



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 22, 2013

Ms. Molly Cost
Assistant General Counsel
Texas Department of Public Safety
5805 North Lamar Boulevard, Box 4087
Austin, Texas 78773-0001

OR2013-01248

Dear Ms. Cost:

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# 476790 (DPS PIR Nos. 12-3624, 12-3625, 12-3632, 12-3639, 12-3640, 12-3643, 12-3664, 12-3665, 12-3702, 12-3823, 12-3839, 12-3872, 12-3882, 12-3913, 12-3973, 12-3985, 12-4353; 13-0014).

The Texas Department of Public Safety (the "department") received (1) requests from multiple requestors for information pertaining to a specified shooting incident, including videos, autopsy reports, and other, related types of information and (2) requests from some of the same requestors for information relating to investigations of shootings from department aircraft for specified periods of time, as well as related use-of-force policies and training information.¹ You state the department does not have some of the requested

¹The department requested, and received, clarification of one of the requests. See Gov't Code § 552.222. One of the requestors also narrowed his request after receiving a cost estimate of charges pursuant to section 552.2615 of the Government Code and a demand for a deposit of such charges pursuant to section 552.263 of the Government Code. See *id.* §§ 552.2615, 552.263.

information.² You also state the department has released or made available some of the requested information in accordance with copyright law. You claim the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.108 of the Government Code.³ We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by one of the requestors. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note the submitted information is not responsive in its entirety to all the requests for information, either because a particular request was only for a portion of the submitted information, or because the portion of the submitted information at issue did not exist when the department received the particular request. Accordingly, the department does not need to release information pursuant to a particular request if the information is not responsive to that request, and this ruling will not address the public availability of the nonresponsive information with respect to the particular request. *See generally Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. App.—San Antonio 1978, writ dismissed).

Next, you indicate some of the requested information consists of records of a grand jury. The judiciary is expressly excluded from the requirements of the Act. *Id.* § 552.003(1)(B). This office has determined that a grand jury, for purposes of the Act, is a part of the judiciary, and therefore not subject to the Act. Open Records Decision No. 411 (1984). Further, records kept by a governmental body that is acting as an agent for a grand jury are considered records in the constructive possession of the grand jury, and therefore are also not subject to the Act. Open Records Decisions Nos. 513 (1988), 411, 398 (1983). *But see* ORD 513 at 4 (defining limits of judiciary exclusion). Thus, to the extent the requested information is held by the department as an agent of the grand jury, it consists of records of the judiciary not subject to disclosure under the Act. To the extent the information does not consist of records of the judiciary, we will address your exceptions to disclosure.

²The Act does not require a governmental body to disclose information that did not exist when the request for information was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

³Although you also raise section 552.101 of the Government Code in conjunction with rule 503 of the Texas Rules of Evidence, this office has concluded that section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 677 (2002), 676 (2002). The proper exceptions to raise when asserting the attorney client privilege for information not subject to section 552.022 of the Government Code is section 552.107. *See* Open Records Decision Nos. 677, 676. In addition, although you initially raised sections 552.102 and 552.111 of the Government Code, you have not submitted arguments explaining how these exceptions apply to the information at issue. Therefore, we presume you no longer assert section 552.102 or 552.111. *See* Gov't Code §§ 552.301, 552.302.

You also inform us the department has provided some of the submitted information to elected state representatives under the legislative privilege pursuant to section 552.008(b) of the Government Code, which states, in part, as follows:

[A] governmental body on request by an individual member, agency, or committee of the legislature shall provide public information, including confidential information, to the requesting individual member, agency, or committee of the legislature if the requesting member, agency or committee states that the public information is requested under [the Act] for legislative purposes.

Gov't Code § 552.008(b). Disclosure of excepted or confidential information to a legislator under section 552.008 does not waive or affect the confidentiality of the information or the right to assert exceptions in the future regarding that information, and provides specific procedures relating to the confidential treatment of the information. *Id.* Accordingly, we will consider the department's claims to withhold the information at issue under the Act.

Next, you acknowledge, and we agree, the submitted information contains court-filed documents that are subject to section 552.022 of the Government Code, which we have marked. Section 552.022(a)(17) provides the following:

Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

...

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

Id. § 552.022(a)(17). Section 552.108 is discretionary and does not make information confidential under the Act. *See* Open Records Decision No. 177 (1977) (governmental body may waive statutory predecessor to section 552.108); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the department may not withhold the information subject to section 552.022 under section 552.108. However, sections 552.101 and 552.130 of the Government Code make information confidential under the Act.⁴ Therefore, we will consider the applicability of these sections to the information

⁴The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body. *See* Open Records Decision Nos. 481 at 2 (1987), 480 at 5 (1987); *see, e.g.*, Open Records Decision No. 470 at 2 (1987) (because release of confidential information could impair rights of third parties and because improper release constitutes a misdemeanor, attorney general will raise predecessor statute of section 552.101 on behalf of governmental bodies).

subject to section 552.022. However, we will first consider the department's arguments under section 552.108 for the information that is 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: (1) release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Generally, 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 Gov't Code §§ 552.108(a)(1), (b)(1), .301(e)(1)(A); see also *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You inform us the information you have marked under section 552.108 relates to pending criminal investigations. Based on this representation, we conclude the release of this information, other than the information subject to section 552.022 of the Government Code, 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. 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).

