



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 11, 2006

Mr. Rashaad V. Gambrell
Assistant City Attorney
City of Houston
P.O. Box 1562
Houston, Texas 77251-1562

OR2006-00378

Dear Mr. Gambrell:

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# 239849.

The Houston Police Department (the "department") received two requests for five categories of information relating to reports and policies and procedures pertaining to the use of force. You inform us that you will release some of the requested information to the requestors. You claim that portions of the submitted information are excepted from disclosure under sections 552.101, 552.108, 552.1175, 552.130, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, we note that you inform us that the department is withholding and releasing a portion of the requested information, department General Order No. 600-17, issue date May 17, 2005, in accordance with a prior ruling of this office, Open Records Letter No. 2005-09644 (2005). A governmental body may rely on a prior ruling to withhold requested information without requesting an attorney general decision on the required disclosure of the information when: 1) the records or information at issue are precisely the same records or information that were previously submitted to this office pursuant records

¹We assume that 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 that those records contain substantially different types of information than that submitted to this office.

or information is the same governmental body that previously requested and received a ruling from the attorney general; 3) the prior ruling concluded that the precise records or information are or are not excepted from disclosure under the Act; and 4) the law, facts, and circumstances on which the prior ruling was based have not changed since the issuance of the ruling. *See* Open Records Decision No. 673 (2001). You have not indicated that the pertinent facts and circumstances have changed since the issuance of Open Records Letter No. 2005-09644. Consequently, we determine that the department may continue to follow our ruling in Open Records Letter No. 2005-09644 with respect to the required disclosure of the information at issue in that ruling.

Next, we note that the submitted information includes custodial death reports. In 2003, the Office of the Attorney General (the "OAG") revised the format of a custodial death report. Previously, the report consisted of five sections. In Open Records Decision No. 521 at 5 (1989), we concluded that under article 49.18(b) of the Code of Criminal Procedure in conjunction with a directive issued by the OAG, section one of a custodial death report filed with this office was public information and must be released, but sections two through five of the report, as well as attachments to the report, were confidential. *See* Crim. Proc. Code art. 49.18(b) (attorney general shall make report, with exception of any portion of report that attorney general determines is privileged, available to any interested person). A custodial death report now consists of two pages and an attached summary of how the death occurred. The OAG has determined that the two-page report and summary must be released to the public; however, any other documents submitted with the revised report are confidential under article 49.18 of the Code of Criminal Procedure. *See also* Open Records Decision No. 623 at 3 (1994) (exceptions to public disclosure under Act generally not applicable to information that another statute expressly makes public). Therefore, the department must release the submitted custodial death reports and the summaries of how the deaths occurred under article 49.18 of the Code of Criminal Procedure. We now address your arguments for the remaining information.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses the doctrine of common law privacy. Common law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). 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 assert, and we agree, that Exhibit 2 contains information that is considered highly intimate or embarrassing and is not of legitimate concern to the public. Accordingly, we

have marked the private information that the department must withhold pursuant to section 552.101 in conjunction with common law privacy. The remaining information in Exhibit 2 must be released to the requestor.

Section 552.101 also encompasses confidentiality provisions such as section 58.007 of the Family Code. Juvenile law enforcement records relating to conduct that occurred on or after September 1, 1997 are confidential under section 58.007. For purposes of section 58.007, "child" means a person who is ten years of age or older and under seventeen years of age. *See* Fam. Code § 51.02(2). The relevant language of section 58.007(c) reads as follows:

(c) 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;
- (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 Subchapter B.

Fam. Code § 58.007(c). We have reviewed Exhibit 4 and find that this information involves allegations of juvenile conduct in violation of penal statutes that occurred after September 1, 1997. Thus, Exhibit 4 is subject to section 58.007. Since none of the exceptions in section 58.007 appear to apply, Exhibit 4 is confidential under section 58.007(c) of the Family Code and must be withheld in its entirety pursuant to section 552.101 of the Government Code.

Section 552.108(a) 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(a)(1) 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), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state that Exhibit 3 relates to a pending investigation. Based upon this representation, we conclude that the release of this information 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. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases).

Section 552.108(a)(2) excepts from disclosure information concerning an investigation that concluded in a result other than conviction or deferred adjudication. A governmental body claiming section 552.108(a)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. You inform us that Exhibits 5 and 6 relate to criminal investigations that were cleared due to the death of the defendants. Therefore, these investigations have concluded in a result other than a conviction or deferred adjudication. Accordingly, we agree that section 552.108(a)(2) is applicable to Exhibits 5 and 6.

We note, however that basic information about an arrested person, an arrest, or a crime is not excepted from disclosure under section 552.108. Gov't Code § 552.108(c). Such basic information refers to the information held to be public in *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). See Open Records Decision No. 127 (1976) (summarizing types of information considered to be basic information). Thus, with the exception of basic information, you may withhold from disclosure Exhibit 3 pursuant to section 552.108(a)(1) and Exhibits 5 and 6 pursuant to section 552.108(a)(2). We note that you have the discretion to release all or part of the remaining information that is not otherwise confidential by law. Gov't Code § 552.007.

In summary, the department must continue to follow our ruling in Open Records Letter No. 2005-09644 with respect to the information at issue in that ruling. The department must release the submitted custodial death reports and the summaries of how the deaths occurred under article 49.18 of the Code of Criminal Procedure. The department must withhold the marked information in Exhibit 2 pursuant to section 552.101 in conjunction with common law privacy. Exhibit 4 is confidential under section 58.007(c) of the Family Code and must be withheld in its entirety pursuant to section 552.101 of the Government Code. With the exception of basic information which must be released, you may withhold from disclosure Exhibit 3 pursuant to section 552.108(a)(1) and Exhibits 5 and 6 pursuant to section 552.108(a)(2). The remaining information must be released to the requestor. As our ruling is dispositive, we need not address your remaining arguments against disclosure.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days.

Id. § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Office of the Attorney General at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Kay Hastings
Assistant Attorney General
Open Records Division

KH/JLF/er

Ref: ID# 239849

Enc. Submitted documents

c: Mr. Ryan Kelly (UNT)
C/O Light of Day Project
Freedom of Information Foundation of Texas
400 S. Record Street, Suite 240
Dallas, Texas 75202
(w/o enclosures)

Ms. Pamela Bond (UNT)
C/O Light of Day Project
Freedom of Information Foundation of Texas
400 S. Record Street, Suite 240
Dallas, Texas 75202
(w/o enclosures)