



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 2, 2012

Mr. Steven Meyer  
Assistant City Attorney  
Legal Division  
Arlington Police Department  
Mail Stop 04-0200  
P.O. Box 1065  
Arlington, Texas 76004-1065

OR2012-17584

Dear Mr. Meyer:

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# 469818 (Reference Nos. 8732-081412, 9055-091812, and 9085-092112).

The Arlington Police Department (the "department") received three requests from two different requestors for information pertaining to a specified incident, a specified internal affairs investigation related to the incident, and disciplinary records of a named officer involved in the incident at issue.<sup>1</sup> You state you have released some information responsive to the second and third requests. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note some of the submitted information, which we have marked, is not responsive to the first request because it was created after the date the department received the first request. The department need not release this non-responsive information in

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<sup>1</sup>The first request was received on August 14, 2012 (the "first request"), the second request was received on September 18, 2012 (the "second request"), and the third request was received on September 19, 2012 (the "third request").

response to the first request, and this ruling will not address that information with respect to the first request. Furthermore, we note a portion of the submitted information, which we have marked, is not responsive to any of the submitted requests because it does not relate to the incident at issue, the internal affairs investigation at issue, or to the disciplinary records of the named officer. The department need not release this non-responsive information, and this ruling will not address that information.

Next, we must address the department's obligations under section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(e) requires the governmental body to submit to the attorney general, not later than the fifteenth business day after the date of the receipt of the request: (1) written comments stating why the governmental body's claimed exceptions apply to the information that it seeks to withhold; (2) a copy of the written request for information; (3) a signed statement of the date on which the governmental body received the request or evidence sufficient to establish that date; and (4) the specific information that the governmental body seeks to withhold or representative samples if the information is voluminous. *See* Gov't Code § 552.301(e)(1). As previously noted, the department received the first request for information on August 14, 2012. The department states its office was closed on September 3, 2012 in observance of Labor Day. This office does not count the date the request was received or holidays for the purpose of calculating a governmental body's deadlines under the Act. Accordingly, the department's fifteen-business-day deadline was September 5, 2012. Although you timely submitted to our office information responsive to the first request for information, we note some of the information you submitted for the second and third requests was also responsive to the first request. However, you did not submit this information until October 2, 2012. *See id.* § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). As such, we find the department failed to comply with the requirements of section 552.301 as to this information, which we have marked.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the information at issue is public and must be released unless the governmental body overcomes this presumption by demonstrating a compelling reason to withhold the information. *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). A compelling reason generally exists when information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3, 325 at 2 (1982). Although you raise sections 552.103 and 552.108 of the Government Code for the information at issue, these sections are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived.

See Gov't Code § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 177 (1977) (statutory predecessor to section 552.108 subject to waiver). Thus, in failing to comply with section 552.301, the department has waived its arguments under sections 552.103 and 552.108 for the information that was not timely submitted in response to the first request and may not withhold this information on these bases. However, because sections 552.101, 552.117, and 552.130 of the Government Code provide compelling reasons to withhold information, we will consider the applicability of these exceptions to the information at issue.<sup>2</sup> We will also consider the exceptions you raise for the timely submitted responsive 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 information protected by other statutes, including section 58.007 of the Family Code, which protects juvenile law enforcement records related to delinquent conduct and conduct indicating a need for supervision that occurred on or after September 1, 1997. Section 58.007 provides, in relevant part:

(c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

- (1) if maintained on paper or microfilm, kept separate from adult files and records;
- (2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and
- (3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapters B, D, and E.

Fam. Code § 58.007(c). For purposes of section 58.007(c), a “child” is a person who was ten years of age or older and under seventeen years of age at the time of the conduct. *Id.* § 51.02(2). Report number 12-46867 involves juvenile delinquent conduct that occurred

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<sup>2</sup>The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

after September 1, 1997. *See id.* § 51.03 (defining “delinquent conduct” for purposes of Fam. Code § 58.007). For purposes of section 58.007(c), “child” means a person who is ten years of age or older and under seventeen years of age at the time of the reported conduct. *See id.* § 51.02(2). It does not appear any of the exceptions in section 58.007 apply. Therefore, the department must withhold report number 12-46867, as well as the additional information we have marked, under section 552.101 of the Government Code in conjunction with section 58.007(c) of the Family Code.<sup>3</sup> However, the remaining information consists of information from an internal affairs investigation. The internal affairs investigation does not consist of juvenile law enforcement records for purposes of section 58.007. Therefore, we conclude none of the remaining information constitutes juvenile law enforcement records. Thus, the remaining information is not confidential under section 58.007 and may not be withheld pursuant to section 552.101 of the Government Code on this basis.