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). Basic information refers to the information held to be public in *Houston Chronicle*. See Open Records Decision No. 127 (1976) (summarizing types of information made public by *Houston Chronicle*). Thus, with the exception of the basic front-page offense and arrest information and the information subject to section 552.022 of the Government Code, the department may withhold the information you have marked under section 552.108(a)(1).⁵

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 information protected by other statutes, including section 58.007 of the Family Code. 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;

⁵As our ruling is dispositive, we do not address your other arguments to withhold this information.

(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). You assert the basic information pertaining to one of the investigations at issue is confidential under section 58.007. This basic information at issue pertains to a use-of-force investigation by the Texas Rangers of an incident where a number of suspects were shot by a department officer from a helicopter during a high-speed pursuit. Upon review, we find you have not established any of the basic information at issue involves an investigation by the department of alleged juvenile delinquent conduct occurring after September 1, 1997, for purposes of section 58.007. *See id.* § 51.03(a), (b) (defining “delinquent conduct” and “conduct indicating a need for supervision” for purposes of section 58.007). Thus, the basic information pertaining to the use-of-force investigation is not confidential under section 58.007, and the department may not withhold it under section 552.101 on that ground. You also assert the information subject to section 552.022 is confidential under section 58.007. We find some of the information subject to section 552.022 involves alleged juvenile delinquent conduct occurring after September 1, 1997. Therefore, the department must withhold this information, which we have marked, under section 552.101 of the Government Code in conjunction with section 58.007. However, you have not established the remaining information subject to section 552.022 involves alleged juvenile delinquent conduct occurring after September 1, 1997. Accordingly, the remaining information subject to section 552.022 is not confidential under section 58.007 and the department may not withhold it from release under section 552.101 on that ground.

Section 552.101 of the Government Code also encompasses section 411.00755 of the Government Code. Open Records Letter No. 2010-12863 (2010) is a previous determination to the department authorizing it to withhold personnel records of commissioned officers of the department under section 552.101 of the Government Code in conjunction with section 411.00755(b) of the Government Code without the necessity of requesting an attorney general decision, unless the exceptions to confidentiality listed in subsections 411.00755(b)(1)-(12) or the release provisions listed in subsection 411.00755(c) are applicable. *See* Open Records Decision No. 673 at 7-8 (2001) (listing elements of second type of previous determination under section 552.301(a) of the Government Code). You state the remaining information you have marked under section 411.00755 consists of personnel records of commissioned officers of the department that are subject to section 411.00755. You also state this information does not contain the types of information listed in subsections 411.00755(b)(1)-(12), and there is no indication the release provisions in subsection 411.00755(c) are applicable. Therefore, based on your representations and our

review, we conclude the department must withhold the remaining information you have marked under section 552.101 of the Government Code in conjunction with section 411.00755 of the Government Code pursuant to the previous determination issued to the department in Open Records Letter No. 2010-12863.⁶

Some of the information subject to section 552.022 of the Government Code is excepted from disclosure under section 552.130 of the Government Code. Section 552.130(a) provides the following:

Information is excepted from the requirements of Section 552.021 if the information relates to:

- (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state or another state or country;
- (2) a motor vehicle title or registration issued by an agency of this state or another state or country; or
- (3) a personal identification document issued by an agency of this state or another state or country or a local agency authorized to issue an identification document.

Gov't Code § 552.130(a). The department must withhold the motor vehicle record information we have marked under section 552.130.

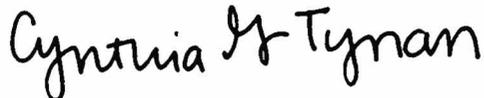
To conclude, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 58.007 of the Family Code and under section 552.130 of the Government Code, but must release the remaining information we have marked pursuant to section 552.022 of the Government Code for those requests for which such information is responsive. With the exception of basic information, which the department must release for those requests for which such information is responsive, the department may withhold the remaining information you have marked under section 552.108(a)(1) of the Government Code. The department must withhold the remaining information you have marked under section 552.101 of the Government Code in conjunction with section 411.00755 of the Government Code pursuant to the previous determination issued to the department in Open Records Letter No. 2010-12863.

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.

⁶As our ruling is dispositive, we do not address your other arguments to withhold this information.

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,



Cynthia G. Tynan
Assistant Attorney General
Open Records Division

CGT/tch

Ref: ID# 476790

Enc. Submitted documents

c: Fifteen Requestors
(w/o enclosures)