



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 28, 2012

Ms. Donna L. Johnson
For the City of Tomball
Olson & Olson, L.L.P.
2727 Allen Parkway, Suite 600
Houston, Texas 77019-2133

OR2012-19147

Dear Ms. Johnson:

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# 470984 (COT12-015).

The City of Tomball (the "city"), which you represent, received a request for four categories of information pertaining to fifteen specified citations, fourteen cause numbers, three warrants, and two reports; information pertaining to the investigative procedures for seven specified offenses; and five categories of information pertaining to six specified police officers. You state the city has released some of the requested information. You also state the city will redact social security numbers pursuant to section 552.147(b) of the Government code, and personal e-mail addresses under to section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).¹ You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.108,

¹Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act. Gov't Code § 552.147. However, in this instance, the requestor has a right of access to his client's social security number. *See generally id.* § 552.023(b) (person or person's authorized representative has a special right of access to records that contain information relating to the person that are protected from public disclosure by laws intended to protect that person's privacy interests). Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

552.117, 552.122, and 552.130 of the Government Code. You state you have notified the police officers to whom the requested information relates pursuant to section 552.304 of the Government Code. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

Initially, we note the requestor specifically excludes the officers' home addresses, home telephone numbers, and social security numbers; information indicating whether the officers have family members; vehicle identification numbers; driver's license numbers; motor vehicle record information; and tax forms. Accordingly, these types of information are not responsive to the instant request. Additionally, we note a portion of the submitted information, which we have marked, is not responsive to the instant request because it does not pertain to the investigative procedures for the offenses specified in the request. This ruling does not address the public availability of non-responsive information, nor is the city required to release non-responsive information to this requestor.

Next, we address your assertion that some of the information at issue is subject to a previous request for information, as a result of which this office issued Open Records Letter No. 2012-07390 (2012). In that ruling, we determined that because the information at issue was maintained by the Tomball Municipal Court, it was not subject to the Act and need not be released. Although you seek to rely on that prior ruling, that request for information was submitted to a different governmental body. Therefore, the city may not rely on our previous ruling to the Tomball Municipal Court as a previous determination for the information at issue. *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 that information is or is not excepted from disclosure). Accordingly, we will consider your arguments against disclosure of the information at issue, as well as the information not previously at issue in Open Records Letter No. 2012-07390.

We next note the submitted responsive information includes court filed documents. Section 552.022(a)(17) 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). Thus, the court filed documents we have marked are subject to disclosure under section 552.022(a)(17). Although you seek to withhold the court filed documents under sections 552.103 and 552.108 of the Government Code, those sections are discretionary exceptions to disclosure that protect a

²We 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.

governmental body's interests and do not make information confidential under the Act. *See id.* § 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 section 552.103); Open Records Decision Nos. 542 at 4 (statutory predecessor to section 552.103 may be waived), 177 at 3 (1977) (statutory predecessor to Gov't Code § 552.108 subject to waiver); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the marked court filed documents may not be withheld under section 552.103 or section 552.108 of the Government Code. Although you also claim section 552.130 of the Government Code, which is a confidentiality provision for the purposes of section 552.022(a)(17), the court documents do not contain any information made confidential under section 552.130 of the Government Code. Therefore, the marked court filed documents must be released pursuant to section 552.022(a)(17) of the Government Code. We now turn to your claims for the remaining information.

You state the city will withhold fingerprints under section 560.003 of the Government Code pursuant to the previous determination issued in ORD No. 684.³ 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 section 560.003 of the Government Code, which provides "[a] biometric identifier in the possession of a governmental body is exempt from disclosure under [the Act]." *Id.* § 560.003; *see id.* § 560.001(1) ("biometric identifier" means retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry). However, we note the submitted information includes the fingerprints of the requestor's client. Section 560.002 of the Government Code provides, however, "[a] governmental body that possesses a biometric identifier of an individual . . . may not sell, lease, or otherwise disclose the biometric identifier to another person unless . . . the individual consents to the disclosure[.]" *Id.* § 560.002(1)(A). Accordingly, we find a person, or the person's authorized representative, has a right of access under subsection 560.002(1)(A) to that person's biometric information. In this instance, the requestor has a right of access to his client's fingerprints. *See id.* § 560.002(1). Thus, the fingerprints we have marked must be released to this requestor pursuant to section 560.002(1)(A). *See* ORD 481 at 4. We agree the city must withhold the remaining fingerprints under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code.

