



ATTORNEY GENERAL OF TEXAS
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November 29, 2012

Ms. L. Carolyn Nivens
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OR2012-19214

Dear Ms. Nivens:

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# 472316 (Reference No. W001951-091012; File No. 4396-001).

The Friendswood Police Department (the "department"), which you represent, received a request for (1) the requestor's client's file, including (a) agreements involving the client; (b) reports or notes of officers who had contact with the client on a specified date; (c) policies governing strip searches and certain custodial arrests; (d) the operation plan for the controlled buy the client performed for the department; (e) a list of the officers who were present to protect the client; (f) dash camera video from a named officer's patrol unit for a specified date and time period; and (g) security tapes from the jail for a specified date and time period; (2) policies governing street contracts, controlled buys, and operation plans for controlled buys; (3) the number of informants under contract to conduct controlled buys and avoid prosecution; (4) the number of such contracts approved by a district attorney's office; and (5) two named police officers' personnel records. You state the department does not maintain a record of the number of informants it has under contract.¹ You state some of the requested information either has been or will be released. You claim the submitted

¹We note the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

information is excepted from disclosure under sections 552.101, 552.102, 552.108, 552.117, 552.130, 552.136, and 552.152 of the Government Code.² We have considered the exceptions you claim and reviewed the information you submitted.

We first note some of the submitted information falls within the scope of section 552.022(a) of the Government Code, which provides in part:

(a) Without limiting the amount or kind of information that is public information under [the Act], the following categories of information are public information and not excepted from required disclosure under [the Act] unless made confidential under [the Act] or other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108 [of the Government Code];

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body; [and]

...

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(1), (3), (17). In this instance, the submitted information includes completed evaluations made by the department, information in an account relating to the expenditure of public funds by the department, and a court record. That information is subject to section 552.022(a)(1), (3), and (17). As such, it must be released unless the information is made confidential under the Act or other law or subject to

²Although you also raise section 552.1175 of the Government Code, we note section 552.117 is the applicable exception to claim for personnel information related to a current or former employee of the department. Thus, this decision does not address section 552.1175. You also raise 552.024 of the Government Code, which is not an exception to disclosure under subchapter C of the Act. Section 552.024 enables an official or employee of a governmental body to request confidentiality for information protected by section 552.117(a)(1) of the Government Code. We also note you appear to raise section 552.101 of the Government Code in conjunction with section 552.108 of the Government Code and section 552.102 of the Government Code in conjunction with section 552.152 of the Government Code. The Act's exceptions to disclosure do not encompass other exceptions to disclosure under subchapter C of the Act. Lastly, we note you raise section 552.115 of the Government Code but have provided no arguments for the applicability of that exception. Therefore, this decision does not address section 552.115. See Gov't Code §§ 552.301(e)(1)(A), .302.

section 552.022(a)(1) but excepted from disclosure under section 552.108. Thus, we will consider your claims under section 552.108 for the completed evaluations that are subject to section 552.022(a)(1) and the submitted information that is not subject to section 552.022(a). Although you also seek to withhold the account information and the court record under section 552.108, we note that section is a discretionary exception that protects a governmental body's interests and may be waived. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 177 at 3 (1977) (statutory predecessor to Gov't Code § 552.108 subject to waiver). As such, section 552.108 does not make information confidential for purposes of section 552.022(a)(3) and (17). Therefore, the account information and the court record, which we have marked, may not be withheld under section 552.108. You also claim sections 552.101, 552.102, 552.117, 552.130, 552.136, and 552.152 of the Government Code, which make information confidential for purposes of section 552.022(a)(3) and (17). Therefore, we will determine whether any of the account information or any information in the court record must be withheld under sections 552.101, 552.102, 552.117, 552.130, 552.136, or 552.152.

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 and why section 552.108(a)(1) 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 claim section 552.108(a)(1) for the information in Exhibits A, B, C, D, E, and G. We note most of the information at issue consists of administrative and personnel records. In this instance, however, you indicate release of the information at issue would interfere with a pending criminal prosecution and other ongoing criminal cases. Based on your representations, we conclude the department may withhold Exhibits A, B, C, D, E, and G under section 552.108(a)(1) of the Government Code, except for the account information and the court record that are subject to section 552.022(a)(3) and (17).³ *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).

