



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 10, 2007

Ms. Jo-Christy Brown
Brown & Carls, L.L.P.
106 East Sixth Street, Suite 550
Austin, Texas 78701

OR2007-00429

Dear Ms. Brown:

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# 268885.

The Bastrop Police Department (the "department"), which you represent, received a request for the following information:

1. "Copies of any 'use of force' report or other record documenting the use of any weapon that would deliver an electric shock to a person . . . since Jan. 1, 2000[.]"
2. Copies of any offense or incident report documenting the circumstances under which [department] officers came into contact with any person on whom a weapon that would deliver an electric shock to a person was used since Jan. 1, 2000.
3. Any custodial death report filed by or on behalf of [the department] documenting the death of any person in your custody on whom a weapon that would deliver an electric shock to a person was used since Jan. 1, 2000.
4. Copies of any reports of training injuries sustained by officers or employees involving weapons that would deliver an electric shock.
5. Copies of any policies regarding [the] department's use of force."

You inform us that the department does not maintain information responsive to items 3 and 4 of the request.¹ You state that you have released some information to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered your arguments and reviewed the submitted information.

Initially, we note that the requestor, in the request for information, specifically excludes the following information from the request: driver's license numbers, license plate numbers, vehicle identification numbers, handgun or Taser serial numbers, social security numbers, bank account numbers of suspects, FBI numbers, and juvenile information, including name, age, and address. Thus, this information is not responsive to the present request. Accordingly, we do not address your arguments for this information and it need not be released.

Next, you argue that all of the submitted information implicates the privacy interests of the witnesses, informants, and other parties identified in the documents.² Section 552.101 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 the common law right of privacy, which protects information that is 1) highly intimate or embarrassing, such that its release 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 (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.

¹ The Act does not require a governmental body to disclose information that did not exist at the time the request was received, nor does it require a governmental body to prepare new information in response to a request. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Attorney General Opinion H-90 (1973); Open Records Decision Nos. 452 at 2-3 (1986), 342 at 3 (1982), 87 (1975); see also Open Records Decision Nos. 572 at 1 (1990), 555 at 1-2 (1990), 416 at 5 (1984).

² Although you make this argument under section 552.305 of the Government Code, we note that section 552.305 is not an exception to disclosure. See Gov't Code § 552.305. Section 552.305 addresses the procedural requirements for notifying third parties that their interests may be affected by a request for information. See *id.* The proper exception to raise in this instance is section 552.101 of the Government Code.

Information may also be withheld under section 552.101 in conjunction with common law privacy upon a showing of “special circumstances.” *See* Open Records Decision No. 169 (1977). This office considers “special circumstances” to refer to a very narrow set of situations in which the release of information would likely cause someone to face “an imminent threat of physical danger.” *Id.* at 6. Such “special circumstances” do not include “a generalized and speculative fear of harassment or retribution.” *Id.* In this instance, you express generalized concerns that the release of the submitted information will lead to potential harm to the witnesses and other individuals identified in the submitted information. However, you provide no specific explanation detailing particularized threats or safety concerns. Thus, the department has failed to articulate how release of the information would present an imminent credible threat to the safety of the witnesses and other individuals. Accordingly, as you have not demonstrated the existence of special circumstances, you may not withhold any of the submitted information on that basis.

You also argue some of the submitted information constitutes a compilation of an individual’s criminal history that is protected by common law privacy. To demonstrate the applicability of common law privacy, both prongs of the *Industrial Foundation* test must be satisfied. *Indus. Found.*, 540 S.W.2d at 681-82. A compilation of an individual’s criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *Cf. United States Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (when considering prong regarding individual’s privacy interest, court recognized distinction between public records found in courthouse files and local police stations and compiled summary of information and noted that individual has significant privacy interest in compilation of one’s criminal history). Further, we find that a compilation of a private citizen’s criminal history is generally not of legitimate concern to the public. Although you contend a portion of the submitted information constitutes a compilation of an individual’s criminal history, we disagree and find that such information is not protected by common law privacy and may not be withheld under section 552.101 on that basis. *Cf. Gov’t Code* § 411.082(2)(B) (term CHRI does not include driving record information).

Section 552.101 also encompasses criminal history record information (“CHRI”) generated by the National Crime Information Center or by the Texas Crime Information Center. Title 8, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI that the

Texas Department of Public Safety (“DPS”) maintains, except that the DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov’t Code § 411.083. Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 11.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090 - .127. Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. However, the term CHRI does not include driving record information. *See* Gov’t Code § 411.082(2)(B). Accordingly, the department must withhold the CHRI that we have marked in Exhibit F under section 552.101 of the Government Code in conjunction with federal law and chapter 411 of the Government Code.

Section 552.101 also encompasses section 58.007 of the Family Code which makes confidential juvenile law enforcement records relating to conduct that occurred on or after September 1, 1997. Section 58.007(c) provides in pertinent part 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). Section 51.02(2)(A) defines “child” as a person who is ten years of age or older and under seventeen years of age. Section 58.007 is not applicable to

information that relates to a juvenile as a complainant, victim, witness, or other involved party and not as a suspect or offender. Although you claim that Exhibit C is subject to section 58.007, upon review, we find that Exhibit C is not a juvenile law enforcement record. As such, Exhibit C may not be withheld under section 552.101 in conjunction with section 58.007.

