



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 22, 2013

Mr. Steven E. Meyer
Assistant City Attorney
Arlington Police Department
P.O. Box 1065
Arlington, Texas 76004-1065

OR2013-01206

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# 476708 (Arlington Ref. No. 9494).

The Arlington Police Department (the "department") received a request for: (1) a list of citations written by a named officer during a certain period; (2) a list of all citations written by department officers during the same period at a specified location; (3) any audio or video recordings related to a specified citation; and (4) any disciplinary records, complaints, or commendations for the named officer. You claim the submitted information is excepted from disclosure under sections 552.102, 552.103, 552.108, and 552.117 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Initially, you state the department does not maintain some of the information in the format sought by the requestor. The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *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), 563 at 8 (1990), 555 at 1–2 (1990). However, a governmental body must make a good-faith

¹Although you raise section 552.1175 of the Government Code, we note section 552.117 is the proper exception to raise for information held in an employment context.

effort to relate a request to information that is within its possession or control. *See* Open Records Decision No. 561 at 8–9 (1990). As you have submitted information for our review, we presume the department has made a good faith effort to relate the request to information it maintains.

Next, we note some of the submitted information, which we have marked, is part of a completed investigation. Section 552.022 provides “a completed report, audit, evaluation, or investigation made of, for, or by a governmental body” is expressly public, unless it is excepted by section 552.108 of the Government Code or made confidential under the Act or other law. Gov’t Code § 552.022(a)(1). Although you claim section 552.103 of the Government Code for this information, that is a discretionary exception to disclosure, which protects a governmental body’s interests and may be waived. *See 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 No. 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body’s position in litigation and does not itself make information confidential); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.103 does not make information confidential for purposes of section 552.022(a)(1). Thus, the department may not withhold the information we have marked subject to section 552.022 under section 552.103 of the Government Code. However, you raise sections 552.102 and 552.117 of the Government Code for this information. As those exceptions do make information confidential under the Act, we will consider your assertion of those exceptions.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.”² Gov’t Code § 552.101. Section 552.101 encompasses section 550.065(b) of the Transportation Code, which states that, except as provided by subsection (c) or (e), accident reports are privileged and confidential. Transp. Code § 550.065(b). Section 550.065(c)(4) provides for the release of crash reports to a person who provides two of the following three pieces of information: (1) the date of the accident; (2) the name of any person involved in the accident; and (3) the specific location of the accident. *Id.* § 550.065(c)(4). Under this provision, the Texas Department of Transportation or another governmental entity is required to release a copy of an accident report to a person who provides the agency with two or more pieces of information specified by the statute. In this case, the requestor has not provided the department with two of the three pieces of information. Accordingly, the department must

²The 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).

withhold the crash report we have marked under section 552.101 of the Government Code in conjunction with section 550.065(b) of the Transportation Code.³

Section 552.103 of the Government Code provides:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); ORD 551 at 4. The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You state the remaining information is related to a criminal case that is pending in the Arlington Municipal Court. As the department is not a party to the litigation, the department does not have a litigation interest in the matter for purposes of section 552.103. In such a situation, we require an affirmative representation from the governmental body with the litigation interest that the governmental body wants the information at issue withheld from disclosure under section 552.103. However, you have not provided this office with an affirmative representation from any governmental body with a litigation interest that the governmental body wishes the information at issue to be withheld pursuant to section 552.103. Accordingly, the department may not withhold any of the remaining information under section 552.103 of the Government Code.

³As our ruling is dispositive, we do not consider your remaining arguments for this information.

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 found some kinds of medical information or information indicating disabilities or specific illnesses are protected by common-law privacy. See Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Upon review, we find the information we have marked is highly intimate or embarrassing and of no legitimate public interest. Accordingly, the department must withhold this information under section 552.101 of the Government Code in conjunction with common-law privacy.⁴

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. Accordingly, the department must withhold the date of birth we have marked under section 552.102(a) of the Government Code. However, no portion of the remaining information is subject to section 552.102(a) of the Government Code, and the department may not withhold any of the remaining information on that basis.

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 claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. See *id.* §§ 552.108(a)(1), .301(e)(1)(A); see also *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You

⁴As our ruling is dispositive, we do not address your remaining argument for this information.

state the information submitted as Exhibit D relates to a pending criminal prosecution and release of the 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 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). Based on this representation and our review, we agree the department may withhold the information submitted as Exhibit D under section 552.108(a)(1) of the Government Code.

Section 552.117(a)(2) excepts from disclosure the home address, home telephone number, emergency contact information, social security number, and family member information of a peace officer, as defined by article 2.12 of the Code of Criminal Procedure, regardless of whether the peace officer made an election under section 552.024 of the Government Code. Gov't Code § 552.117(a)(2); Open Records Decision No. 622 (1994). Accordingly, the department must withhold the information we have marked under section 552.117(a)(2) of the Government Code.

Section 552.130 of the Government Code excepts from disclosure information relating to a motor vehicle title or registration issued by an agency of this state or another state or country. Gov't Code § 552.130(a)(2). Accordingly, the department must withhold the information we have marked under section 552.130 of the Government Code.⁵

In summary, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 550.065 of the Transportation Code and in conjunction with common-law privacy. The department must withhold the information we have marked under section 552.102(a) of the Government Code. The department may withhold the information submitted as Exhibit D under section 552.108(a)(1) of the Government Code. The department must withhold the information we have marked under section 552.117(a)(2) of the Government Code and the information we have marked under section 552.130 of the Government Code. The remaining information must be released.

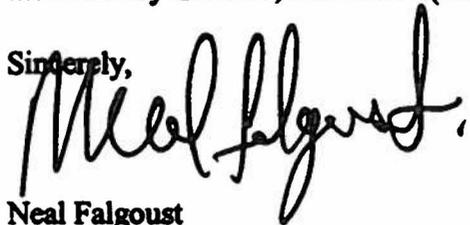
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

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,

⁵Open Records Decision No. 684 (2009) serves as a previous determination to all governmental bodies permitting them to withhold certain categories of information, including a Texas license plate number under section 552.130(a)(2) of the Government Code, without requesting a decision from this office.

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,

A handwritten signature in black ink, appearing to read "Neal Falgoust". The signature is written in a cursive style with a large initial "N".

Neal Falgoust
Assistant Attorney General
Open Records Division

NF/ag

Ref: ID# 476708

Enc. Submitted documents

c: Requestor
(w/o enclosures)