Next, we consider your claims for the account information and the information in the court record. 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. We understand you to claim section 552.101 in conjunction with common-law privacy, which protects information that is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and of no legitimate public interest. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540

³As we are able to make this determination, we need not address your other arguments against disclosure of this information.

S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common law privacy, both elements of the test must be established. Common-law privacy encompasses the specific types of information held to be intimate or embarrassing in *Industrial Foundation*. See *id.* at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). This office has determined other types of information also are private under section 552.101. See generally Open Records Decision No. 659 at 4-5 (1999) (summarizing information attorney general has held to be private). We also have concluded financial information related only to an individual ordinarily satisfies the first element of the common-law privacy test, but the public has a legitimate interest in the essential facts about a financial transaction between an individual and a governmental body. See Open Records Decision Nos. 600 at 9-12 (1992), 545 at 4 (1990), 523 at 4 (1989), 373 at 4 (1983).

We note the account information and the court record pertain to police officers employed by the department. Information concerning public employees and public employment is generally not private because the public has a legitimate interest in such information, particularly when the information pertains to law enforcement. See Open Records Decision No. 444 at 6 (1986) (public has genuine interest in information concerning law enforcement employee's qualifications and performance and circumstances of his termination or resignation); see also Open Records Decision Nos. 562 at 10 (1990) (personnel information does not involve most intimate aspects of human affairs, but in fact touches on matters of legitimate public concern), 473 at 3 (1987) (fact that public employee received less than perfect or even very bad evaluation not private), 470 at 4 (1987) (job performance does not generally constitute public employee's private affairs), 405 at 2 (1983) (manner in which public employee's job was performed cannot be said to be of minimal public interest), 329 (1982) (reasons for employee's resignation ordinarily not private). We also note common-law privacy is not applicable to information contained in public court records. See *Star-Telegram v. Walker*, 834 S.W.2d 54 (Tex. 1992). We therefore conclude the department may not withhold any of the information encompassed by section 552.022(a)(3) and (17) 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). 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 Third Court of Appeals ruled the privacy test under section 552.102(a) was the same as the privacy test under section 552.101 of the Government Code in conjunction with *Industrial Foundation v. Texas Industrial Accident Board*. See 540 S.W.2d at 685. The Texas Supreme Court has expressly disagreed with *Hubert's* interpretation of section 552.102(a), however, 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 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. Thus, as none of the information subject to section 552.022(a)(3) or (17) falls within the scope of section 552.102(a) of the Government Code, the department may not withhold any of the information at issue on that basis.

Section 552.117(a)(2) of the Government Code excepts from disclosure the home address and 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(a)(2). Section 552.117(a)(2) adopts the definition of peace officer found at article 2.12 of the Code of Criminal Procedure. We have marked information the department must withhold under section 552.117(a)(2) of the Government Code.

Section 552.130 of the Government Code excepts from disclosure information related to a motor vehicle title or registration issued an agency of this state or another state or country. *See id.* § 552.130(a)(2). We have marked motor vehicle information the department must withhold under section 552.130 of the Government Code.

Lastly, section 552.152 of the Government Code provides as follows:

Information in the custody of a governmental body that relates to an employee or officer of the governmental body is excepted from [required public disclosure] if, under the specific circumstances pertaining to the employee or officer, disclosure of the information would subject the employee or officer to a substantial threat of physical harm.

Gov't Code § 552.152. You state the release of certain police officers' names and badge numbers could endanger the officers' lives and physical safety. Based on your representations, we conclude the department must withhold the officers' names and badge numbers under section 552.152 of the Government Code.

In summary, the department (1) may withhold Exhibits A, B, C, D, E, and G under section 552.108(a)(1) of the Government Code, except for the account information and the court record we have marked that are subject to section 552.022(a)(3) and (17) of the Government Code; (2) must withhold the information we have marked under section 552.117(a)(2) of the Government Code; (3) must withhold the motor vehicle information we have marked under section 552.130 of the Government Code; and (4) must

withhold the officers' names and badge numbers under section 552.152 of the Government Code.⁴ The rest of the submitted information 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, 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,



James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/bhf

Ref: ID# 472316

Enc: Submitted information

c: Requestor
(w/o enclosures)

⁴As we are able to make these determinations, we need not address your other arguments against disclosure, except to note the remaining information includes a social security number. Section 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 under the Act.