



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 11, 2013

Ms. Linda Pemberton
Office of the City Attorney
City of Killeen
P.O. Box 1329
Killeen, Texas 76540

OR2013-09802

Dear Ms. Pemberton:

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# 490056 (ORR # W010237).

The Killeen Police Department (the "department") received a request for all police records related to a specified address during a specified period of time. You state the department has released twenty-two call for service reports. You claim 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, we note some of the submitted information appears to have been the subject of previous requests for information, as a result of which this office issued Open Records Letter Nos. 2012-07409 (2012), 2012-16696 (2012), and 2013-08191 (2013). In Open Records Letter No. 2012-07409, we determined, (1) the department must withhold the information we marked under section 552.101 in conjunction with common-law privacy; (2) with the exception of basic information, the department may withhold police report number 10-009975 under section 552.108(a)(1) of the Government Code; and (3) the department must release the remaining information. In this instance, the department asserts police report number 10-009975 is excepted from disclosure under section 552.108(a)(2) of the Government Code. Therefore, circumstances have changed with respect to police report number 10-009975, and the department may not rely upon Open Records Letter

No. 2012-07409 as a previous determination for police report number 10-009975. However, we have no indication the law, facts, or circumstances have changed with regard to the remaining information at issue in Open Records Letter No. 2012-07409. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

In Open Records Letter No. 2012-16696, we determined the department must (1) continue to rely on Open Records Letter No. 2012-07409 as a previous determination and withhold or release the previously ruled upon information in accordance with that ruling and (2) release the remaining information. We also have no indication the law, facts, or circumstances have changed with regard to the information at issue in Open Records Letter No. 2013-16696. *See* ORD 673.

Finally, in Open Records Letter No. 2013-08191, we determined, in relevant part, (1) to the extent the department maintained law enforcement records depicting a named individual as a suspect, arrestee, or criminal defendant, the department must withhold any such information under section 552.101 of the Government Code in conjunction with common-law privacy; (2) the department must continue to rely on Open Records Letter Nos. 2013-03660 (2013), 2012-07409, and 2012-16696 as previous determinations and withhold or release the previously ruled upon information in accordance with those rulings; (3) the department must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code; and (4) with the exception of basic information, the department may withhold the remaining information under section 552.108(a)(2). In this instance, we note the request for information does not implicate the privacy interest of the named individual, and the requestor is the individual whose privacy interest was implicated in Open Records Letter No. 2013-08191. Thus, we find the law, facts, and circumstances with regard to the information that listed the named individual as a suspect, arrestee, or criminal defendant have changed. Therefore, the department may not rely upon Open Records Letter No. 2013-08191 as a previous determination with regard to any such information. However, we have no indication the law, facts, or circumstances have changed for the remaining information at issue in Open Records Letter No. 2013-08191. *See* ORD 673.

Section 552.007 of the Government Code provides if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential under law. *See* Gov't Code § 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Accordingly, pursuant

to section 552.007, the department may not now withhold any previously released information unless its release is expressly prohibited by law or the information is confidential under law. You seek to withhold portions of the submitted information under section 552.101 of the Government Code in conjunction with the common-law informer's privilege. Because the purpose of the common-law informer's privilege is to protect the flow of information to a governmental body, rather than to protect a third person, the informer's privilege, unlike other claims under section 552.101, may be waived. *See* Open Records Decision No. 549 at 6 (1990). Further, you also raise section 552.108, which may be waived. *See* Open Records Decision No. 586 (1991) (governmental body may waive statutory predecessor to section 552.108); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). The common-law informer's privilege and section 552.108 do not prohibit the release of information or make information confidential. Thus, to the extent any portion of the submitted information was responsive to and previously released in accordance with Open Records Letter Nos. 2012-07409, 2012-16696, or 2013-08191, the department may not now withhold such information under section 552.101 in conjunction with the common-law informer's privilege or section 552.108. You also claim section 552.101 in conjunction with section 261.201 of the Family Code and portions of the information are subject to section 552.101 in conjunction with common-law privacy. Because these exceptions make information confidential under law, we will address their applicability to any previously released information. Further, we will address all of your submitted arguments, to the extent the submitted information was not responsive to and previously released in accordance with Open Records Letter Nos. 2012-07409, 2012-16696, or 2013-08191.

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes. Section 261.201 of the Family Code provides, in part, as follows:

(a) [T]he following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a). You state some of the submitted documents relate to investigations of alleged child neglect under chapter 261 of the Family Code. *See id.* §§ 261.001 (defining “neglect” for purposes of chapter 261 of the Family Code), 101.003(a) (defining “child” for purposes of this section as person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes). Accordingly, we find portions of the information are subject to chapter 261 of the Family Code. You do not indicate the department has adopted a rule that governs the release of this type of information. Therefore, we assume no such regulation exists. Given that assumption, we conclude the information we have marked is confidential pursuant to section 261.201 of the Family Code, and the department must withhold it under section 552.101 of the Government Code.¹ *See* Open Records Decision No. 440 at 2 (1986) (predecessor statute). However, upon review, we find you have failed to demonstrate how any portion of call for service report number 1405546 was used or developed in an investigation of alleged or suspected child abuse or neglect under section 261.201(a)(2). Furthermore, you have not established call for service report number 1405546 is a report of alleged or suspected abuse or neglect made under section 261.201(a)(1). Therefore, the department may not withhold call for service report number 1405546 under section 552.101 of the Government Code in conjunction with section 261.201 of the Family 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(a)(1) 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 call for service report number 1455422 and police report number 12-013560 pertain to an active criminal investigation. Based on your representation, we conclude the release of the information at issue 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. Civ. 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). Thus, section 552.108(a)(1) is applicable to call for service report number 1455422 and police report number 12-013560.

