to the specified incident reports. Because the requestor specifically requests these incident reports, they are not part of a compilation of the individual's criminal history that implicates the person's privacy. Upon review, however, we agree portions of these incident reports constitute a compilation of an individual's criminal history. Therefore, the department must withhold the information we marked in these specified incident reports under section 552.101 in conjunction with common-law privacy.

We also understand you to argue the identity of an undercover police officer is confidential pursuant to common-law privacy and "special circumstances." You argue release of this information "would place [his] li[fe] at risk." However, the Third Court of Appeals recently ruled 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. & Hearst Newspapers, L.L.C.*, 287 S.W.3d 390, 394-95 (Tex. App.—Austin 2009, pet. granted). The court of appeals ruled 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, the information at issue consists of an undercover officer's name and identification number. Upon review, we find this information is not highly intimate or embarrassing. See Open Records Decision No. 455 at 7 (1987) (names and addresses are not protected by privacy). As you have failed to meet the first prong of the *Industrial Foundation* test for privacy, we conclude the undercover officer's name and identification number is not confidential under common-law privacy and the department may not withhold this information under section 552.101.

We note, however, the Eighty-first Legislature enacted section 552.151 of the Government Code which relates to a public employee or officer's safety.¹ 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.

¹The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Gov't Code § 552.151. In this instance, you indicate the release of the undercover officer's name and identification number would likely cause the officer to face a threat of imminent physical danger. Based on your representation and our review, we find the department has demonstrated release of the information at issue would subject the officer to a substantial threat of physical harm. Accordingly, the department must withhold the information we marked under section 552.151.

Section 552.101 of the Government Code also encompasses chapter 411 of the Government Code. Criminal history record information ("CHRI") generated by the National Crime Information Center or by the Texas Crime Information Center is confidential. *See* Gov't Code § 411.083(a); Open Records Decision No. 565 (1990). Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. *See* ORD 565. The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 deems confidential CHRI the Department of Public Safety ("DPS") maintains, except DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov't Code § 411.083. Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090-.127. Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 in conjunction with Government Code chapter 411, subchapter F. Upon review, we find a portion of the submitted information, which we marked, consists of CHRI that is confidential under chapter 411. Accordingly, the department must withhold the information we marked under section 552.101 in conjunction with chapter 411 and federal law.

Finally, we note portions of the remaining information are subject to section 552.130 of the Government Code. Section 552.130 excepts from disclosure "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[.]" *Id.* § 552.130(a)(1), (2). The department must withhold the Texas driver's license and motor vehicle record information we marked under section 552.130.²

In summary, to the extent the department maintains law enforcement records depicting the named individual as a suspect, arrestee, or criminal defendant, the department must withhold

²This office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including Texas driver's license and license plate numbers under section 552.130 of the Government Code, without the necessity of requesting an attorney general decision.

any such information under section 552.101 of the Government Code in conjunction with common-law privacy. The department must withhold the information we marked under section 552.101 of the Government Code in conjunction with (1) common-law privacy and (2) chapter 411 of the Government Code and federal law. The department must also withhold the information we marked under sections 552.151 and 552.130 of the Government Code. The remaining information must be released.³

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, toll free, at (888) 672-6787.

Sincerely,



Ana Carolina Vieira
Assistant Attorney General
Open Records Division

ACV/eeg

Ref: ID# 396098

Enc. Submitted documents

c: Requestor
(w/o enclosures)

³We note the information being released contains social security numbers. 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. See Gov't Code § 552.147.