



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 21, 2009

Mr. Samuel D. Hawk
Assistant City Attorney
Criminal Law and Police Division
City of Dallas
1400 South Lamar
Dallas, Texas 75215

OR2009-14888

Dear Mr. Hawk:

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# 358906 (DPD Request No. 2009-6156).

The Dallas Police Department (the "department") received a request for copies of expense reports for members of narcotics units run by two named officers. You claim portions of the requested information are excepted from disclosure under sections 552.101, 552.108, 552.130, and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, we note the submitted information contains documents relating to the expenditure of public funds by the department. Section 552.022(a)(3) provides for required disclosure of "information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[,]" unless the information is expressly confidential under other law. Gov't Code § 552.022(a)(3). Thus, the department must release these documents, which we have marked, under section 552.022(a)(3), unless that

¹We assume 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.

information is expressly confidential under other law. Although you seek to withhold portions of the information at issue under section 552.108 of the Government Code, this section is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See id.* § 552.007; Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 177 (1977) (governmental body may waive statutory predecessor to section 552.108). As such, section 552.108 is not other law that makes information confidential for the purposes of section 552.022(a)(3). Therefore, the information at issue may not be withheld under section 552.108. However, you also claim portions of the information are excepted from disclosure under section 552.101 of the Government Code, which is other law for purposes of section 552.022. Accordingly, we will consider the applicability of this exception to the documents at issue, as well as the information not subject to section 552.022.

We first address your arguments under section 552.101 of the Government Code for the submitted information, including the information subject to section 552.022. 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. Section 552.101 encompasses the common-law right to privacy, which protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *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 met. *Id.* at 681-82. You have marked the identifying information of undercover officers as confidential pursuant to common-law privacy and "special circumstances." You argue release of this information "would jeopardize the safety of [department] officers and place their lives at risk," and, therefore special circumstances exist under common-law privacy to withhold the identities of these officers. However, the Third Court of Appeals recently ruled 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.*, 287 S.W. 3d 390 (Tex. App.—Austin 2009, pet. filed). The court of appeals ruled 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. Upon review of the information at issue, we find the information you have marked is not intimate or embarrassing. As this information fails 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 Eighty-first Legislature recently enacted section 552.151 of the Government Code which relates to a public employee's or officer's safety. 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.

Gov't Code § 552.151. In this instance, you explain release of the identifying information of undercover officers would likely cause officers to face a threat of imminent physical danger. Based on your representations and our review, we find the department has demonstrated release of undercover officers' identifying information would subject the officers to a substantial threat of physical harm. Accordingly, we have marked the identifying information of undercover officers that must be withheld under section 552.151 of the Government Code.

Section 552.101 of the Government Code also encompasses information other statutes makes confidential, such as section 560.003 of the Government Code, which provides "[a] biometric identifier in the possession of a governmental body is exempt from disclosure under [the Act]." *Id.* § 560.003; *see id.* §§ 560.001(1) ("biometric identifier" means retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry), .002 (prescribing manner in which biometric identifiers must be maintained and circumstances in which they can be released), .003 (providing biometric identifiers in possession of governmental body are exempt from disclosure under Act). You do not inform us, and the submitted information does not indicate, section 560.002 permits the disclosure of the fingerprints at issue. Therefore, the department must withhold the fingerprints we have marked under section 552.101 in conjunction with section 560.003 of the Government Code.

Section 552.108(a)(1) of the Government Code 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[.]" Gov't Code § 552.108(a)(1). A governmental body claiming section 552.108 must reasonably explain how and why 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).

Section 552.108(b)(1) of the Government Code excepts from disclosure "[a]n 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 . . . if: (1) release of the internal record or notation would interfere with law enforcement or prosecution." Section 552.108(b)(1) is 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 police efforts to effectuate the laws of this State." *City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.).

To prevail on its claim that section 552.108(b)(1) excepts information from disclosure, a governmental body must do more than merely make a conclusory assertion that releasing the information would interfere with law enforcement. Instead, the governmental body must meet its burden of explaining how and why release of the requested information would interfere with law enforcement and crime prevention. *See* Open Records Decision No. 562 at 10 (1990) (construing statutory predecessor). In addition, generally known policies and techniques may not be withheld under section 552.108. *See, e.g.*, Open Records Decision Nos. 531 at 2-3 (1989) (Penal Code provisions, common law rules, and constitutional limitations on use of force are not protected under law enforcement exception), 252 at 3 (1980) (governmental body did not meet burden because it did not indicate why investigative procedures and techniques requested were any different from those commonly known). The determination of whether the release of particular records would interfere with law enforcement is made on a case-by-case basis. *See* Open Records Decision No. 409 at 2 (1984) (construing statutory predecessor).

You state the information you have marked under section 552.108 of the Government Code relates to on-going narcotics investigations. Based upon your representations and our review, we conclude you have established a portion of the information you have marked relates to pending criminal investigations. Accordingly, the department may withhold the information we have marked under section 552.108(a)(1) of the Government Code.² However, you have failed to demonstrate how the release of the remaining information you have marked, including service numbers, crime intel numbers, and tag numbers, would interfere with law enforcement and crime prevention. Therefore, the department has failed to demonstrate how subsections 552.108(a)(1) and 552.108(b)(1) are applicable to this information. Accordingly, the department may not withhold any of the remaining information you have marked under subsections 552.108(a)(1) and 552.108(b)(1).

In summary, the department must withhold the information we have marked under section 552.151 of the Government Code. The department must withhold the fingerprints we have marked under section 552.101 in conjunction with section 560.003 of the Government Code. The department may withhold the information we have marked under section 552.108(a)(1) 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

²As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

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, toll free, at (888) 672-6787.

Sincerely,



Paige Lay
Assistant Attorney General
Open Records Division

PL/eeg

Ref: ID# 358906

Enc. Submitted documents

cc: Requestor
(w/o enclosures)