



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

October 5, 2012

Mr. Nathan L. Brown  
Assistant City Attorney  
City of El Paso  
2 Civic Center Plaza, Ninth Floor  
El Paso, Texas 79901

OR2012-15970

Dear Mr. Brown:

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# 467097.

The El Paso Police Department (the "department") received a request for a specified offense report regarding a named individual. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We note the submitted information includes court-filed documents. Section 552.022 of the Government Code provides for required public disclosure of "information that is also contained in a public court record," unless the information is made confidential under the Act or other law. Gov't Code § 552.022(a)(17). Although the department seeks to withhold the court-filed documents under section 552.108 of the Government Code, this section is discretionary in nature and does not make information confidential under the Act. *See id.* § 552.007; Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally), 586 (1991) (governmental body may waive section 552.108). Therefore, the department may not withhold the court-filed documents, which we have marked, under section 552.108 of the Government Code. However, section 552.101 of the Government Code does make information confidential for purposes of section 552.022 of the Government Code. Accordingly, we will consider this exception for both the information subject to section 552.022 as well as the remaining information. We will also address your argument

under section 552.108 for the submitted information not subject to section 552.022 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 the common-law right to privacy, 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. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). You argue the submitted information should be withheld in its entirety under section 552.101 in conjunction with common-law privacy. We note the submitted information concerns a sexual assault. Generally, only information that either identifies or tends to identify a victim of sexual assault or other sex-related offense must be withheld under common-law privacy. *See* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). However, a governmental body is required to withhold all of the information at issue when the requestor knows the identity of the alleged sexual assault victim. *See* ORD 393. Although you seek to withhold the submitted information in its entirety, you have not demonstrated, nor does the submitted information reflect, the requestor knows the identity of the alleged sexual assault victim. Thus, the department may not withhold the submitted information in its entirety under common-law privacy.

We next address your arguments for the information not subject to section 552.022. 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 must reasonably explain how release of the information at issue would interfere with the detection, investigation, or prosecution of crime. *See id.* § 552.301(e)(1)(A) (governmental body must provide comments explaining why exceptions raised should apply to information requested); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state the submitted information pertains to a pending criminal investigation. Based on your representation and our review of the information, we conclude release of the submitted information would interfere with the detection, investigation, or prosecution of a crime. *See Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court describes law enforcement interests that are present in active cases), *writ ref’d per curiam*, 536 S.W.2d 559 (Tex. 1976). Thus section 552.108(a)(1) is generally applicable to the information at issue.

We note, 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). Section 552.108(c) refers to the basic “front-page” information held to be public in *Houston Chronicle*, and includes, among other items, the identity of the complainant and a detailed description of the offenses. *See* 531 S.W.2d at 186-88. Basic information is not confidential under

section 552.108, even if it does not literally appear on the front page of the report. *See* Open Records Decision No. 127 (1976) (summarizing types of information deemed public by *Houston Chronicle*). Therefore, with the exception of basic information, the department may withhold the submitted report under section 552.108(a)(1) of the Government Code.

We note a portion of the basic information is subject to section 552.101 of the Government Code in conjunction with common-law privacy, which is subject to the two-part test discussed above. In this instance, the victim of the alleged sexual assault is also the complainant. As noted, this office has concluded information that either identifies or tends to identify a victim of sexual assault or other sex-related offense must be withheld under common-law privacy. ORD 393 at 2; *see also Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied) (identity of witnesses to and victims of sexual harassment was highly intimate or embarrassing information and public did not have a legitimate interest in such information). Accordingly, in releasing basic information the department must withhold the identifying information of the victim/complainant, which we have marked, under section 552.101 in conjunction with common-law privacy.

We note, however, the requestor is an investigator with the Texas Board of Nursing (the “board”). Section 411.125 of the Government Code provides:

The [board] is entitled to obtain from the [Department of Public Safety] criminal history record information maintained by the [Department of Public Safety] that relates to a person who:

- (1) is an applicant for or holder of a license issued by the board;
- (2) has requested a determination of eligibility for a license from the board; or
- (3) is subject to investigation by the board in connection with a complaint or formal charge against the person.

Gov’t Code § 411.125. In addition, section 411.087(a) of the Government Code provides in pertinent part:

(a) [A] person, agency, department, political subdivision, or other entity that is authorized by this subchapter to obtain from the [Department of Public Safety] criminal history record information maintained by the [Department of Public Safety] that relates to another person is authorized to:

...

(2) obtain from any other criminal justice agency in this state criminal history record information maintained by that criminal justice agency that relates to that person.

*Id.* § 411.087(a)(2). “Criminal history record information” is defined as “information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions.” *Id.* § 411.082(2). Thus, under sections 411.125 and 411.087, the requestor may have a right of access to any criminal history record information about the named individual contained in the department’s records.

Accordingly, if the individual at issue is an applicant for a license from the board, a holder of a license from the board, has requested a determination of eligibility for a license from the board, or is subject to investigation by the board in connection with a complaint or formal charge, then the requestor is authorized to obtain the criminal history record information in the submitted report from the department pursuant to section 411.087(a)(2) of the Government Code. *See id.* §§ 411.087(a)(2), .082(2), .125(a). Thus, if any of these conditions is met, then the department must make available to the requestor criminal history record information under section 411.087. *See* Open Records Decision No. 451 (1986) (specific statutory right of access provisions overcome general exceptions to disclosure under the Act); *see also Collins v. Tex Mall, L.P.*, 297 S.W.3d 409, 415 (Tex. App.—Fort Worth 2009, no pet.) (statutory provision controls and preempts common-law when statute directly conflicts with common-law principle); *CenterPoint Energy Houston Elec. LLC v. Harris County Toll Rd.*, 436 F.3d 541, 544 (5th Cir. 2006) (common law controls where there is no conflicting or controlling statutory law). In that instance, with the exception of basic information, the department may withhold the remaining information under section 552.108(a)(1) of the Government Code. However, if the individual who is named as the arrested person in the report does not meet any of the criteria of subsection 411.125(1)-(3), then the board does not have a special right of access to the criminal history record information under section 411.087. In that event, with the exception of basic information, the department may withhold the submitted information under section 552.108(a)(1) of the Government Code. In either case, when releasing basic information, the department must withhold the identifying information of the complainant under section 552.101 of the Government Code in conjunction with common-law privacy.

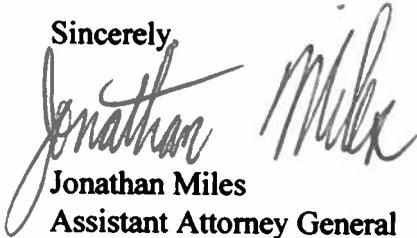
In summary, if the board has a right of access pursuant to section 411.087(a)(2) of the Government Code, the department must make available to the requestor criminal history record information regarding the named individual under section 411.087 but may withhold the remaining information under section 552.108(a)(1) of the Government Code, with the exception of basic information and the information subject to section 552.022(a)(17). If the board does not have a right of access to the criminal history record information under section 411.087 then, with the exception of basic information and the information subject to section 552.022(a)(17), the department may withhold the submitted information under section 552.108(a)(1) of the Government Code. In either case, when releasing basic information, the department must withhold the identifying information of the complainant

under section 552.101 of the Government Code in conjunction with common-law privacy.

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](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,



Jonathan Miles  
Assistant Attorney General  
Open Records Division

JM/bhf

Ref: ID# 467097

Enc. Submitted documents

c: Requestor  
(w/o enclosures)