



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 8, 2013

Mr. James W. Wright
City Attorney
City of Livingston
208 West Church Street
Livingston, Texas 77351-3281

OR2013-17474

Dear Mr. Wright:

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# 501466.

The Livingston Police Department (the "department") received a request for information pertaining to the department's digital arrest log for a specified period of time. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.¹

Initially, you state the department sought clarification with respect to the request for information. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request). You state the department has not received a response from the requestor. We note a governmental body has a duty to make a good-faith effort to relate a request for information to information the governmental body holds. *Open Records Decision No. 561 (1990)*. In this case, as you have submitted information responsive to the request and have made arguments against disclosure of this

¹We assume the "representative sample" of records submitted to this office is 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 those records contain substantially different types of information than those submitted to this office.

information, we will address the applicability of your arguments to the submitted information.

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 information made confidential by other statutes, such as articles 55.01 through 55.05 of the Code of Criminal Procedure. These statutes provide for the expunction of criminal records in certain limited circumstances. Article 55.03 prescribes the effect of an expunction order and provides:

When the order of expunction is final:

- (1) the release, maintenance, dissemination, or use of the expunged records and files for any purpose is prohibited;
- (2) except as provided in Subdivision (3) of this article, the person arrested may deny the occurrence of the arrest and the existence of the expunction order; and
- (3) the person arrested or any other person, when questioned under oath in a criminal proceeding about an arrest for which the records have been expunged, may state only that the matter in question has been expunged.

Crim. Proc. Code art. 55.03. Article 55.04 imposes sanctions for violations of an expunction order and provides in part:

Sec. 1. A person who acquires knowledge of an arrest while an officer or employee of the state or of any agency or other entity of the state or any political subdivision of the state and who knows of an order expunging the records and files relating to that arrest commits an offense if he knowingly releases, disseminates, or otherwise uses the records or files.

Id. art. 55.04, § 1. This office has determined the expunction statute prevails over the Act. *See* Open Records Decision No. 457 at 2 (1987) (governmental body prohibited from releasing or disseminating arrest records subject to expunction order, as "those records are not subject to public disclosure under the [Act]"). You contend some of submitted information may be the subject of an expunction order. You state the arrest at issue pertains to "pending expunction proceedings." However, you do not inform us, and the submitted information does not otherwise reveal, whether or when the petition for expunction was granted. Nevertheless, to the extent an order for expunction of the information at issue has been granted, article 55.03 of the Code of Criminal Procedure prohibits the department from releasing any such information. *See* Crim. Proc. Code art. 55.03. To the extent the

information at issue is not subject to an order for expunction, it may not be withheld on the basis of article 55.03 of the Code of Criminal Procedure, and the department must dispose of any such information in accordance with the rest of this ruling.

The department raises section 552.103 of the Government Code for a portion of the submitted information. Section 552.103 provides in relevant part as follows:

(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 purpose of section 552.103 is to protect the litigation interests of governmental bodies that are parties to the litigation at issue. *See id.* § 552.103(a); Open Records Decision No. 638 at 2 (1996) (section 552.103 only protects the litigation interests of the governmental body claiming the exception). A governmental body has the burden of providing relevant facts and documents to show section 552.103(a) is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was 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, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). ORD 551 at 4.

You inform us the information at issue relates to pending expunction proceeding. However, we note the department is not a party to the litigation and, therefore, does not have a litigation interest in the matter for purposes of section 552.103. *See* Gov't Code § 552.103(a); Open Records Decision No. 575 at 2 (1990) (stating that predecessor to section 552.103 only applies when governmental body is party to litigation). 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 a governmental body with a litigation interest explaining that it seeks to withhold the information at issue pursuant to section 552.103. Accordingly, the department may not withhold any of the information at issue under section 552.103 of the Government Code.

Section 552.108(a)(1) of the Government Code excepts from disclosure “[information 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 release of the information at issue would interfere with the detection, investigation, or prosecution of crime. *See id.* § 552.301(e)(1)(A) (governmental body must provide comments explaining why exceptions raised should apply to information requested); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You indicate the submitted rap sheet and mug shot pertain to a pending criminal investigation. Upon review, we conclude release of the information at issue 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 describes law enforcement interests that are present in active cases), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Therefore, the department may withhold the submitted rap sheet and mug shot pursuant to section 552.108(a)(1) of the Government Code.²

Section 552.101 of the Government Code also encompasses the doctrine of 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. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. We note dates of birth of members of the public are generally not highly intimate or embarrassing. *See* Open Records Decision No. 455 at 7 (1987) (home addresses, telephone numbers, dates of birth not protected under privacy). Upon review, we find you have failed to demonstrate how the submitted dates of birth are highly intimate or embarrassing and not of legitimate public interest. Therefore, the department may not withhold this information under section 552.101 in conjunction with common-law privacy.

In summary, to the extent that the information you have marked is the subject of an expunction order, the department must withhold any such information under section 552.101 of the Government Code in conjunction with article 55.03 of the Code of Criminal Procedure. The department may withhold the submitted rap sheet and mug shot under

²As our ruling is dispositive, we need not address your remaining argument against its disclosure.

section 552.108(a)(1) of the Government Code. The department must release the remaining information.

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Paige Lay
Assistant Attorney General
Open Records Division

PL/bhf

Ref: ID# 501466

Enc. Submitted documents

cc: Requestor
(w/o enclosures)