



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 21, 2011

Ms. Elizabeth L. White
Ross, Banks, May, Cron & Cavin, P.C.
2 Riverway, Suite 700
Houston, Texas 77056-1918

OR2011-17167

Dear Ms. White:

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# 436986 (File No. 4396-001).

The Friendswood Police Department (the "department"), which you represent, received a request for nine categories of information relating to a specified incident involving a named individual or the involved police officers on a specified date and the department's policies manual.¹ You state the department will release some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101, 552.108, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note a portion of the submitted information, which we have indicated, is not responsive to the present request for information. This decision does not address the public availability of the nonresponsive information, and the department need not release it. However, although you marked portions of the remaining information as nonresponsive, we conclude this information is responsive to the request, and we will therefore consider your arguments against disclosure.

Next, we note some of the requested information is the subject of Open Records Letter Nos. 2006-13059 (2006) and 2007-08319 (2007). In Open Records Letter No. 2006-13059,

¹You provide documentation showing the department sought and received clarification from the requestor regarding one category of the request. See Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used).

this office determined the marked portions of the city police department's policies and procedures manual could be withheld pursuant to section 552.108(b)(1) of the Government Code and the remaining information was subject to release. In Open Records Letter No. 2007-08319, this office determined the information at issue must be released. With regard to the requested information that is identical to the information previously requested and ruled upon by this office in those prior rulings, as we have no indication that the law, facts, and circumstances on which the prior rulings were based have changed, we conclude you must continue to rely on Open Records Letter Nos. 2006-13059 and 20007-08319 as previous determinations and withhold or release the information at issue in accordance with those rulings. See Open Records Decision No. 673 (2001) (so long as law, facts, circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). To the extent the submitted information is not encompassed by the previous rulings, we will consider your arguments against disclosure.

We also note the submitted information contains fingerprints. 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, such as section 560.003 of the Government Code. Section 560.003 provides "[a] biometric identifier in the possession of a governmental body is exempt from disclosure under [the Act]." *Id.* § 560.003; *see also id.* §§ 560.001(1) (defining "biometric identifier" to include fingerprints), .002(1)(A) (governmental body may not sell, lease, or otherwise disclose individual's biometric identifier to another person unless individual consents to disclosure). Therefore, the department must withhold the fingerprints we have marked under section 552.101 in conjunction with section 560.003 of the Government Code.

Section 552.101 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). 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) (finding significant privacy interest in compilation of individual's criminal history by recognizing distinction between public records found in courthouse files and local police stations and compiled summary of criminal history information). Furthermore, we find a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. In this instance, the requestor seeks information concerning a specific incident relating to the named individual. We find this request does not implicate an individual's common-law right of privacy. Accordingly, the city may not withhold any of the submitted information as a criminal history compilation under section 552.101 in conjunction with common-law privacy.

Section 552.108 of the Government Code provides in part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime;

(2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication[.]

(b) An 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 is excepted 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(a)(1)-(2), (b)(1). We note the protections offered by sections 552.108(a)(1) and 552.108(a)(2) of the Government Code are, generally, mutually exclusive. Section 552.108(a)(1) generally applies to information that pertains to criminal investigations or prosecutions that are currently pending, while section 552.108(a)(2) protects law enforcement records that pertain to criminal investigations and prosecutions that have concluded in final results other than criminal convictions or deferred adjudications. A governmental body claiming section 552.108(a)(1) 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). A governmental body claiming section 552.108(a)(2) must demonstrate the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. *See Gov't Code* §§ 552.108(a)(2), .301(e)(1)(A).

You raise section 552.108(a)(1) for portions of the submitted information and state this information pertains to a matter that is still under investigation. However, you also have provided this office with a memo from the department stating the requested information pertains to a case that was dismissed and, therefore, did not result in conviction or deferred adjudication. Based on these conflicting representations, we are unable to determine whether the information at issue relates to an ongoing criminal case or a closed case that did not result in conviction or deferred adjudication. Thus, we conclude you have failed to demonstrate the applicability of either section 552.108(a)(1) or section 552.108(a)(2) to the information at issue. Therefore, the department may not withhold this information under section 552.108(a)(1) or (a)(2).

Subsection 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.” *City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.). To prevail on its claim that subsection 552.108(b)(1) excepts information from disclosure, a governmental body must do more than merely make a conclusory assertion that releasing the information would interfere with law enforcement. Instead, the governmental body must meet its burden of explaining how and why release of the requested information would interfere with law enforcement and crime prevention. *See* Open Records Decision No. 562 at 10 (1990) (construing statutory predecessor). In addition, generally 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 law enforcement exception), 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). The determination of whether the release of particular records would interfere with law enforcement is made on a case-by-case basis. *See* Open Records Decision No. 409 at 2 (1984) (construing statutory predecessor).

In this instance, you have not provided any arguments as to how subsection 552.108(b)(1) applies to the information at issue. Thus, we find the department has failed to meet its burden to demonstrate how the release of the information at issue would interfere with law enforcement and crime prevention. Accordingly, the department may not withhold any of the information at issue under subsection 552.108(b)(1).

Section 552.130 of the Government Code 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 another state or country [or] a motor vehicle title or registration issued by an agency of this state or another state or country.” Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 4 (to be codified as an amendment to Gov’t Code § 552.130(a)). Therefore, the department must withhold the information we have marked under section 552.130 of the Government Code.

We note some of the submitted video and audio recordings contain motor vehicle record information. You state the department lacks the technical capability to redact the information subject to section 552.130 in the video and audio recordings. Thus, the department must withhold the video recordings in their entirety under section 552.130 of the Government Code. However, because the department had the ability to copy the submitted audio recordings in order to submit the requested information for our review, we believe the department has the capacity to produce a copy of only the non-confidential portions of the information at issue. Therefore, we find the department must withhold the information in the audio recordings we have indicated under section 552.130 of the Government Code. The department must release the remaining information in the audio recordings.

In summary, the department must withhold the fingerprints we have marked under section 552.101 in conjunction with section 560.003 of the Government Code. The department must withhold the information we have marked, the submitted video recordings, and the information in the audio recordings we have indicated under section 552.130 of the Government Code. The department must release the remaining information.²

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,



Mack T. Harrison
Assistant Attorney General
Open Records Division

MTH/em

Ref: ID# 436986

Enc. Submitted documents

c: Requestor
(w/o enclosures)

²We note 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. *See* Gov't Code § 552.147(b).