



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 17, 2009

Mr. Mack Reinwand
Assistant City Attorney
Arlington Police Department
P.O. Box 1065 Mail Stop 04-0200
Arlington, Texas 76004-1065

OR2009-08386

Dear Mr. Reinwand:

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# 344724 (No. 2009-03-089).

The City of Arlington and the Arlington Police Department (collectively the "city") received a request for information relating to five named individuals and two specified locations of a particular business entity. You state that some of the requested information either has been or will be released. You claim that the rest of the requested information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the information you submitted.

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. This exception encompasses common-law privacy, which protects information that is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and of no legitimate public interest. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Common-law privacy encompasses the specific types of information that are held to be intimate or embarrassing in *Industrial Foundation*. *See id.* at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). This office has determined that other types of information also are private under section 552.101. *See*

generally Open Records Decision No. 659 at 4-5 (1999) (summarizing information attorney general has held to be private). You contend that the information in Exhibit C is confidential in its entirety under section 552.101 in conjunction with common-law privacy. This is not an instance, however, in which all of the information in a particular police report must be withheld on privacy grounds. Nevertheless, we have marked information in Exhibit C that is intimate or embarrassing and not a matter of legitimate public interest. The city must withhold that information under section 552.101 in conjunction with common-law privacy. The remaining information in Exhibit C is not private and may not be withheld on that basis under section 552.101.

We note that section 552.130 of the Government Code is applicable to some of the remaining information in Exhibit C.¹ Section 552.130 excepts from disclosure information relating to a motor vehicle operator's or driver's license or permit or a motor vehicle title or registration issued by an agency of this state. See Gov't Code § 552.130(a)(1)-(2). We have marked Texas driver's license information in Exhibit C that must be withheld under this exception. We also have marked what appear to be license plate numbers. To the extent that the marked information consists of Texas license plate numbers, the city also must withhold that information under section 552.130.

Next, we address your claim under section 552.108 of the Government Code for the information submitted as Exhibit B. Section 552.108(a)(1) excepts from disclosure "[i]nformation 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[.]" *Id.* § 552.108(a)(1). A governmental body must reasonably explain how and why section 552.108 is applicable to the information at issue. See *id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state that Exhibit B is related to a pending criminal investigation. Based on your representation, we conclude that section 552.108(a)(1) is generally applicable to Exhibit B. 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).

We note that 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 186-88. The city must generally release basic information, including a detailed description of the offense and the names of the arresting and investigating officers, even if the information does not literally appear on the front page of an offense or arrest report. See

¹Unlike other exceptions to disclosure under the Act, this office will raise section 552.130 on behalf of a governmental body, as this exception is mandatory and may not be waived. See Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

Open Records Decision No. 127 at 3-4 (1976) (summarizing types of information deemed public by *Houston Chronicle*).

You seek to withhold the names of undercover police officers in Exhibit B under section 552.101 in conjunction with common-law privacy and “special circumstances.”² You contend that the release of the officers’ names “would place their lives at risk.” However, the Third Court of Appeals recently ruled that the “special circumstances” exception found in past Attorney General Open Records Decisions directly conflicts with Texas Supreme Court precedent regarding common-law privacy. *See Tex. Dep’t of Pub. Safety v. Cox Tex. Newspapers, L.P. and Hearst Newspapers, L.L.C.*, No. 03-08-00516-CV, 2009 WL 1491880 (Tex. App.—Austin May 29, 2009, no pet. h.). The court of appeals ruled that the two-part test set out in *Industrial Foundation* is the “sole criteria” for determining whether information can be withheld under common-law privacy. *Id.*; *see also Indus. Found.*, 540 S.W.2d at 686. In this instance, the information at issue consists of undercover officers’ names. We find that the officers’ names are not intimate or embarrassing information. Therefore, as you have not satisfied the first element of the *Industrial Foundation* test for common-law privacy, we find that the officers’ names are not confidential under common-law privacy and may not be withheld on that basis under section 552.101.

We also note, however, that the 81st Legislature recently enacted section 552.151 of the Government Code, which relates to a public employee or officer’s safety.³ This section provides in part:

Information in the custody of a governmental body that relates to an employee or officer of the governmental body is excepted from the requirements of Section 552.021 if, under the specific circumstances pertaining to the employee or officer, disclosure of the information would subject the employee or officer to a substantial threat of physical harm.

Act of May 31, 2009, 81st. Leg., R.S., S.B. 1068, § 4 (to be codified at Gov’t Code § 552.151). You represent to this office that the undercover police officers’ lives would be endangered by public disclosure of their names. Based on your representation, we find that the city has demonstrated that release of the information at issue would subject the officers

²We note that the department did not claim “special circumstances” under section 552.101 within the fifteen-business-day deadline prescribed by section 552.301 of the Government Code. *See Gov’t Code § 552.301(e)(1)(A)*. Because the applicability of section 552.101 can provide a compelling reason for non-disclosure under section 552.302 of the Government Code, we will address your argument. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982).

³Unlike other exceptions to disclosure under the Act, this office will raise section 552.151 on behalf of a governmental body, as this exception is mandatory and may not be waived. *See Gov’t Code §§ 552.007, .352*; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

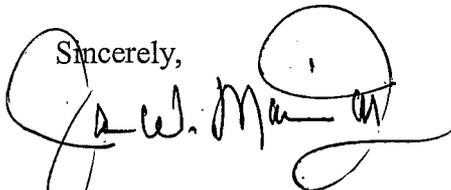
to a substantial threat of physical harm. We therefore conclude that the city must withhold the officers' names, which we have marked, under section 552.151. The rest of the basic information in Exhibit B must be released under section 552.108(c). The city may withhold the remaining information in Exhibit B under section 552.108(a)(1).

In summary: (1) the city must withhold the information that we have marked in Exhibit C under section 552.101 of the Government Code in conjunction with common-law privacy; (2) the city also must withhold the marked Texas driver's license information in Exhibit C under section 552.130 of the Government Code, as well as the rest of the marked information in Exhibit C to the extent that it consists of Texas license plate numbers; (3) the city may withhold Exhibit B under section 552.108(a)(1) of the Government Code, except for basic information under section 552.108(c); and (4) in releasing basic information, the city must withhold the marked names of the undercover police officers under section 552.151 of the Government Code. The rest of the submitted 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 at (512) 475-2497.

Sincerely,

A handwritten signature in black ink, appearing to read "J.W. Morris, III". The signature is written in a cursive style with a large, looped initial "J".

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/cc

Ref: ID# 344724

Enc: Submitted documents

c: Requestor
(w/o enclosures)