



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 6, 2012

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

OR2012-08716

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# 455592 (Friendswood PIR No. W001404-031912).

The City of Friendswood (the “city”), which you represent, received a request for all records related to the arrest and custody of a named individual, including all incident reports prepared by the city or by the city’s police department. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.108, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, we note some of the submitted information, which we have marked, is not responsive to the instant request for information because it was created after the date the request was received or consists of the current request for information. This ruling does not address the public availability of non-responsive information, and the city is not required to release non-responsive information in response to this request.

Next, we note it appears portions of the responsive information were the subject of two previous requests for information, in response to which this office issued Open Records Letter Nos. 2012-04538 (2012) and 2012-04685 (2012). In these rulings, we determined with the exception of basic information, the city may withhold the submitted information

¹We assume 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 those records contain substantially different types of information than that submitted to this office.

under section 552.108(a)(1) of the Government Code. We further ruled the city may withhold the identity of the complainant in the basic information under section 552.101 of the Government Code in conjunction with the informer's privilege. In Open Records Letter No. 2012-04685, we ruled the city may not withhold any of the basic information under section 552.102 of the Government Code. As we have no indication the law, facts, and circumstances on which the prior rulings were based have changed, the city must continue to rely on the prior rulings as previous determinations and withhold or release the identical information in accordance with Open Records Letter Nos. 2012-04538 and 2012-04685. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and 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 information is or is not excepted from disclosure). To the extent the information in the current request is not encompassed by the previous rulings, we will address your arguments.

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 . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov’t Code § 552.108(a)(1). A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why this exception is applicable to the information at issue. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). However, section 552.108 is generally not applicable to information relating to an administrative investigation that did not result in a criminal investigation or prosecution. *See Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. Civ. App.—El Paso 1992, writ denied) (statutory predecessor to section 552.108 not applicable to internal investigation that did not result in criminal investigation or prosecution); *see also* Open Records Decision No. 350 at 3-4 (1982).

You inform us the responsive information consists of an incident report and related information and information from an open internal affairs investigation. You state this information relates to pending criminal investigations. Accordingly, based upon your representations and our review, we conclude release of the responsive information 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).

We note section 552.108 does not except from disclosure “basic information about an arrested person, an arrest, or a crime.” Gov’t Code § 552.108(c). Section 552.108(c) refers to the basic “front-page” information held to be public in *Houston Chronicle*. *See* 531 S.W.2d at 186-87; *see also* Open Records Decision No. 127 (1976) (summarizing types of information considered to be basic information). We note basic information includes the identity and description of the complainant and a detailed description of the offense but does not include motor vehicle record information encompassed by section 552.130 of the

Government Code. *See* ORD 127 at 3-4; *see also* Gov't Code § 552.130. Thus, with the exception of basic information, the city may withhold the responsive information under section 552.108(a)(1) of the Government Code.²

You assert the identity of the complainant in the basic information is subject to the common-law informer's privilege. 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. The common-law informer's privilege, incorporated into the Act by section 552.101, has long been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). This privilege protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided the subject of the information does not already know the informer's identity. Open Records Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978). It protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 279 at 2 (1981) (citing Wigmore, Evidence, § 2374, at 767 (McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. *See* Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5.

You indicate the basic information reveals the identity of a person reporting violations of the Penal Code to the department and the violations at issue carry criminal penalties. You state the department is responsible for enforcement of the violations at issue. We therefore conclude the city may withhold the identity of the complainant, which we have marked, from basic information under section 552.101 of the Government Code in conjunction with the common-law informer's privilege. However, we note the remaining basic information does not identify the complainant. Accordingly, the city may not withhold any of the remaining basic information under section 552.101 of the Government Code in conjunction with the common-law informer's privilege.

Next, you claim section 552.102 of the Government Code for the remaining responsive information. Section 552.102(a) excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). You assert the privacy analysis under section 552.102(a) is the same as the *Industrial Foundation* common-law privacy test, which protects information if it (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. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685

²As we are able to resolve this matter under section 552.108, we do not address your remaining argument against disclosure of the responsive information, except to note basic information may not be withheld from public disclosure under section 552.103. *See* Open Records Decision No. 597 (1991).

(Tex. 1976). In *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled the privacy test under section 552.102(a) is the same as the *Industrial Foundation* privacy test. However, the Texas Supreme Court expressly disagreed with *Hubert's* interpretation of section 552.102(a) and held its privacy standard differs from the *Industrial Foundation* test under section 552.101. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). The Supreme Court then considered the applicability of section 552.102, and has held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Id.* Upon review, we find none of the remaining responsive information is excepted under section 552.102(a) of the Government Code and, therefore, none of it may be withheld on that basis.

In summary, to the extent the responsive information is the same information that was previously ruled upon in Open Records Letter Nos. 2012-04538 and 2012-04685, the city must continue to rely upon those rulings and withhold or release the information in accordance with those rulings. To the extent the information was not previously ruled upon, with the exception of basic information, the city may withhold the responsive information under section 552.108(a)(1) of the Government Code. In releasing basic information, the city may withhold the identity of the complainant under section 552.101 of the Government Code in conjunction with the informer's privilege.

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,



Charles Galindo Jr.
Assistant Attorney General
Open Records Division

CG/bs

Ref: ID# 455592

Enc. Submitted documents

c: Requestor
(w/o enclosures)