



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 25, 2013

Mr. Richard L. Bilbie
Assistant City Attorney
City of Harlingen
P.O. Box 2207
Harlingen, Texas 78551-2207

OR2013-12876

Dear Mr. Bilbie:

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# 494151.

The Harlingen Police Department (the "department") received a request for the following categories of information: (1) the department's procedures to remove a person from a home; (2) information pertaining to a specified incident, including a 9-1-1 recording from a specified telephone number; and (3) the personnel file of a named department officer. We understand the responsive 9-1-1 recording has been disposed of in accordance with the department's retention policy.¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.108, 552.117, 552.1175, and 552.152 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note you have redacted portions of the submitted information. Pursuant to section 552.301 of the Government Code, a governmental body that seeks to withhold requested information must submit to this office a copy of the information, labeled to indicate which exceptions apply to which parts of the copy, unless the governmental body

¹The 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 dism'd); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

has received a previous determination for the information at issue. Gov't Code §§ 552.301(a), (e)(1)(D). We note the department has redacted motor vehicle record information and social security numbers pursuant to sections 552.130(c) and 552.147(b) of the Government Code, respectively.² We also note the department has redacted some information pertaining to the named officer under section 552.117(a)(2) of the Government Code pursuant to Open Records Decision No. 670 (2001).³

You have also redacted dates of birth pertaining to individuals who are not employees of the department. Section 552.1175(f) of the Government Code authorizes a governmental body to redact under section 552.1175(b) without seeking a decision from this office, the home address, home telephone number, emergency contact information, date of birth, social security number, and family member information of certain individuals, when that information is held by a governmental body in a non-employment capacity and the individual elects to keep the information confidential. *See* Act of May 26, 2013, 83rd Leg., R.S., H.B. 1632, § 3 (to be codified as an amendment to Gov't Code § 552.1175). We are unable to determine from the information provided which, if any, of the individuals whose information you redacted are currently licensed peace officers. We note the application of section 552.1175 will only apply in the event these individuals are currently licensed as peace officers and elect to restrict access to the information in accordance with section 552.1175(b). We have marked additional information that is subject to section 552.1175 of the Government Code. If the individuals whose information is at issue are not currently licensed as peace officers or do not elect to restrict access to the information in accordance with section 552.1175(b), the information you have redacted, and the additional information we have marked, may not be withheld under section 552.1175 of the Government Code.

However, you do not assert, nor does our review of our records indicate, that you have been authorized to withhold the remaining redacted information without first seeking a ruling from this office. *See* Gov't Code § 552.301(a); Open Records Decision No. 673 (2001). As such, these types of information must be submitted in a manner that enables this office to determine whether the information comes within the scope of an exception to disclosure.

²Section 552.130(c) of the Government Code allows a governmental body to redact the information described in subsection 552.130(a) without the necessity of seeking a decision from the attorney general. *See* Act of May 6, 2013, 83rd Leg., R.S., S.B. 458, § 1 (to be codified as an amendment to 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* Gov't Code § 552.130(d), (e). Section 552.147(b) of the Government Code 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. Gov't Code § 552.147(b).

³Open Records Decision No. 670 is a previous determination that authorizes all governmental bodies to withhold the home addresses and telephone numbers, personal cellular telephone and pager numbers, social security numbers, and family member information of peace officers under section 552.117(a)(2) of the Government Code, without the necessity of requesting an attorney general decision.

Because we are unable to discern the nature of some of the remaining redacted information, the department has failed to comply with section 552.301, and such information is presumed public under section 552.302. *See* Gov't Code §§ 552.301(e)(1)(D), .302. Thus, we conclude that the department must release the information we have marked. We will, however, address the remaining redacted information, as we are able to discern the nature of this information.

Next, we will address your argument under section 552.108 of the Government Code, as it is potentially the most encompassing. Section 552.108(a)(2) of the Government Code excepts from disclosure information concerning an investigation that concluded in a result other than conviction or deferred adjudication. *Id.* § 552.108(a)(2). A governmental body claiming section 552.108(a)(2) must demonstrate the requested information relates to a criminal investigation that concluded in a final result other than a conviction or deferred adjudication. *See id.* § 552.301(e)(1)(A); Open Records Decision No. 434 at 2–3 (1986). You state Exhibit E pertains to a closed criminal case. Based on this representation, we agree section 552.108(a)(2) of the Government Code is applicable to Exhibit E.

However, section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. Gov't Code § 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). This information includes, but is not limited to, a detailed description of the offense. *See* Open Records Decision No. 127 (1976) (summarizing types of information deemed public by *Houston Chronicle*). Accordingly, with the exception of basic information, the department may withhold Exhibit E under section 552.108(a)(2) of the Government Code.

