



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 14, 2012

Mr. Kyle G. Thomas
Assistant City Attorney
City of Sugar Land
P.O. Box 110
Sugar Land, Texas 77487-0110

OR2012-09177

Dear Mr. Thomas:

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# 456523.

The City of Sugar Land (the "city") received a request for: (1) any family violence records pertaining to the requestor and a named individual; (2) any records concerning the requestor and the named individual at a specified address; and (3) a specified record pertaining to a specified apartment complex. You inform us that some of the responsive information has been or will be released to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101, 552.108, 552.130, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we must address the city's obligations under the Act. Section 552.301 describes the procedural obligations placed on a governmental body that receives a written request for information it wishes to withhold. Pursuant to section 552.301(b) of the Government Code, the governmental body must request a ruling from this office and state the exceptions to disclosure that apply within ten business days after receiving the request. Gov't Code § 552.301(b). You state the city received the request for information on March 23, 2012. Accordingly, the city's ten-business-day deadline was April 9, 2012. While you raised sections 552.101, 552.130, and 552.147 of the Government Code within the ten-business-day time period required by subsection 552.301(b), you did not raise section 552.108 of the

Government Code until April 16, 2012. Consequently, we find the city failed to comply with the procedural requirements of section 552.301(b) of the Government Code with respect to its arguments under section 552.108.

Generally, a governmental body's failure to comply with section 552.301 results in the waiver of its untimely claim, unless that claim is a compelling reason for withholding information from disclosure. *See generally 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); *see also generally* Open Records Decision No. 630 (1994). A compelling reason to withhold information exists where some other source of law makes the information confidential or where third party interests are at stake. 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. Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions in general), 177 at 3 (1997) (statutory predecessor to section 552.108 subject to waiver). Thus, in failing to timely raise section 552.108 for the submitted information, the city has waived its argument under that section. We note, however, the interests under section 552.108 of a governmental body other than the one that failed to comply with section 552.301 can provide a compelling reason for non-disclosure under section 552.302 of the Government Code. *See* Open Records Decision No. 586 at 2-3 (1991). You represent that the Fort Bend County District Attorney's Office (the "district attorney's office") asserts a law enforcement interest in Exhibits B-1 and B-2. Therefore, we will determine whether the city may withhold these exhibits on behalf of the district attorney's office under section 552.108. We will also consider your timely raised claims under sections 552.101, 552.130, and 552.147 of the Government Code.

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 made confidential by other statutes. You claim Exhibits B-5 through B-7 are made confidential by section 58.106. However, subchapter B of chapter 58 of the Family Code, which contains section 58.106, pertains to the administration of the juvenile justice information system by the Texas Department of Public Safety. *See* Fam. Code § 58.102. Because the information at issue was not requested from the Texas Department of Public Safety, we conclude that section 58.106 is not applicable in this instance. Thus, Exhibits B-5 through B-7 are not confidential under section 58.106 of the Family Code and may not be withheld under section 552.101 of the Government Code on that basis.

Section 552.101 of the Government Code also encompasses laws that make criminal history record information ("CHRI") confidential. CHRI generated by the National Crime Information Center or by the Texas Crime Information Center is confidential under federal

and state law. 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* Open Records Decision No. 565 at 7 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *See id.* Section 411.083 of the Government Code 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. *See 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. Thus, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. Upon review, we conclude the information we have marked in Exhibit B-3 constitutes CHRI for purposes of chapter 411. Accordingly, this information must be withheld under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code and federal law.

Section 552.101 of the Government Code also encompasses section 560.003 of the Government Code, which provides that “[a] biometric identifier in the possession of a governmental body is exempt from disclosure under [the Act].” *See 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 city must withhold the fingerprints we have marked in Exhibit B-3 under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code.¹

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). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. The type 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. This office has found that some kinds of medical

¹We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including fingerprint information under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code, without the necessity of requesting an attorney general decision.

information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision No. 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Upon review, we find the information we have marked in Exhibit B-3 is highly intimate or embarrassing and not of legitimate public concern. Thus, the city must withhold this information under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.108(a) of the Government Code provides as follows:

(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; [or]

(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[.]

