



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 14, 2013

Mr. John R. Batoon
Assistant City Attorney
City of El Paso
P.O. Box 1890
El Paso, Texas 79950-1890

OR2013-10093

Dear Mr. Batoon:

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# 490131.

The El Paso Police Department (the "department") received a request for information concerning a specified incident. 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 the submitted information was the subject of a previous request for information from the same requestor, in response to which this office issued Open Records Letter No. 2013-03174 (2013). In that ruling, we concluded with the exception of basic information, the department may withhold the information at issue under section 552.108(a)(2) of the Government Code because it related to a case that ended in a result other than a conviction or deferred adjudication. However, in response to the present request, you argue a different subsection of section 552.108(a) of the Government Code applies. Thus, the circumstances surrounding this information have changed, and you may not rely on Open Records Letter No. 2013-03174 as a previous determination. *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 information is or is not excepted from disclosure). Accordingly, we will address your argument against disclosure of the submitted information.

You now raise section 552.108(a)(1) of the Government Code. Section 552.108 provides, in part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime; [or]

(2) it is information that the deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication[.]

Gov't Code § 552.108(a)(1)–(2). Generally, sections 552.108(a)(1) and 552.108(a)(2) are mutually exclusive. Section 552.108(a)(1) protects information the release of which would interfere with a particular pending criminal investigation or prosecution. In contrast, section 552.108(a)(2) protects information that relates to a concluded criminal investigation or prosecution that did not result in a conviction or deferred adjudication. 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).

In this instance, you cite to section 552.108(a)(1) and argue the submitted information pertains to an active criminal investigation. However, in response to the previous request for the same information, you raised section 552.108(a)(2) of the Government Code and informed this office the information at issue pertained to a concluded investigation that did not result in a conviction or deferred adjudication. As noted above, in response to your prior request for a ruling this office issued Open Records Letter No. 2013-03174, which concluded with the exception of basic information, the department may withhold the information at issue under section 552.108(a)(2) of the Government Code. In raising section 552.108(a)(1), you have provided no additional arguments explaining how the information at issue, which you previously described as relating to a concluded case, now relates to an ongoing criminal investigation. Because of your contradictory representations, we conclude you have failed to sufficiently demonstrate the applicability of section 552.108(a)(1) to the submitted information. *See Gov't Code § 552.301(e)(1)(A)* (governmental body must provide comments explaining why claimed exceptions to disclosure apply). Consequently, the department may not now withhold the submitted information under section 552.108(a)(1) of the Government Code.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *Id.* § 552.101. Section 552.101 encompasses the doctrine of common-law privacy, which protects information if it (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). The type of information considered intimate and 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. 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* Open Records Decision Nos. 393, 339; *see also* ORD 440 (detailed descriptions of serious sexual offenses must be withheld). Upon review, we find the submitted information generally is the type of information protected by common-law privacy. However, as the individual with the privacy interest, the requestor has a special right of access to information that would ordinarily be withheld to protect her privacy, and such information cannot be withheld from her on that basis. *See* Gov't Code § 552.023(b) (governmental body may not deny access to person to whom information relates or person's agent on grounds that information is considered confidential by privacy principles). Accordingly, the department may not withhold any of the submitted information under section 552.101 of the Government Code on the basis of common-law privacy.

Section 552.101 of the Government Code also encompasses the doctrine of constitutional privacy. The constitutional right to privacy protects two types of interests. *See* Open Records Decision No. 600 at 4 (1992) (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985)). The first is the interest in independence in making certain important decisions related to the "zones of privacy" recognized by the United States Supreme Court. *Id.* The zones of privacy recognized by the United States Supreme Court are matters pertaining to marriage, procreation, contraception, family relationships, and child rearing and education. *See id.* The second interest is the interest in avoiding disclosure of personal matters. The test for whether information may be publicly disclosed without violating constitutional privacy rights involves a balancing of the individual's privacy interests against the public's need to know information of public concern. *See* Open Records Decision No. 455 at 5-7 (1987) (citing *Fadjo v. Coon*, 633 F.2d 1172, 1176 (5th Cir. 1981)). The scope of information considered private under the constitutional doctrine is far narrower than under the common-law right to privacy; the material must concern the "most intimate aspects of human affairs." *See id.* at 5 (citing *Ramie*, 765 F.2d at 492). Upon review of the submitted information, we find it does not contain information that is protected under constitutional privacy. Accordingly, the department may not withhold it under section 552.101 of the Government Code.

Section 552.130 of the Government Code excepts from disclosure information relating to a motor vehicle operator's or driver's license or permit issued by an agency of this state or

another state or country.¹ Gov't Code § 552.130(a). The department must withhold the driver's license information we marked under section 552.130 of the Government Code. The department must release the remaining information.²

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Neal Falgoust
Assistant Attorney General
Open Records Division

NF/ag

Ref: ID# 490131

Enc. Submitted documents

c: Requestor
(w/o enclosures)

¹The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

²We note the requestor has a special right of access to the information being released. *See* Gov't Code § 552.023(b). Accordingly, if the department receives another request for this same information from a different requestor, it must again seek a ruling from this office.