Section 552.108(a)(2) of the Government Code excepts from disclosure information concerning an investigation that did not result in conviction or deferred adjudication. *See* Gov’t Code § 552.108(a)(2). A governmental body claiming section 552.108(a)(2) must demonstrate the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. *See id.* § 552.301(e)(1)(A)

¹As our ruling is dispositive for this information, we need not consider your remaining arguments against its disclosure.

(governmental body must provide comments explaining why exceptions raised should apply to information requested). You state portions of the remaining information at issue relate to closed cases that did not result in convictions or deferred adjudications. Based on these representations and our review, we agree section 552.108(a)(2) is applicable to the remaining information at issue.

However, we note 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*. *See* 531 S.W.2d at 186-88; Open Records Decision No. 127 (1976) (summarizing types of information considered to be basic information). We note basic information includes, among other items, the identity of the complainant. *See* ORD 127 at 3-4. Thus, to the extent the submitted information was not responsive to and previously released in accordance with Open Records Letter Nos. 2012-07409, 2012-16696, or 2013-08191, and with the exception of the basic information, which must be released, the department may withhold call for service report number 1455422 and police report number 12-013560 under section 552.108(a)(1) of the Government Code and the remaining information at issue under section 552.108(a)(2) of the Government Code.

Section 552.101 of the Government Code 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 from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided the subject of the information does not already know the informer's identity. *See* Open Records Decision No. 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 1-2 (1981) (citing 8 John H. Wigmore, *Evidence in Trials at Common Law*, § 2374, at 767 (J. 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 (1988). However, individuals who provide information in the course of an investigation but do not make the initial report of the violation are not informants for the purposes of claiming the informer's privilege. The privilege excepts the informer's statement only to the extent necessary to protect that informer's identity. Open Records Decision No. 549 at 5 (1990). We note the informer's privilege does not apply where the informant's identity is known to the individual who is the subject of the complaint. *See* Open Records Decision No. 208 at 1-2 (1978).

You state portions of the basic information identify complainants who reported violations of city ordinances. You state violations of the relevant city ordinances are punishable by fine. You do not indicate, and we do not find, the subject of the complaints already knows

the identity of the informers. Based upon your representations and our review, we conclude the department may withhold the identity of the complainants, which we have marked, under section 552.101 of the Government Code in conjunction with the common-law informer's privilege. We note, however, some of the remaining information pertains to a report made to the department by an animal control officer. We note the animal control officer had a duty to notify the department of citizens' complaints. The purpose of the informer's privilege is to encourage "citizens" to report wrongful behavior to the appropriate officials. *See Roviario v. United States*, 353 U.S. 53, 59 (1957). The privilege is not intended to protect the identities of public officials and employees who have a duty to report violations of the law. *Cf. United States v. St. Regis Paper Co.*, 328 F. Supp. 660, 665 (W.D. Wis. 1971) (concluding that public officer may not claim informer's reward for service it is his or her official duty to perform). Thus, we find you have failed to demonstrate the informer's privilege is applicable to this information and it may not be withheld under section 552.101 on that basis. Further, you have failed to demonstrate any portion of the remaining information consists of the identifying information of an individual who made the initial report of a criminal violation to the department for purposes of the informer's privilege. Accordingly, the department may not withhold any portion of the remaining information under section 552.101 on that basis.

Section 552.101 of the Government Code also encompasses common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person and (2) 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. *See id.* at 681-82. The type of information considered intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. This office has found some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 455 (1987) (information pertaining to prescription drugs, specific illnesses, operations and procedures, and physical disabilities protected from disclosure), 422 (1984), 343 (1982). Upon review, we find the information we have marked is highly intimate or embarrassing and not of legitimate public concern. Therefore, to the extent the submitted information was responsive to and previously released in accordance with Open Records Letter Nos. 2012-07409, 2012-16696, or 2013-08191, the department must withhold the marked information under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find you have not demonstrated how any portion of the remaining information is highly intimate or embarrassing and not of legitimate public concern. Thus, no portion of the remaining information may be withheld under section 552.101 in conjunction with common-law privacy.

In summary, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. To the extent the submitted information was not responsive to and previously released in accordance with Open Records Letter Nos. 2012-07409, 2012-16696, or 2013-08191, and with the exception of basic information, the department may withhold call for service report number 1455422 and police report number 12-013560 under section 552.108(a)(1) of the Government Code and the remaining information at issue under section 552.108(a)(2) of the Government Code. In releasing the basic information, the department may withhold the identity of the complainants we have marked under section 552.101 of the Government Code in conjunction with the common-law informer's privilege. To the extent the submitted information was responsive to and previously released in accordance with Open Records Letter Nos. 2012-07409, 2012-16696, or 2013-08191, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. Any 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, toll free at (888) 672-6787.

Sincerely,



Nicholas A. Ybarra
Assistant Attorney General
Open Records Division

NAY/ac

Ref: ID# 490056

Enc. Submitted documents

c: Requestor
(w/o enclosures)