The department claims the information in Exhibits B and D is subject to section 552.108 of the Government Code. Section 552.108 of the Government Code provides in relevant part the following:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime;

...

(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 the requirements of Section 552.021 if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution[.]

Gov't Code § 552.108(a)(1), (b)(1). A governmental body claiming subsection 552.108(a)(1) or 552.108(b)(1) must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), (b)(1), 552.301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977).

We note that section 552.108(a)(1) is generally not applicable to internal administrative records that do not involve the investigation or prosecution of crime. *See City of Fort Worth*, 86 S.W.3d 320, *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). Exhibit D includes a department use of force report, which is an administrative record. Although we are cognizant of the fact that use of force investigations are based on an underlying arrest or detention, the focus of these investigations is on the propriety of an officer's conduct, not the underlying arrests. You do not state, nor does it appear, that the use of force investigation in Exhibit D relates to a criminal investigation into an officer's conduct. Accordingly, we conclude that the department may not withhold the documents regarding the use of force investigation in Exhibit D, which we have marked, under section 552.108(a)(1).

However, Exhibit D includes the offense report and witness statements pertaining to a criminal investigation, which you state is currently pending. You further assert that release of these documents would interfere with this pending criminal investigation. Based upon this representation, we find that the department has demonstrated the applicability of section 552.108(a)(1) to the remainder of Exhibit D. *See generally 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).

However, section 552.108 does not except from disclosure basic information about an arrest, an arrested person, or a crime. Gov't Code § 552.108(c). Such basic information refers to the information held to be public in *Houston Chronicle*. *See Open Records Decision No. 127* (1976) (summarizing types of information considered to be basic information). Thus, with the exception of basic information, which you state has already been released, the department may withhold the remainder of Exhibit D under section 552.108.

Section 552.108(b) applies to the internal records of a law enforcement agency, provided the law enforcement agency reasonably explains how and why release of the information at issue would interfere with law enforcement or prosecution. *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.) (section 552.108(b)(1) exception intended to protect information which, if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine law enforcement efforts). This office has stated that under the statutory predecessor to section 552.108(b), a governmental body may withhold information that would reveal law enforcement techniques or procedures. *See, e.g., Open Records Decision Nos. 531* (1989) (release of detailed use of force guidelines would unduly interfere with law enforcement), 456 (1987) (release of forms containing information regarding location of

off-duty police officers in advance would unduly interfere with law enforcement), 413 (1984) (release of sketch showing security measures to be used at next execution would unduly interfere with law enforcement), 409 (1984) (if information regarding certain burglaries exhibit a pattern that reveals investigative techniques, information is excepted under predecessor to section 552.108), 341 (1982) (release of certain information from Department of Public Safety would unduly interfere with law enforcement because release would hamper departmental efforts to detect forgeries of drivers' licenses), 252 (1980) (predecessor to section 552.108 is designed to protect investigative techniques and procedures used in law enforcement), 143 (1976) (disclosure of specific operations or specialized equipment directly related to investigation or detection of crime may be excepted). However, generally known policies and techniques may not be withheld under section 552.108. *See, e.g.*, Open Records Decision No. 531 at 2-3 (Penal Code provisions, common law rules, and constitutional limitations on use of force are not protected under predecessor to section 552.108).

You state that Exhibit B relates to the department's policies regarding the use of a Taser and claim that release of this information could expose department officers to substantial danger and interfere with the department's law enforcement functions. Based on your arguments and our review of Exhibit B, we find that release of portions of the information at issue would interfere with law enforcement. Thus, the department may withhold the information we have marked in Exhibit B under section 552.108(b)(1). However, the department has not explained how release of the remaining information in Exhibit B would interfere with law enforcement. Accordingly, the remaining information in Exhibit B must be released.

We note that the remaining submitted information contains Texas motor vehicle record information. Section 552.130 of the Government Code excepts from disclosure information that "relates to . . . a motor vehicle operator's or driver's license or permit issued by an agency of this state [or] a motor vehicle title or registration issued by an agency of this state." Gov't Code § 552.130. Thus, the department must withhold the Texas motor vehicle information we have marked in accordance with section 552.130.

In summary, this ruling does not address the submitted information that is not responsive to the request and it need not be released. The department may withhold the information we have marked in Exhibit B under section 552.108(b)(1). With the exception of basic information, the department may withhold the information we have marked in Exhibit D under section 552.108(a)(1). We have marked the CHRI in Exhibit E that must be withheld under section 552.101 in conjunction with federal law and chapter 411 of the Government

Code. The department must withhold the Texas motor vehicle information we have marked in accordance with section 552.130. The remaining submitted information must be released.

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

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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,

A handwritten signature in black ink, appearing to read "Ramsey Abarca". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Ramsey A. Abarca
Assistant Attorney General
Open Records Division

RAA/eb

Ref: ID# 268885

Enc. Submitted documents

c: Mr. Kendall Kuenemann
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(w/o enclosures)