



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 21, 2012

Ms. Tiffany Bull
Assistant City Attorney
City of Arlington
P.O. Box 9023
Arlington, Texas 76004-3231

OR2012-04178

Dear Ms. Bull:

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# 448328 (PD Reference 6278 and 6279).

The Arlington Police Department (the "department") received two requests from the same requestor for fourteen categories of information pertaining to two named department officers, including payroll records and department policies, procedures, and manuals. You state the department does not have all the requested information.¹ You claim that the submitted information is exempted from disclosure under sections 552.101, 552.102, 552.103, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

¹We note the Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

²We assume the "representative sample" of information 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 those records contain substantially different types of information than those submitted to this office.

Initially, we note the requestor has excluded from his requests the named officers' social security numbers, personal bank information, dates of birth, medical records, home addresses or telephone numbers, and cellular telephone numbers. Thus, these types of information are not responsive to this request. This ruling does not address the public availability of any information that is not responsive to the request, and the department need not release such information.

Next, we note some of the submitted information is subject to section 552.022 of the Government Code, which provides in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108; [and]

(2) the name, sex, ethnicity, salary, title, and dates of employment of each employee and officer of a governmental body[.]

Gov't Code § 552.022(a)(1), (2). In this instance, the submitted information contains completed reports, evaluations, and investigations that are subject to subsection 552.022(a)(1) and must be released unless they are excepted under section 552.108 or made confidential under the Act or other law. The submitted information also contains salary information subject to section 552.022(a)(2) that must be released unless it is made confidential under the Act or other law. Although you assert the salary information is excepted from disclosure under sections 552.103 and 552.108 of the Government Code, those exceptions are discretionary and do not make information confidential under the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103); 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). Therefore, the department may not withhold the requested salary information subject to section 552.022(a)(2) under section 552.103 or section 552.108 of the Government Code. Additionally, although you raise section 552.103 for the completed reports, evaluations, and investigations, this section does not make information confidential under the Act. Therefore, the department may not withhold the completed reports, evaluations, and investigations under section 552.103. However, we will address whether the completed reports, evaluations, and investigations may be withheld under section 552.108 of the Government Code. We note sections 552.101 and 552.102 of the Government Code make information confidential under the Act for purposes of section 552.022. Therefore, we will consider the applicability of these exceptions to the information subject to section 552.022, as well as the remaining submitted information.

Next, we address your argument under section 552.108 of the Government Code for the information not subject to section 552.022(a)(2) of the Government Code. 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[.]” Gov’t Code § 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.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state the information at issue relates to an incident that has not received final disposition in court, and the information could be used as evidence of witness credibility. Based on your representations and our review, we conclude that the release of the submitted information would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests that are present in active cases), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Therefore, the department may withhold the information not subject to section 552.022(a)(2) under section 552.108(a)(1) of the Government Code.³

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. You claim the information subject to section 552.022(a)(2) of the Government Code is confidential pursuant to common-law privacy and constitutional privacy, which are also encompassed by section 552.101. The common-law right to privacy protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *See id.* at 681-82.

Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual’s interest in avoiding disclosure of personal matters. *See Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7 (1987). The first type protects an individual’s autonomy within “zones of privacy” which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. ORD 455 at 4. The second type of constitutional privacy requires a balancing between the individual’s privacy interests and the public’s need to know information of public concern. *Id.* at 7. The scope of information protected is narrower than that under the common-law doctrine of privacy; constitutional privacy under section 552.101 is reserved for “the most

³As our ruling is dispositive for this information, we need not address your remaining arguments against its disclosure.

intimate aspects of human affairs.” *Id.* at 5 (quoting *Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985)).

Upon review, however, we find none of the information at issue is highly intimate or embarrassing information of no legitimate public interest. Consequently, none of the information subject to section 552.022(a)(2) may be withheld under section 552.101 in conjunction with common-law privacy. Furthermore, we conclude you have not shown the information at issue comes within one of the constitutional zones of privacy or involves the most intimate aspects of human affairs. *See* Open Records Decision Nos. 470 (1987), 455, 444 (1986), 423 at 2 (1984). Accordingly, the department may not withhold any of the information subject to section 552.022(a)(2) under section 552.101 in conjunction with constitutional privacy.

Section 552.102 of the Government Code excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” Gov’t Code § 552.102(a). Upon review, we find none of the information subject to section 552.022(a)(2) is excepted under section 552.102(a) of the Government Code. Accordingly, none of the information at issue may be withheld on that basis.

In summary, the department must release the requested salary information subject to section 552.022(a)(2) of the Government Code. The department may withhold the remaining requested information not subject to section 552.022(a)(2) under section 552.108(a)(1) of the Government Code.

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

Sincerely,



Sarah Casterline
Assistant Attorney General
Open Records Division

SEC/som

Ref: ID# 448328

Enc. Submitted documents

c: Requestor
(w/o enclosures)