



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 13, 2011

Ms. Jenny Gravley
Taylor, Olson, Adkins, Sralla, Elam, L.L.P.
6000 Western Place, Suite 200
Fort Worth, Texas 76107-4654

OR2011-09985

Dear Ms Gravley:

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# 423665.

The Benbrook Police Department (the "department"), which you represent, received a request for information pertaining to complaints filed by two named individuals against each other. You state the department will release some information to the requestor. You claim some of the requested information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Initially, we address the requestor's contention that the information at issue was previously released to the public in response to requests for information received by the department on July 31, 2010, and March 9, 2011. Section 552.007 of the Government Code provides that if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential under law. Gov't Code § 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records

¹In your letter of May 17, 2011, you state the department will release the portion of the submitted information which had previously been released in response to a request for information the department received on March 9, 2011. Therefore, we understand you to have withdrawn your request for an opinion on this information.

Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Thus, we understand the requestor to argue that the department has waived its claims against disclosure by previously releasing the information at issue to the public. The department states the information at issue was not released in response to the March 9, 2011, request. We note, however, the department did not respond to the requestor's contention that the information at issue was released in response to the July 31, 2010, request. Whether the information at issue was previously released to the public is a question of fact that this office cannot resolve through the open records ruling process. *See* Open Records Decision Nos. 554 (1990), 552 (1990). Under these circumstances, we must rule conditionally. To the extent the department has previously released the information at issue, the department has waived its claim under section 552.108 of the Government Code and may not withhold it on that basis. *See* Open Records Decisions Nos. 665 at n.5 (2000) (discretionary exceptions in general), 177 (1977) (statutory predecessor to section 552.108 subject to waiver). However, to the extent the information at issue has not been previously released, we will address the department's claims under section 552.108. Furthermore, because section 552.101 of the Government Code makes information confidential under law, we will also consider the department's arguments under this section for the information at issue.

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 information protected by other statutes. You claim the information at issue is excepted under section 16.02 of the Penal Code. Section 16.02 provides, in relevant part:

(b) A person commits an offense if he:

- (1) intentionally intercepts, endeavors to intercept, or procures another person to intercept or endeavor to intercept a wire, oral, or electronic communication;
- (2) intentionally discloses or endeavors to disclose to another person the contents of a wire, oral, or electronic communication if the person knows or has reason to know the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection[.]

Penal Code § 16.02(b)(1), (2). You state the e-mails at issue were forwarded to one of the named individuals' e-mail account. You inform us that the Tarrant County District Attorney's Office (the "district attorney") is conducting an investigation to determine whether a violation of section 16.02 of the Penal Code has been committed by the forwarding of the e-mails at issue. However, you do not inform us, nor do you otherwise establish, that section 16.02 has been violated. Without a clear violation of section 16.02(b)(1), we cannot

find that section 16.02(b)(2) is applicable in this instance. Accordingly, the department may not withhold the e-mails at issue on this basis.

Section 552.101 of the Government Code also 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). The types of information considered intimate or 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. Upon review, we find you have failed to demonstrate that any of the information at issue is highly intimate or embarrassing and not of legitimate public interest. Therefore, the department may not withhold any of the information at issue under section 552.101 of the Government Code in conjunction with common-law privacy.

Next, to the extent the department has not previously released the information at issue, we address your claim under section 552.108(a)(1) 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 . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov’t Code § 552.108(a)(1). 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), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state, and provide a letter from the district attorney confirming, the information at issue relates to a pending criminal investigation. Based on this representation and our review, we conclude release of the information at issue 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) (court delineates law enforcement interests that are present in active cases), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Accordingly, the department may withhold the information at issue under section 552.108(a)(1) of the Government Code.

In summary, to the extent the department has previously released the information at issue, the department must release the information at issue to the requestor. To the extent the information at issue has not been previously released, the department may withhold it under section 552.108(a)(1) of the Government Code.

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,

A handwritten signature in blue ink that reads "Sean Nottingham".

Sean Nottingham
Assistant Attorney General
Open Records Division

SN/em

Ref: ID# 423665

Enc. Submitted documents

c: Requestor
(w/o enclosures)