Gov't Code § 552.108(a)(1)-(2). Subsection 552.108(a)(1) is mutually exclusive of subsection 552.108(a)(2). Subsection 552.108(a)(1) protects information, the release of which would interfere with a particular pending criminal investigation or prosecution. In contrast, subsection 552.108(a)(2) protects information that relates to a concluded criminal investigation or prosecution that did not result in a conviction or deferred adjudication. A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why the exception it claims is applicable to the information the governmental body seeks to withhold. *See id.* § 552.301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). Section 552.108 may be invoked by the proper custodian of information relating to an investigation or prosecution of criminal conduct. *See* Open Records Decision No. 474 at 4-5 (1987). You inform us that Exhibit B-2 deals with an investigation that ended in deferred adjudication. However, you represent the district attorney's office has informed you that it objects to the release of Exhibits B-1 and B-2 because doing so would interfere with the district attorney's pending criminal prosecution of the offense listed in Exhibit B-1. Based on your representations and our review, we conclude release of this 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 per curiam*, 536 S.W.2d 559 (Tex. 1976). Therefore, section 552.108(a)(1) is applicable to Exhibits B-1 and B-2.

However, 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). Basic information refers

to the information held to be public in *Houston Chronicle* and includes an arrestee's social security number. *See* 531 S.W.2d at 186-87; Open Records Decision No. 127 at 3-4 (1976) (summarizing types of information deemed public by *Houston Chronicle*). Thus, with the exception of basic information, the city may withhold Exhibits B-1 and B-2 under section 552.108(a)(1) of the Government Code.²

You raise sections 552.130 and 552.147 of the Government Code for portions of the remaining information. Section 552.130(a)(1) provides that information relating to a motor vehicle operator's or driver's license or permit issued by any agency of this state or another state or country is excepted from public release. Gov't Code § 552.130(a)(1). We note some of the driver's license information at issue belongs to the requestor. Because section 552.130 protects personal privacy, the requestor has a right of access to her own driver's license information under section 552.023 of the Government Code. *See id* § 552.023(a) (“[a] person or a person's authorized representative has a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect that person's privacy interests”); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individuals request information concerning themselves). Accordingly, the city must withhold the driver's license information pertaining to other individuals, which we have marked, under section 552.130(a)(1) of the Government Code.

Section 552.147(a) of the Government Code provides “[t]he social security number of a living person is excepted from” required public disclosure under the Act. Gov't Code § 552.147(a). You raise this section for the remaining social security numbers, which include the social security numbers of the arrestees listed in Exhibits B-1 and B-2. We note the information at issue includes the requestor's social security number. Because section 552.147 protects personal privacy, the requestor has a right of access to her own social security number under section 552.023 of the Government Code. *See id* § 552.023; ORD 481 at 4. Accordingly, the city may withhold the remaining social security numbers we have marked under section 552.147(a) of the Government Code.

In summary, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with (1) chapter 411 of the Government Code and federal law, (2) section 560.003 of the Government Code, and (3) common-law privacy. With the exception of basic information, the city may withhold Exhibits B-1 and B-2 under section 552.108(a)(1) of the Government Code. The city must withhold the driver's license information we have marked in the remaining information under section 552.130(a)(1) of the Government Code. The city may withhold the remaining social security numbers we have

²As our ruling for this information is dispositive, we need not address your remaining arguments against its disclosure.

marked under section 552.147(a) 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,



Kenneth Leland Conyer
Assistant Attorney General
Open Records Division

KLC/dls

Ref: ID# 456523

Enc. Submitted documents

c: Requestor
(w/o enclosures)

³Because this requestor has a right of access under section 552.023 of the Government Code to information being released that may be confidential with respect to the general public, if the city receives another request for this particular information from a different requestor, then the city should again seek a decision from this office.