Section 552.108(b)(1) of the Government Code excepts from disclosure the internal records and notations of law enforcement agencies and prosecutors when their release would interfere with law enforcement and crime prevention. Gov't Code § 552.108(b)(1); *see also* Open Records Decision No. 531 at 2 (1989) (quoting *Ex parte Pruitt*, 551 S.W.2d 706, 710 (Tex. 1977)). Section 552.108(b)(1) is intended to protect "information which, if released, would permit private citizens to anticipate weaknesses in a police department, avoid

³We note Open Records Decision No. 684 also authorizes all governmental bodies to withhold a fingerprint under section 552.101 in conjunction with section 560.003 of the Government Code.

detection, jeopardize officer safety, and generally undermine police efforts to effectuate the laws of this State.” *City of Fort Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no writ). To demonstrate the applicability of this exception, a governmental body must meet its burden of explaining how and why release of the requested information would interfere with law enforcement and crime prevention. Open Records Decision No. 562 at 10 (1990). This office has concluded that section 552.108(b) excepts from public disclosure information relating to the security or operation of a law enforcement agency. *See, e.g.*, Open Records Decision Nos. 531 (release of detailed use of force guidelines would unduly interfere with law enforcement), 252 (1980) (Gov’t Code § 552.108 is designed to protect investigative techniques and procedures used in law enforcement), 143 (1976) (disclosure of specific operations or specialized equipment directly related to investigation or detection of crime may be excepted). Section 552.108(b)(1) is not applicable, however, to generally known policies and procedures. *See, e.g.*, ORD Nos. 531 at 2-3 (Penal Code provisions, common law rules, and constitutional limitations on use of force not protected), 252 at 3 (governmental body failed to indicate why investigative procedures and techniques requested were any different from those commonly known).

You state the responsive portions of the policy manual you have highlighted reveal “internal law enforcement policies that if released, may allow criminals and others to manipulate them and jeopardize public safety[.]” Based on your arguments and our review, we find release of the information you have highlighted in the submitted policy manual would interfere with law enforcement. Accordingly, the city may withhold the information you have highlighted under section 552.108(b)(1) of the Government Code.

Section 552.108 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 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).

You state the remaining information you have indicated, that is not subject to section 552.022 of the Government Code, relates to pending criminal prosecutions and one pending appeal. Based on these representations and our review of the information at issue, we conclude that section 552.108(a)(1) is generally applicable to this information. *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 the responsive information not subject to section 552.022 includes citations. Because a copy of these documents are provided to the person who is the subject of the citations, we find release of the these documents will not interfere with the detection,

investigation, or prosecution of crime. *See* Gov't Code § 552.108(a)(1). Therefore, the city may not withhold the citations under section 552.108.

We also note section 552.108 does not except from disclosure “basic information about an arrested person, an arrest, or a crime.” *Id.* § 552.108(c). Section 552.108(c) refers to the basic front-page offense and arrest information held to be public in *Houston Chronicle*. *See* 531 S.W.2d at 186-88; *see also* Open Records Decision No. 127 at 3-4 (1976) (summarizing types of information deemed public by *Houston Chronicle*). Except for the basic information and the citations, the city may withhold the responsive information you have indicated that is not subject to section 552.022 under section 552.108(a)(1) of the Government Code.⁴

Section 552.101 of the Government Code also encompasses confidentiality provisions such as section 58.007 of the Family Code. Juvenile law enforcement records relating to conduct that occurred on or after September 1, 1997 are confidential under section 58.007. Section 58.007(c) reads as follows:

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). *See also id.* § 51.02(2) (defining “child” as a person who is ten years of age or older and younger than seventeen years of age). Upon review, we find you have failed to establish any of the remaining responsive information involves alleged juvenile delinquent conduct or conduct indicating a need for supervision occurring after September 1, 1997. *See id.* § 51.03(a), (b) (defining “delinquent conduct” and “conduct indicating a need

⁴As this ruling is dispositive of this information, we do not address your remaining arguments against disclosure except to note basic information is generally not excepted from public disclosure under section 552.103 of the Government Code. Open Records Decision No. 597 (1991).

for supervision”). Thus, none of the remaining responsive information is confidential under section 58.007, and the city may not withhold it under section 552.101 on that ground.

Section 552.101 of the Government Code also encompasses section 261.201(a) of the Family Code, which provides as follows:

[T]he following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

- (1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and
- (2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Id. § 261.201(a). You assert some of the remaining information was used or developed in an investigation under chapter 261. *See id.* § 101.003(a) (defining “child” for purposes of section 261.201). However, upon review, we find you have not established the information is within the scope of section 261.201 of the Family Code. *See id.* § 261.001(1), (4) (defining “abuse” and “neglect” for purposes of section 261.201 of Family Code). Thus, the remaining responsive information is not confidential under section 261.201, and the city may not withhold it under section 552.101 on that ground.

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. This office has also found personal financial information not relating to a financial transaction between an individual and a governmental body is generally intimate or embarrassing. *See generally* Open Records Decision Nos. 600 at 9-10 (employee’s designation of retirement beneficiary, choice of insurance carrier, election of optional coverages, direct deposit authorization, forms allowing employee to allocate pretax compensation to group insurance, health care or dependent care), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). However, there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See* ORDs 600 at 9 (information revealing that employee participates in group insurance plan

