



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

March 26, 2013

Mr. Matthew B. Cross  
Assistant City Attorney  
City of El Paso  
P.O. Box 1890  
El Paso, Texas 79950-1890

OR2013-04895

Dear Mr. Cross:

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# 482133.

The El Paso Police Department (the "department") received a request for information pertaining to a specified incident, including specified dash cam and holding area video recordings, the complaint affidavit of a named officer, any supplemental reports filed by the named officer, and any photographs taken of a named individual in relation to the specified incident. The requestor is also seeking reports pertaining to a specified internal affairs investigation and the personnel records of a named officer. You state the department will release some of the requested information to the requestor. You state the department does not have information responsive to the request for specified dash cam and holding area video recordings.<sup>1</sup> You claim the submitted information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. Additionally, you provide an affidavit from the District Attorney's Office for the 34th Judicial District (the "district attorney's office") who claims the submitted information is excepted from disclosure under sections 552.103 and 552.108 of the Government Code. See Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or

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<sup>1</sup>We note the Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

should not be released). We have considered the submitted arguments and reviewed the submitted information.

Initially, we note a portion of the information you have submitted is not responsive to the instant request because it was created after the date of the request.<sup>2</sup> This ruling does not address the public availability of the non-responsive information, which we have marked, nor is the department required to release non-responsive information in response to this request.

Next, we note some of the responsive information is subject to section 552.022 of the Government Code. Section 552.022(a)(17) provides for the required public disclosure of "information that is also contained in a public court record," unless it is "made confidential under [the Act] or other law[.]" *Id.* § 552.022(a)(17). The signed Certificate of Magistrate, which we have marked, is subject to section 552.022(a)(17) and must be released unless it is confidential under the Act or other law. The district attorney's office seeks to withhold the court-filed document, which we have marked, under section 552.103 of the Government Code, and you and the district attorney's office seek to withhold this document under section 552.108 of the Government Code. However, those sections are discretionary exceptions to disclosure that protect 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 Gov't Code § 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 177 at 3 (1977) (statutory predecessor to section 552.108 subject to waiver). As such, sections 552.103 and 552.108 do not make information confidential for the purposes of section 552.022(a)(17). Therefore, the document we have marked under 552.022(a)(17) of the Government Code may not be withheld under section 552.103 or section 552.108. We also understand you to raise section 552.101 in conjunction with common-law and constitutional privacy for the court-filed document. We note that information that has been filed with a court is not protected by common-law privacy. *See Star-Telegram v. Walker*, 834 S.W.2d 54 (Tex. 1992) (common-law privacy not applicable to court-filed document). However, we will address your arguments under section 552.101 in conjunction with constitutional privacy for the court-filed document, as well as the arguments for the remaining responsive information at issue.

We will first address your arguments for the information not subject to section 552.022(a)(17) of the Government Code. Section 552.108(a)(1) of the Government Code generally excepts from disclosure information held by a law enforcement agency 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. *See Gov't Code* § 552.108(a)(1). A governmental body that claims information is excepted from disclosure

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<sup>2</sup>*See Bustamante*, 562 S.W.2d 266; ORD 452 at 3.

under section 552.108 must reasonably explain how and why section 552.108 is applicable to the information. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986). In this instance, a portion of the remaining responsive information you seek to withhold under section 552.108 pertains to an internal affairs investigation made for or by the department. We note that section 552.108 is generally not applicable to records of an internal affairs investigation that is purely administrative in nature and does not involve the investigation or prosecution of crime. *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no pet.); *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). However, as noted above, you have provided our office with an affidavit from the district attorney's office asserting that the internal affairs information, as well as the remaining responsive information, is related to a pending criminal prosecution by the district attorney's office. Based on this representation and our review of the information at issue, we conclude that the release of the information at issue 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), *writ ref'd n.r.e.*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases).

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). Section 552.108(c) refers to the basic front-page information held to be public in *Houston Chronicle*. *See* 531 S.W.2d at 186. The department must release basic information, including a detailed description of the offense and arrest information, even if this information does not literally appear on the front page of an incident or arrest report. *See id.* at 186-88; Open Records Decision No. 127 at 3-4 (1976) (summarizing types of information deemed public by *Houston Chronicle*). Therefore, with the exception of basic information, the department may withhold the responsive information not subject to section 552.022(a)(17) under section 552.108(a)(1) of the Government Code.<sup>3</sup>

We understand you to raise section 552.101 of the Government Code in conjunction with common-law privacy for the basic information. We also understand you to raise section 552.101 in conjunction with constitutional privacy for the basic information and the court-filed document subject to section 552.022(a)(17). 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 the doctrines of common-law and constitutional privacy. Common-law privacy

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<sup>3</sup>As our ruling is dispositive for the information subject to section 552.108(a)(1), we do not address the remaining claims against disclosure for this information, except to note that basic information held to be public in *Houston Chronicle* is generally not excepted from public disclosure under section 552.103 of the Government Code. Open Records Decision No. 597 (1991).

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. Upon review, we find the department has failed to demonstrate any of the basic information is highly intimate or embarrassing and a matter of no legitimate public interest. Therefore, no portion of the basic information may be withheld under section 552.101 in conjunction with common-law privacy.

Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. See *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. ORD 455 at 4. The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* at 7. The scope of information protected is narrower than that under the common-law doctrine of privacy; constitutional privacy under section 552.101 is reserved for "the most intimate aspects of human affairs." *Id.* at 5 (quoting *Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985)). Upon review, we find you have failed to demonstrate the basic information or the information subject to section 552.022(a)(17) falls within the zones of privacy or implicates an individual's privacy interests for purposes of constitutional privacy. Therefore, the department may not withhold the basic information or the court-filed document subject to section 552.022(a)(17) under section 552.101 of the Government Code in conjunction with constitutional privacy.

In summary, with the exception of the court-filed document subject to section 552.022(a)(17) of the Government Code and basic information, the department may withhold the responsive information under section 552.108(a)(1) of the Government Code.<sup>4</sup> The department must release the court-filed document and the basic information.

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<sup>4</sup>Although basic information includes an arrestee's 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 from this office under the Act. Gov't Code § 552.147(b).

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,



Jeffrey W. Giles  
Assistant Attorney General  
Open Records Division

JWG/tch

Ref: ID# 482133

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

