



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 19, 2009

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

OR2009-11635

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# 352696 (2009-06-015).

The Arlington Police Department (the "department") received a request for all police records, including offenses, arrests, citations, and warrants, associated with specific sexually oriented businesses licensed by the City of Arlington (the "city") during a specified time period. You claim that the requested citations are records of the judiciary and therefore are not subject to the Act pursuant to section 552.003 of the Government Code. You claim that 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.

Initially, you claim that the requested citations are not subject to the Act. Section 552.003(b) of the Government Code excludes the judiciary from the Act. Therefore, the Act neither authorizes information held by the judiciary to be withheld nor requires that it be disclosed. *See* Open Records Decision No. 25 (1974). You explain that the "copies of the requested citations . . . are delivered to and maintained by the [city] municipal court." Accordingly, to the extent that the requested citations are maintained solely by the city's municipal court, they are not subject to release under the Act and need not be released in response to the present request. *See* Gov't Code § 552.0035 (access to information maintained by or for

judiciary is governed by rules adopted by supreme court); Tex. R. Jud. Admin. 12 (public access to judicial records).¹ However, to the extent copies of the requested citations are also maintained by the department, they are subject to the Act and must be released to the requestor, as no exceptions to disclosure for the citations are raised.

We next address your claim that Exhibit D is excepted from disclosure under section 552.101 in conjunction with common-law privacy. 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). Generally, only information that either identifies or tends to identify a victim of sexual assault or other sex-related offense must be withheld under common-law privacy. See Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). However, a governmental body is required to withhold an entire report when identifying information is inextricably intertwined with other releasable information or when the requestor knows the identity of the alleged victim. See ORDs 393, 339; see also ORD 440 (1986) (detailed descriptions of serious sexual offenses must be withheld). You contend that the information in Exhibit D 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 the police reports must be withheld on privacy grounds. Nevertheless, the department must withhold the information we have marked that is intimate or embarrassing and not a matter of legitimate public interest under section 552.101 in conjunction with common-law privacy. The remaining information in Exhibit D is not private and may not be withheld on that basis under section 552.101.

¹We note that records of the judiciary may be public under other sources of law. See Gov't Code § 29.007(d)(4) (complaints filed with municipal court clerk); *id.* § 29.007(f) (municipal court clerks shall perform duties prescribed by law for county court clerk); Loc. Gov't Code § 191.006 (records belonging to office of county clerk shall be open to public unless access restricted by law or court order); see also *Star-Telegram, Inc. v. Walker*, 834 S.W.2d 54, 57 (Tex. 1992) (documents filed with courts are generally considered public and must be released); Attorney General Opinions DM-166 (1992) at 2-3 (public has general right to inspect and copy judicial records), H-826 (1976); Open Records Decision No. 25 (1974).

Section 552.101 also encompasses the common-law informer's privilege, which Texas courts have long recognized. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969). The informer's privilege protects the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided that the subject of the information does not already know the informer's identity. *See* Open Records Decision Nos. 515 at 3 (1998), 208 at 1-2 (1978). The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." *See* Open Records Decision No. 279 at 2 (1981) (citing Wigmore, Evidence, § 2374, at 767 (McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. *See* Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5 (1988). The privilege excepts the informer's statement only to the extent necessary to protect the informer's identity. *See* Open Records Decision No. 549 at 5 (1990).

You inform us that the records in Exhibit E contain "the identity of the person or persons who furnished information of possible law violations to officers charged with enforcement of those laws." However, you have not submitted Exhibit E for our review. Furthermore, you have not identified the individuals whose identities you believe are protected by the informer's privilege from the submitted information. *See* Gov't Code § 552.301(e)(2) (requiring governmental body to "label that copy of the specific information, or of the representative samples, to indicate which exceptions apply to which parts of the copy"). Accordingly, you have not demonstrated that the informer's privilege is applicable to any portion of the submitted information. Thus, we conclude that the department may not withhold any information under section 552.101 of the Government Code in conjunction with the informer's privilege.

We next address your argument under section 552.108. 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 claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state that Exhibit B and portions of Exhibit C relate to pending criminal investigations. Based on this representation and our review of Exhibits B and C, we conclude that the release of the information you have marked under section 552.108 would interfere with the detection, investigation, or prosecution of crimes. *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.*, 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. Thus, the department must generally release basic information contained in the information you have marked under section 552.108 in Exhibits B and C, 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 Open Records Decision No. 127 at 3-4 (1976) (summarizing types of information deemed public by *Houston Chronicle*).

However, you seek to withhold the identities of undercover police officers in Exhibit C under section 552.101 in conjunction with common-law privacy. You contend that the release of the officers’ identities “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, identification numbers, and assignments. We find that this officer information is 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 officer information is not confidential under common-law privacy and may not be withheld on that basis under section 552.101.

We 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.² 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

²Unlike 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).

endangered by public disclosure of their identities. Based on your representation, we find that the department has demonstrated that release of the information at issue would subject the officers to a substantial threat of physical harm. We therefore conclude that the department must withhold the undercover officers' identifying information in Exhibit C under section 552.151. Therefore, with the exception of the undercover officers' identifying information, the rest of the basic information in Exhibits B and C must be released under section 552.108(c). The remaining information in Exhibit C not subject to 552.108 must also be released.

In summary, the department must withhold the information we have marked in Exhibit D under section 552.101 of the Government Code in conjunction with common-law privacy. With the exception of basic information, the department may withhold the information it has marked in Exhibits B and C under section 552.108 of the Government Code. From the basic information and remaining information in Exhibit C, the department must withhold the identifying information of undercover officers under section 552.151 of the Government Code. The remaining information must be released to the requestor.³

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,



Sarah Casterline
Assistant Attorney General
Open Records Division

SEC/jb

³We note basic information includes an arrestee's social security number. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act. Gov't Code § 552.147(b).

Ref: ID# 352696

Enc. Submitted documents

c: Requestor
(w/o enclosures)