funded partly or wholly by governmental body is not excepted from disclosure), 545 (financial information pertaining to receipt of funds from governmental body or debts owed to governmental body not protected by common-law privacy). Additionally, this office has found that some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* ORDs 470 (illness from severe emotional and job-related stress), 455 (prescription drugs, illnesses, operations, and physical handicaps). We note the doctrine of common-law privacy generally protects the identifying information of juvenile offenders and of juvenile victims of abuse or neglect. *See* Open Records Decision No. 394 (1983); *cf.* Fam. Code §§ 58.007, 261.201. We have marked the information that is highly intimate or embarrassing and of no legitimate public concern that the city must withhold pursuant to section 552.101 of the Government Code in conjunction with common-law privacy. However, we find you have failed to demonstrate that any of the remaining responsive information is highly intimate or embarrassing and not a matter of legitimate public interest. We therefore conclude the city may not withhold any of the remaining responsive information under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.102(a) of the Government Code 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). We understand you to assert the privacy analysis under section 552.102(a) is the same as the common-law privacy test under section 552.101 of the Government Code, which is discussed above. *See Indus. Found.*, 540 S.W.2d at 685. 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 of appeals ruled the privacy test under section 552.102(a) is the same as the *Industrial Foundation* privacy test. However, the Texas Supreme Court has expressly disagreed with *Hubert’s* interpretation of section 552.102(a) and held the privacy standard under section 552.102(a) differs from the *Industrial Foundation* test under section 552.101. *See Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). The Supreme Court also considered the applicability of section 552.102(a) and held it excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *See id.* at 348. The city must withhold the dates of birth you have marked, in addition to the dates of birth we have marked, under section 552.102(a) of the Government Code. However, we find no portion of the remaining responsive information is subject to section 552.102(a) of the Government Code, and the city may not withhold any of the remaining responsive information on that basis.

Section 552.122 of the Government Code excepts from disclosure “a test item developed by a . . . governmental body[.]” Gov’t Code § 552.122(b). In Open Records Decision No. 626 (1994), this office determined the term “test item” in section 552.122 includes “any standard means by which an individual’s or group’s knowledge or ability in a particular area is evaluated,” but does not encompass evaluations of an employee’s overall job performance or suitability. ORD 626 at 6. The question of whether specific information falls within the

scope of section 552.122(b) must be determined on a case-by-case basis. *Id.* Traditionally, this office has applied section 552.122 where release of “test items” might compromise the effectiveness of future examinations. *Id.* at 4-5; *see also* Open Records Decision No. 118 (1976). Section 552.122 also protects the answers to test questions when the answers might reveal the questions themselves. *See* Attorney General Opinion JM-640 at 3 (1987); ORD 626 at 8. The city seeks to withhold the Investigations Exam under section 552.122 of the Government Code. Having reviewed the information at issue, we agree the city may withhold the submitted exam under section 552.122(b) of the Government Code.

Section 552.130 of the Government Code provides information relating to a motor vehicle operator’s license or driver’s license, title, or registration issued by a Texas agency, or an agency of another state or country, is excepted from public release. Gov’t Code § 552.130(a)(1), (2). A portion of the responsive information you have highlighted under section 552.130 consists of motor vehicle record information belonging to the requestor’s client. We note section 552.130 protects personal privacy. Therefore, as the authorized representative of the individual at issue, the requestor has a special right of access to the motor vehicle information belonging to his client, which we have marked for release. *See id.* § 552.023; Open Records Decision No. 481 at 4 (1987) (governmental body may not deny access to person to whom information relates or person’s authorized representative on grounds that information is considered confidential by privacy principles). Upon review, we conclude, with the exception of the requestor’s client’s information, the city must withhold the responsive information you have marked, in addition to the responsive information we have marked for withholding, under section 552.130 of the Government Code.

The remaining responsive information contains photocopies of one of the specified officer’s identification cards. Section 552.139(b)(3) of the Government Code provides, “a photocopy or other copy of an identification badge issued to an official or employee of a governmental body” is confidential.⁵ Gov’t Code § 552.139(b)(3). Therefore, the city must withhold the photocopies of the identification cards, which we have marked, under section 552.139(b)(3) of the Government Code.

In summary, the city must release the marked fingerprints pursuant to section 560.002 of the Government Code. The policy manual you have marked may be withheld under section 552.108(b)(1) of the Government Code. With the exception of the policy manual, basic information, and the citations, the city may withhold the responsive information you have indicated that is not subject to section 552.022(a)(17) under section 552.108(a)(1) of the Government Code. The city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The city

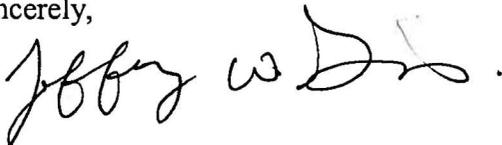
⁵The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

must withhold the birth dates you have marked and we have marked under section 552.102(a) of the Government Code. The city may withhold the information you have marked under section 552.122 of the Government Code. With the exception of the requestor's client's information, which we have marked for release, the city must withhold the information you have marked, in addition to the information we have marked for withholding, under section 552.130 of the Government Code. The city must withhold the photocopies of the identification cards we have marked under section 552.139(b)(3) of the Government Code. The city must release the remaining responsive information.⁶

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,



Jeffrey W. Giles
Assistant Attorney General
Open Records Division

JWG/eb

Ref: ID# 470984

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁶We note that because the requestor has a right of access to information being released in this instance, the city must again seek a decision from this office if it receives another request for the same information from another requestor.