



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 23, 2009

Ms. Cheryl K. Byles
Assistant City Attorney
City of Fort Worth
1000 Throckmorton Street
Fort Worth, Texas 76102

OR2009-10265

Dear Ms. Byles:

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# 349850 (Fort Worth Request No. 3431-09).

The City of Fort Worth (the "city") received a request for information relating to a specified incident. You claim the submitted 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 submitted information.

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 to privacy. Information is protected from disclosure by the common-law right to privacy when (1) it is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities and (2) there is no legitimate public interest in its disclosure. *See 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.* 681-82.

You have marked the name and identification number of an undercover officer as confidential pursuant to common-law privacy and "special circumstances." You argue that release of this information "would likely cause the [officer] to face "imminent threat of physical danger" and therefore special circumstances exist under common-law privacy to withhold the identity of this officer. 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. *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 an undercover officer’s name and identification number. Upon review, we find that the officer’s name and identification number are not intimate or embarrassing. As you have failed to meet the first prong of the *Industrial Foundation* test for privacy, we find that the information at issue is not confidential under common-law privacy and the city may not withhold it under section 552.101.

The Eighty-first Legislature recently enacted section 552.151 of the Government Code which relates to a public employee or officer’s safety.¹ This section provides:

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.

Added by Act of June 3, 2009, 81st. Leg., R.S., S.B. 1068, § 4 (to be codified at Tex. Gov’t Code § 552.151). In this instance, you explain the release of the undercover officer’s name and identification number would likely cause him to face a threat of imminent physical danger. Based on your representations and our review, we find the city has demonstrated release of the information at issue would subject the officer to a substantial threat of physical harm. Accordingly, the city must withhold the name and identification number of the undercover officer you have marked, and the information we have marked, under section 552.151 of the Government Code.

Section 552.108(b)(1) of the Government Code provides:

(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:

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

Gov’t Code § 552.108(b)(1). Section 552.108(b)(1) protects information the public disclosure of which would interfere with law enforcement and crime prevention. See *City*

¹The Office of the Attorney General will raise a mandatory exception like section 552.151 on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

of *Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.) (section 552.108(b)(1) protects information that, if released, would permit private citizens to anticipate weaknesses in police departments, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate state laws); Open Records Decision Nos. 562 at 10 (1990), 531 at 2 (1989). A governmental body claiming section 552.108(b)(1) must reasonably explain how and why the release of the requested information would interfere with law enforcement. See Gov't Code §§ 552.108(b)(1), .301(e)(1)(A); see also *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977).

You contend the e-mail screen name you have marked in the submitted incident report is used for police investigation purposes. You state release of the screen name would reveal how police investigate online criminal activity and allow individuals to avoid arrest for these activities. Based on your representations and our review, we conclude the city has demonstrated that the release of this information would interfere with law enforcement and crime prevention. Thus, we conclude the city may withhold the screen name it has marked under section 552.108(b)(1) of the Government Code.² As you raise no other exceptions against disclosure, the remaining 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,



Pamela Wissemann
Assistant Attorney General
Open Records Division

PFW/dls

²We note that the information being released contains confidential information to which the requestor has a right of access. See Gov't Code § 552.023(a); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual asks governmental body to provide him with information concerning himself). Therefore, if the city receives another request for this same information from a different requestor, then the city should again seek a decision from this office.

Ref: ID# 349850

Enc. Submitted documents

c: Requestor
(w/o enclosures)