



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 25, 2012

Ms. Jennifer C. Cohen
Assistant General Counsel
Texas Department of Public Safety
P.O. Box 4087
Austin, Texas 78773-0001

OR2012-01255

Dear Ms. Cohen:

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# 443413 (PIR # 11-2619).

The Texas Department of Public Safety (the "department") received a request for reports to twelve missing or stolen firearms. You state the department is withholding some of the requested information pursuant to Open Records Letter No. 2010-12863 (2010), a previous determination authorizing the department to withhold personnel records of commissioned officers of the department under section 552.101 of the Government Code in conjunction with section 411.00755 of the Government Code. *See* Gov't Code § 411.00755(b)(1)-(12), (c); *see also id.* § 552.301(a); Open Records Decision No. 673 at 7-8 (2001). You claim some of the submitted information is excepted from disclosure under sections 552.108, 552.117, 552.1175, and 552.130 of the Government Code. You inform us the interests of the Austin Police Department (the "APD"), the Fort Worth Police Department (the "FWPD"), the Houston Police Department (the "HPD"), the Wichita Falls Police Department (the "WFPD"), the Harris County Constable Precinct 5 (the "constable"), and the Montgomery County Sheriff's Office (the "sheriff") may be implicated by the request. Thus, you notified these third parties of the request and of their right to submit arguments to this office. *See* Gov't Code § 552.304 (interested party may submit comments to this office stating why the information at issue should or should not be released). We have received comments from the APD and the HPD. We have considered the submitted arguments and reviewed the submitted information.

As you acknowledge, the department failed to comply with section 552.301 of the Government Code in seeking an open records decision from this office. A governmental body's failure to comply with the procedural requirements of section 552.301 results in the

legal presumption the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 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, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 630 (1994). Normally, a compelling interest is demonstrated when some other source of law makes the information at issue confidential or third-party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). Section 552.108 of the Government Code is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See* Gov't Code § 552.007; Open Records Decision Nos. 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions), 177 (1977) (statutory predecessor to section 552.108 subject to waiver). However, the need of a governmental body, other than the one that has failed to timely seek an open records decision, to withhold information under section 552.108 can provide a compelling reason under section 552.302. Open Records Decision No. 586 (1991). Because you inform us the APD and HPD object to the release of some of the submitted information, we will consider the APD's and HPD's claims regarding section 552.108. Furthermore, because your claims under sections 552.117, 552.1175, and 552.130 of the Government Code can provide compelling reasons to withhold information, we will consider whether these exceptions are applicable to the submitted information. Additionally, we note some of submitted information may be subject to sections 552.101 and 552.136 of the Government Code.¹ Because these sections can also provide compelling reasons to withhold information, we will consider whether these exceptions are applicable to the submitted 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 established. *Id.* at 681-82. This office has found that personal financial information not related to a financial transaction between an individual and a governmental body is intimate and embarrassing and of no legitimate public interest. *See* Open Records Decision Nos. 600 (1992), 545 (1990), 523 (1989), 373 (1983). Upon review, we find the information we have marked is highly intimate or embarrassing and of no legitimate public interest. Accordingly, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.

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

Section 552.108(a)(1) of the Government Code excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov’t Code § 552.108(a)(1). Generally, a governmental body claiming section 552.108 must reasonably explain how and why release of the requested information would interfere with law enforcement. *See id.* § 552.301(e)(1)(A). The APD states that report 2010-2910651 pertains to an ongoing criminal investigation. The HPD states report 172308310 relates to a criminal investigation that is inactive. The HPD also informs us that the statute of limitations has not run, and the case may be reactivated as information is developed. Based on these representations, we conclude the release of reports 2010-2910651 and 172308310 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). Thus, section 552.108(a)(1) is generally applicable to reports 2010-2910651 and 172308310.

We note, however, section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. *Id.* § 552.108(c). Basic information refers to the information held to be public in *Houston Chronicle*. *See* Open Records Decision No. 127 (1976) (summarizing types of information made public by *Houston Chronicle*). Accordingly, with the exception of basic information, the department may withhold reports 2010-2910651 and 172308310 under section 552.108(a)(1) of the Government Code.²

You claim section 552.117 of the Government Code for personal information contained in the remaining information. Section 552.117(a)(2) excepts from public disclosure the current and former home addresses and telephone numbers, emergency contact information, social security number, and family member information of a peace officer, regardless of whether the peace officer made an election under section 552.024 or 552.1175 of the Government Code to keep such information confidential. Gov’t Code § 552.117(a)(2); *see id.* §§ 552.024, .1175. Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. However, section 552.117 applies only to records that a governmental body holds in an employment capacity. The remaining information consists of law enforcement records of the FWPD, the WFPD, the constable, and the sheriff that are not held by the department in an employment capacity. Therefore, we find section 552.117(a)(2) of the Government Code does not apply in this situation, and conclude the department may not withhold any portion of the remaining information on that basis.

However, the department may be required to withhold the personal information in question under section 552.1175 of the Government Code. This section is applicable to information

²As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

relating to a peace officer, as defined by article 2.12 of the Code of Criminal Procedure. *See id.* § 552.1175(a). Section 552.1175(b) provides, in part, the following:

Information that relates to the home address, home telephone number, emergency contact information, or social security number of [a peace officer as defined by article 2.12 of the Code of Criminal Procedure], or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

- (1) chooses to restrict public access to the information; and
- (2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Id. § 552.1175(b). We note a pager, fax, or cellular telephone number provided to an employee at public expense may not be withheld under section 552.1175. *See generally* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). Upon review, we find the department must withhold the information we have marked under section 552.1175 if the officers at issue elect to restrict access to their information in accordance with section 552.1175(b).³ However, we note the remaining information you have marked does not consist of the home address, home telephone number, emergency contact information, social security number, or family information of a peace officer. Accordingly, the department may not withhold this information under section 552.1175 of the Government Code. Furthermore, the department may not withhold the cellular telephone numbers marked under section 552.1175 if the officers concerned did not pay for the cellular telephone service.

Section 552.130 of the Government Code excepts from disclosure “information [that] relates to (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state or another state or country; [or] (2) a motor vehicle title or registration issued by an agency of this state or another state or country[.]” Gov't Code § 552.130(a)(1)-(2). Upon review, we find the department must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code.

Section 552.136 of the Government Code provides 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.*

³In the event the officers' social security numbers are not excepted from disclosure under section 552.1175, we note section 552.147(b) of the Government Code authorizes a governmental body to redact a living individual's social security number without the necessity of requesting a decision.

§ 552.136(b); *see also id.* § 552.136(a) (defining “access device”). Upon review, we find the department must withhold the credit card numbers we have marked under section 552.136 of the Government Code.

In summary, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. With the exception of basic information, the department may withhold reports 2010-2910651 and 172308310 under section 552.108(a)(1) of the Government Code. The department must withhold the information we have marked under section 552.1175 of the Government Code if the officers at issue elect to restrict access to their information in accordance with section 552.1175(b). The department must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code. The department must withhold the credit card numbers we have marked under section 552.136 of the Government Code. The department must release the remaining information.

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,



Sean Nottingham
Assistant Attorney General
Open Records Division

SN/agn

Ref: ID# 443413

Enc. Submitted documents

c: Requestor
(w/o enclosures)