



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 6, 2013

Ms. Elizabeth White
Counsel for The City of Seabrook
Ross, Banks, May, Cron & Cavin, P.C.
2 Riverway, Suite 700
Houston, Texas 77056-1918

OR2013-09416

Dear Ms. White:

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# 489411.

The City of Seabrook (the "city"), which you represent, received a request for sustained complaints against a named officer; the officer's training history and instructor's observations; the number of arrests the officer has made for driving while intoxicated or driving under the influence cases; records related to the officer's training as a Drug Recognition Expert, a Breath Test Operator, or in Standard Field Sobriety Tests, along with training observation sheets or notes; and policies, procedures, and guidelines for interrogating or investigating minors.¹ You state the city does not have information responsive to the request for sustained complaints against the named officer.² You further state the city will release some information to the requestor. You claim the submitted

¹You state the city sought and received clarification of the information requested. *See* Gov't Code § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

²The Act does not require a governmental body to release information that did not exist when it received a request or to create responsive information. *See Economic 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, 552.114, 552.115, 552.117, 552.119, 552.122, 552.130, 552.136, 552.137, 552.139, 552.140, and 552.147 of the Government Code.³ We have considered the exceptions you claim and reviewed the submitted representative samples of information.⁴

Initially, we note the requestor only seeks sustained complaints against a named officer; the officer's training history and instructor's observations; the number of arrests the officer has made for driving while intoxicated or driving under the influence cases; the officer's training as a Drug Recognition Expert, a Breath Test Operator, or in Standard Field Sobriety Tests, along with training observation sheets or notes; and policies, procedures, and guidelines for interrogating or investigating minors. Accordingly, any other types of information are not responsive to the present request for information. This ruling does not address the public availability of the non-responsive information, which we have marked, and the city need not release the marked information in response to this request.⁵

Section 552.101 of the Government Code excepts from public 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. Section 261.201 of the Family Code provides, in part, as follows:

(a) [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

³Although you also raise sections 552.023 and 552.024 of the Government Code as exceptions to disclosure, we note these sections are not exceptions to public disclosure under the Act. *See* Gov't Code §§ 552.023, .024. Further, although you raise section 552.101 of the Government Code in conjunction with sections 552.114, 552.119, and 552.136 of the Government Code, this office has concluded section 552.101 does not encompass other exceptions found in the Act. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Moreover, although you also raise section 552.1175 of the Government Code, we note section 552.117 is the proper exception for information the city holds in an employment capacity. Finally, although you do not raise section 552.139 in your brief, we understand you to raise this section based on your markings.

⁴We assume that the "representative samples" of records submitted to this office are 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 that those records contain substantially different types of information than that submitted to this office.

⁵Accordingly, we do not address your claimed exceptions for the non-responsive information.

used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a). You claim the information in Exhibit 4 is subject to section 261.201 of the Family Code. We note the information at issue consists of the named police officer's daily training activity report. Upon review, we find you have failed to demonstrate how any portion of the information in Exhibit 4 was used or developed in an investigation of alleged or suspected child abuse or neglect under section 261.201(a)(2). Furthermore, you have not established the information is a report of alleged or suspected abuse or neglect made under section 261.201(a)(1). *See id.* § 261.001(1), (4) (defining "abuse" and "neglect" for purposes of Fam. Code ch. 261). Therefore, the city may not withhold the information at issue under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code.

Section 552.101 of the Government Code also encompasses common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person and (2) 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 satisfied. *Id.* at 681-82. The type of information considered intimate and 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. You claim the information in Exhibit 4 is excepted from disclosure under common-law privacy. Upon review, we find no portion of the information at issue is highly intimate or embarrassing and of no legitimate public concern. Accordingly, the city may not withhold any portion of the information in Exhibit 4 under section 552.101 of the Government Code in conjunction with common-law privacy.

You raise section 552.108 of the Government Code for portions of Exhibit 5, which provides, in part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

...

(2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication[.]

...

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [required public disclosure] if:

...

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication[.]

Gov't Code § 552.108(a)(2), (b)(2). Subsection 552.108(a)(2) protects information that relates to a concluded criminal investigation or prosecution that did not result in a conviction or deferred adjudication. Subsection 552.108(b)(2) protects internal law enforcement and prosecution records that relate to a concluded criminal investigation or prosecution that did not result in a conviction or deferred adjudication. A governmental body claiming an exception under section 552.108 must reasonably explain how and why the exception it claims is applicable to the information the governmental body seeks to withhold. *See id.* § 552.301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You seek to withhold portions of the city's police department's policy manual in Exhibit 5 under subsections 552.108(a)(2) and 552.108(b)(2). You state the information in Exhibit 5 pertains to closed investigations by the city's police department that did not result in conviction or deferred adjudication. However, you have not explained how the highlighted portions of the manual relate to any particular closed criminal investigation that did not result in conviction or deferred adjudication. Therefore, we find subsections 552.108(a)(2) and 552.108(b)(2) are not applicable to the information in Exhibit 5. Therefore, the city may not withhold any portion of the information in Exhibit 5 under subsection 552.108(a)(2) or subsection 552.108(b)(2) of the Government Code.

Subsection 552.108(b)(1) of the Government Code excepts from disclosure “[a]n internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution . . . if . . . release of the internal record or notation would interfere with law enforcement or prosecution[.]” Gov't Code § 552.108(b)(1). Subsection 552.108(b)(1) protects information that, if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate state laws. *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.). To prevail on its claim that subsection 552.108(b)(1) excepts information from disclosure, a governmental body must do more than merely make a conclusory assertion that releasing the information would interfere with law enforcement. Instead, the governmental body must meet its burden of explaining how and why release of the requested information would interfere with law enforcement and crime prevention. *See Open Records Decision No. 562 at 10 (1990) (construing statutory predecessor)*. In addition, generally known policies and techniques may not be withheld under section 552.108. *See, e.g., Open Records Decision Nos. 531 at 2-3 (1989) (Penal Code provisions, common-law rules, and constitutional limitations on use of force not protected), 252 at 3 (1980) (governmental body did not meet burden because it did not indicate why investigative procedures and techniques requested*

were any different from those commonly known). The determination of whether the release of particular records would interfere with law enforcement is made on a case-by-case basis. *See* Open Records Decision No. 409 at 2 (1984) (construing statutory predecessor).

You also seek to withhold the highlighted portions of the policy manual in Exhibit 5 under subsection 552.108(b)(1) of the Government Code. Upon review, we find release of the information we have marked would interfere with law enforcement and crime prevention. Accordingly, the city may withhold the information we have marked in Exhibit 5 under subsection 552.108(b)(1). However, upon review, we find you have failed to demonstrate how release of any of the remaining information at issue in Exhibit 5 would interfere with law enforcement and crime prevention. Accordingly, the city may not withhold any of the remaining information in Exhibit 5 under subsection 552.108(b)(1).

In summary, the city may withhold the information we have marked in Exhibit 5 under subsection 552.108(b)(1) of the Government Code. The remaining responsive 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,



Kristi L. Wilkins
Assistant Attorney General
Open Records Division

KLW/bhf

Ref: ID# 489411

Enc. Submitted documents

c: Requestor
(w/o enclosures)