You assert the timely submitted information is excepted under Section 552.108(a)(1) of the Government Code. Section 552.108(a)(1) 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 and why section 552.108 is applicable to the information at issue. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). The remaining timely submitted responsive information consists of an ongoing internal affairs investigation. As a general rule, section 552.108 is not applicable to a law enforcement agency’s personnel records. *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 329 (Tex. App.—Austin 2002, no pet.) (section 552.108(b)(1) not applicable to documents obtained by police constable for purpose of evaluating applicant’s fitness for employment); *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); Open Records Decision No. 562 at 10 (1990) (predecessor to section 552.108(b) not applicable to employment information in police officer’s file). In this instance, however, we understand you to contend that the internal affairs investigation at issue is related to a pending criminal investigation or prosecution. Accordingly, we conclude that 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. 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). Therefore, the department may withhold the remaining timely submitted responsive information under section 552.108(a)(1) of the Government Code.<sup>4</sup>

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<sup>3</sup>As our ruling for this information is dispositive, we need not address your remaining arguments against its disclosure.

<sup>4</sup>As our ruling for this information is dispositive, we need not address your remaining arguments against its disclosure.

We note a portion of the remaining information that was not timely submitted is subject to common-law privacy. Section 552.101 of the Government Code also encompasses the doctrine of common-law 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). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. The type of information considered highly 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 also found 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) (when considering prong regarding individual's privacy interest, court recognized distinction between public records found in courthouse files and local police stations and compiled summary of information and noted that individual has significant privacy interest in compilation of one's criminal history). Additionally, we find a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. Furthermore, this office has found common-law privacy applies to the identifying information of juvenile offenders. *See Open Records Decision No. 384* (1983); *cf. Fam. Code § 58.007*. Upon review, we find the information we have marked is highly intimate or embarrassing and not of legitimate public concern. Therefore, the department must withhold the information we have marked pursuant to section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.117(a)(2) of the Government Code excepts from disclosure the home address, home telephone number, emergency contact information, and social security number of a peace officer, as well as information that reveals whether the officer has family members, regardless of whether the officer complies with sections 552.024 or 552.1175 of the Government Code. *See Gov't Code §§ 552.117, .024*. Section 552.117(a)(2) adopts the definition of peace officer found at article 2.12 of the Code of Criminal Procedure. We note section 552.117(a)(2) protects a peace officer's personal cellular telephone number if the officer pays for the cellular telephone service with personal funds. *See Open Records Decision No. 670* at 6 (2001). We have marked a police officer's cellular telephone number the department must withhold under section 552.117(a)(2) of the Government Code, if the cellular telephone service is paid for with personal funds.

Section 552.130 of the Government Code provides information relating to a motor vehicle operator's license, driver's license, motor vehicle title or registration, or a personal identification document issued by an agency of this state or another state or country is excepted from public release. *Gov't Code § 552.130*. Upon review, we find the department

must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code.

In summary, the department must withhold report number 12-46867 and the additional information we have marked under section 552.101 of the Government Code in conjunction with section 58.007 of the Family Code. The department may withhold the timely submitted responsive information under section 552.108(a)(1) of the Government Code. The department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. To the extent the officer whose information is at issue pays for the cellular telephone service with personal funds, the department must withhold the cellular telephone number we have marked under section 552.117(a)(2) of the Government Code. The department must withhold the information we have marked under section 552.130 of the Government Code. The remaining responsive information, which we have marked, must be released.

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,



Cynthia G. Tynan  
Assistant Attorney General  
Open Records Division

CGT/akg

Ref: ID# 469818

Enc. Submitted documents

c: Requestor  
(w/o enclosures)