



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 28, 2012

Mr. George E. Hyde
Counsel for the City of Carrollton
Denton, Navarro, Rocha & Bernal, P.C.
2500 West William Cannon, Suite 609
Austin, Texas 78745

OR2012-13623

Dear Mr. Hyde:

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# 463244.

The City of Carrollton and the Carrollton Police Department (collectively the "city"), which you represent, received a request for information pertaining to a specified incident and a named individual's arrest. You state some of the requested information does not exist.¹ You also state you will redact information subject to section 552.130 of the Government Code and social security numbers pursuant to section 552.147(b) of the Government Code.² You claim a portion of the submitted information is not subject to release under the Act. You claim the remaining submitted information is excepted from disclosure under sections 552.101

¹The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

²Section 552.130 permits a governmental body to redact the information described in subsections 552.130(a)(1) and (a)(3), such as driver's license numbers, without the necessity of seeking a decision from the attorney general. *See Gov't Code* § 552.130(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). *See id.* § 552.130(d), (e). Section 552.147(b) 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. *Id.* § 552.147(b).

and 552.108 of the Government Code. We have considered your arguments and reviewed the submitted information.

The Act only applies to information that is “collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business by a governmental body.” Gov’t Code § 552.002(a)(1). The Act does not apply to records of the judiciary. *See id.* § 552.003(1)(B) (definition of “governmental body” under Act specifically excludes the judiciary). Information that is “collected, assembled, or maintained by or for the judiciary” is not subject to the Act. *Id.* § 552.0035(a); *see also* TEX. SUP. CT. R. 12. Consequently, records of the judiciary need not be released under the Act. *See* Attorney General Opinion DM-166 (1992). *But see Benavides v. Lee*, 665 S.W.2d 151 (Tex. App.—San Antonio 1983, no writ); Open Records Decision No. 646 at 4 (1996) (“function that a governmental entity performs determines whether the entity falls within the judiciary exception to the . . . Act”). You assert the submitted arrest warrants and probable cause affidavits are judicial records. However, upon review of the submitted information, we note the city maintains the arrest warrants and probable cause affidavits and they were developed in the course of the investigation at issue. Consequently, we determine the city has failed to establish the records at issue were collected, assembled, or maintained by or for the judiciary. Accordingly, the submitted arrest warrants and probable cause affidavits are subject to the Act.

Section 552.108(b)(2) 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 . . . the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication [.]” Gov’t Code § 552.108(b)(2). Section 552.108(b)(2) is applicable only if the information at issue relates to a concluded criminal case that did not result in a conviction or deferred adjudication. A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why this exception is applicable to the information the governmental body seeks to withhold. *See id.* § 552.301(e)(1)(A). You state the submitted information relates to a closed case that did not result in a conviction or deferred adjudication. However, you inform us the information pertaining to the named individual’s arrest on outstanding warrants relates to a case that concluded in conviction. This information, which we marked, may not be withheld under subsection 552.108(b)(2). Based on your representation and our review, we agree section 552.108(b)(2) is applicable to the remaining information at issue.

Section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. *Id.* § 552.108(c). Basic information refers to the information held to be public in *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976), and includes a detailed description of the offense and the identity of the complainant. *See* Open Records Decision No. 127 (1976) (summarizing types of information made public by *Houston Chronicle*). Thus, with the exception of the basic information and

the information we marked, the city may withhold the information at issue under section 552.108(b)(2) of the Government Code.

However, we understand you to claim the basic information is protected under section 552.101 of the Government Code in conjunction with the common-law informer's privilege. 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. The informer's privilege, incorporated into the Act by section 552.101, has long been recognized by Texas courts. *Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). It protects from disclosure 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. 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." Open Records Decision No. 279 at 2 (1981) (citing 8 John H. Wigmore, *Evidence in Trials at Common Law*, § 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. However, the informer's privilege protects the content of the communication only to the extent that it identifies the informant. *Roviaro v. United States*, 353 U.S. 53, 60 (1957).

You state the information at issue identifies an individual who reported a possible violation of the law to the city's police department, which has the authority to enforce criminal law. In this instance, however, the submitted information reflects the subject of the complaint already knows the complainant's identity. Consequently, you have failed to demonstrate the applicability of the common-law informer's privilege to the basic information, and this information may not be withheld under section 552.101 of the Government Code in conjunction with the common-law informer's privilege.

We now turn to your arguments against disclosure of the information pertaining to the specified arrest. Section 552.101 also encompasses the doctrine of common-law privacy, which protects information that (1) contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person and (2) is not of legitimate concern to the public. *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 demonstrated. *Id.* at 681-82. This office has found a compilation of an individual's criminal history record information is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *Cf. U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (when considering prong regarding individual's privacy interest, court recognized

distinction between public records found in courthouse files and local police stations and compiled summary of information and noted that individual has significant privacy interest in compilation of one's criminal history). Furthermore, we find that a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. The requestor, in part, asks for information pertaining to a specific arrest; therefore, because the requestor specifically asks for this information, it is not part of a compilation of the individual's criminal history and may not be withheld on that basis.

We also understand you to claim section 552.101 of the Government Code in conjunction with the common-law physical safety exception. For many years, this office held section 552.101, in conjunction with the common-law right to privacy, protected information from disclosure when "special circumstances" existed such that disclosure of the information would place an individual in imminent danger of physical harm. *See, e.g., Open Records Decision Nos. 169 (1977) (special circumstances required to protect information must be more than mere desire for privacy or generalized fear of harassment or retribution), 123 (1976) (information protected by common-law right of privacy if disclosure presents tangible physical danger).* The Texas Supreme Court has held, however, that freedom from physical harm does not fall under the common-law right to privacy. *See Tex. Dep't of Pub. Safety v. Cox Tex. Newspapers, L.P. & Hearst Newspapers, LLC, 343 S.W.3d 112 (Tex. 2011)* ("freedom from physical harm is an independent interest protected under law, untethered to the right of privacy"). Instead, in *Cox*, the court recognized, for the first time, a separate common-law physical safety exception to required disclosure that exists independent of the common-law right to privacy. *Id.* at 118. Pursuant to this common-law physical safety exception, "information may be withheld [from public release] if disclosure would create a substantial threat of physical harm." *Id.* In applying this new standard, the court noted "deference must be afforded" law enforcement experts regarding the probability of harm, but further cautioned that "vague assertions of risk will not carry the day." *Id.* at 119. We conclude you have not sufficiently demonstrated that a substantial risk of physical harm would result from the disclosure of any of the remaining information at issue. We therefore conclude the city may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with the common-law physical safety exception.

In summary, with the exception of basic information and the information we have marked for release, the city may withhold the submitted information under section 552.108(b)(2) 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,

A handwritten signature in cursive script that reads "Paigelay".

Paige Lay
Assistant Attorney General
Open Records Division

PL/tch

Ref: ID# 463244

Enc. Submitted documents

c: Requestor
(w/o enclosures)