



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 11, 2009

Ms. Candice M. De La Garza
Assistant City Attorney
City of Houston
P.O. Box 368
Houston, Texas 77001-0368

OR2009-11159

Dear Ms. De La Garza:

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# 352285.

The Houston Police Department (the "department") received a request for six categories of information pertaining to Sexually-Oriented Business permits issued by the City of Houston from January 1, 2008 to the date of the request. You claim portions of the submitted information are exempted from disclosure under sections 552.101 and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Section 552.101 exempts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. You state portions of the submitted information are subject to the decision in *N.W. Enterprises, Inc. v. City of Houston*, 352 F.3d 162 (5th Cir. 2003). The question in *N.W. Enterprises* was the constitutionality of an ordinance of the City of Houston that regulated sexually-oriented

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.

businesses and specified the personal information required of individuals applying for permits to work as managers or entertainers in such businesses. With regard to the required public disclosure under the Act of certain information provided by entertainers and managers in their permit applications, the district court in *N.W. Enterprises* concluded that:

there is meaningful potential danger to individuals working in sexually oriented businesses if the information in their permit applications is disclosed to the public. The Court concludes further that the potential for disclosure is likely to have a chilling effect on the applicants' protected speech. These dangerous and chilling effects are sufficiently severe that the information should be held confidential by the city.

N.W. Enters., Inc. v. City of Houston, 27 F.Supp.2d 754, 843 (S.D. Tex.1998). In upholding the confidentiality determination of the district court, the United States Court of Appeals for the Fifth Circuit stated that "[b]ecause the district court declared the information on entertainer and manager permit applications confidential under the [Act], the City cannot disclose it to the public." *N.W. Enters.*, 352 F.3d at 195. The appellate court also agreed that the entertainers' and managers' home addresses and telephone numbers were confidential. *Id.* Thus, pursuant to *N.W. Enterprises*, information revealing the identity of an entertainer or manager of a sexually-oriented business, including the entertainer's or manager's home address and telephone number, is generally confidential. You inform us that under the city code of ordinances, the definition of the term "operator" includes "manager." See HOUSTON, TEX., CODE OF ORDINANCES Ch. 28, art. III, § 28-121 (1997). Portions of the submitted information reveal the type of information protected in *N.W. Enterprises*. Therefore, this identifying information, which you have highlighted, in addition to the information we have marked, must be withheld under section 552.101 in conjunction with the court's holding in *N.W. Enterprises*. However, *N.W. Enterprises* did not address the confidentiality of information that identifies business owners and business addresses. Furthermore, we note an individual's post office box is not a home address. Therefore, that type of information, which we have marked for release, is not confidential under the decision in *N.W. Enterprises* and may not be withheld on that basis under section 552.101.

You also raise section 552.101 of the Government Code for portions of the remaining information. Section 552.101 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 claim the names of undercover officers in the remaining information are confidential pursuant to common-law privacy and "special circumstances." You argue release of this information "would likely cause the officers to face imminent threat of physical danger" and,

therefore, special circumstances exist under common-law privacy to withhold the identities of these officers. 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. & Hearst Newspapers, L.L.C.*, No. 03-08-00516-CV, 2009 WL 1491880 (Tex. App.—Austin May 29, 2009, pet. granted). 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. Upon review, we find the officers' names are not intimate or embarrassing. As you have failed to meet the first prong of the *Industrial Foundation* test for privacy, we find the information at issue is not confidential under common-law privacy and the department may not withhold it under section 552.101.

The 81st Legislature recently enacted section 552.151 of the Government Code which relates to a public employee or officer's safety.² 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 Gov't Code § 552.151). In this instance, you explain the release of the undercover officers' names, which you have highlighted, would likely cause them to face a threat of imminent physical danger. Based on your representations and our review, we find the department has demonstrated release of the information at issue would subject the officers to a substantial threat of physical harm. Accordingly, the department must withhold the officers' names you have highlighted under section 552.151 of the Government Code.

Finally, you raise section 552.130 of the Government Code for portions of the remaining information. Section 552.130 excepts from disclosure information relating to a Texas driver's license. Gov't Code § 552.130(a)(1). Accordingly, the department must withhold the Texas driver's license numbers you have highlighted under section 552.130 of the Government Code.

In summary, the department must withhold the information you have highlighted, in addition to the information we have marked, under section 552.101 of the Government Code in

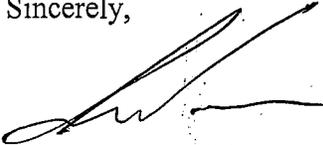
²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

conjunction with the court's holding in *N.W. Enterprises*, with the exception of the information we have marked for release. The department must also withhold the undercover officers' names you have highlighted under section 552.151 of the Government Code. The driver's license numbers you have highlighted must be withheld under section 552.130 of the Government Code. 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,



Ana Carolina Vieira
Assistant Attorney General
Open Records Division

ACV/eeg

Ref: ID# 352285

Enc. Submitted documents

c: Requestor
(w/o enclosures)