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 . . . release of the internal record or notation would interfere with law enforcement or prosecution[.]” Gov't Code § 552.108(b)(1); *see also* Open Records Decision No. 531 at 2 (1989) (quoting *Ex parte Pruitt*, 551 S.W.2d 706, 710 (Tex. 1977)). 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 (Tex. App.—Austin 2002, no writ). To demonstrate the applicability of this exception, a governmental body must meet its burden of explaining how and why release of the requested information would interfere with law enforcement and crime prevention. Open Records Decision No. 562 at 10 (1990). This office has concluded section 552.108(b) excepts from public disclosure information relating to the security or operation of a law enforcement agency. *See, e.g.*, Open Records Decision Nos. 531 (release of detailed use of force guidelines would unduly interfere with law enforcement), 252 (1980) (section 552.108

designed to protect investigative techniques and procedures used in law enforcement), 143 (1976) (disclosure of specific operations or specialized equipment directly related to investigation or detection of crime may be excepted). Section 552.108(b)(1) is not applicable, however, to generally known policies and procedures. *See, e.g.*, ORDs 531 at 2-3 (Penal Code provisions, common law rules, and constitutional limitations on use of force not protected), 252 at 3 (governmental body failed to 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. Open Records Decision No. 409 at 2 (1984).

We understand you seek to withhold Exhibit D under section 552.108(b)(1). You assert that release of the submitted procedures, which we note pertains to domestic violence investigations, would “reveal internal information about [department] procedures in detecting, investigating and prosecuting potential criminal activity.” Having considered your representations and reviewed the information at issue, we find that you have not explained how and why release of this information would interfere with law enforcement and crime prevention. *See* Gov’t Code §552.108 (a)(1), (b)(1); Open Records Decision No. 562 at 10 (1990). Consequently, we determine that the department may not withhold Exhibit D pursuant to section 552.108(b)(1).

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 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). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. This office has found that personal financial information not relating to a financial transaction between an individual and a governmental body is generally intimate or embarrassing. *See generally* Open Records Decision Nos. 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy). Also, a compilation of an individual’s criminal history 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). Moreover, we find a compilation of a private citizen’s criminal history is generally not of legitimate concern to the public. Upon review, we find the information we have marked is highly intimate or embarrassing and not of

legitimate public concern. Therefore, the department must withhold the information we have marked pursuant to section 552.101 of the Government Code in conjunction with common-law privacy. However, you have failed to demonstrate the remaining information is highly intimate or embarrassing and of no legitimate public interest. Thus, the remaining information may not be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.101 also encompasses information made confidential by other statutes, such as section 143.090 of the Local Government Code. We note the City of Harlingen is a civil service city under chapter 143 of the Local Government Code. Section 143.090 provides as follows:

A department, [the Fire Fighters' and Police Officers' Civil Service Commission], or municipality may not release a photograph that depicts a police officer unless:

- (1) the officer has been charged with an offense by indictment or by information;
- (2) the officer is a party in a civil service hearing or a case before a hearing examiner or in arbitration;
- (3) the photograph is introduced as evidence in a judicial proceeding;
or
- (4) the officer gives written consent to the release of the photograph.

Loc. Gov't Code § 143.090. The submitted information contains a redacted photograph of a police officer. You do not indicate the police officer depicted in the redacted photograph has provided the department with written consent to release the photograph. You do not inform us, and it does not appear, that any of the exceptions to withholding the photograph under section 143.090 are applicable. Therefore, we conclude the department must withhold the police officer's photograph that you have redacted under section 552.101 in conjunction with section 143.090 of the Local Government Code.

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). The Texas Supreme Court recently held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). Upon review, we find the department

must withhold the dates of birth you have redacted in Exhibit F under section 552.102 of the Government Code.

Section 552.117(a)(2) excepts from public disclosure the home addresses, home telephone numbers, emergency contact information, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer elects confidentiality under sections 552.024 and 552.1175 of the Government Code.⁴ Gov't Code § 552.117(a)(2). We have marked additional information belonging to the named officer under section 552.117(a)(2) of the Government Code, and the department must withhold this information on this basis. We note the remaining information includes information pertaining to other officers employed by the department. In this instance, it is unclear whether all of the individuals at issue are currently licensed peace officers as defined by article 2.12. Thus, if the individuals at issue are currently licensed peace officers as defined by article 2.12, the department must withhold the individuals' personal information you have redacted under section 552.117(a)(2) of the Government Code. If, however, the individuals at issue are not currently licensed peace officers, the information at issue may not be withheld under section 552.117(a)(2).

If the individuals whose information is at issue are no longer licensed peace officers, then their personal information may be subject to section 552.117(a)(1) of the Government Code, which excepts the same information for a current or former employee of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. *See id.* § 552.117(a)(1). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See Open Records Decision No. 530 at 5 (1989)*. Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Therefore, if the individuals at issue are no longer licensed peace officers as defined by article 2.12, then to the extent they timely elected confidentiality under section 552.024, the department must withhold the information you have redacted under section 552.117(a)(1) of the Government Code. If, however, the individuals at issue did not timely elect to keep their personal information confidential, the information at issue may not be withheld under section 552.117(a)(1).⁵

Section 552.136(b) of the Government Code provides, "[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is

⁴"Peace officer" is defined by Article 2.12 of the Texas Code of Criminal Procedure.

⁵Regardless of the applicability of section 552.117 of the Government Code, section 552.147(b) of the Government Code, as noted above, permits a governmental body to redact a living person's social security number without the necessity of requesting a decision from this office. *See Gov't Code § 552.147(b)*.

collected, assembled, or maintained by or for a governmental body is confidential.”⁶ Gov’t Code § 552.136(b); *see id.* § 552.136(a) (defining “access device”). Accordingly, the department must withhold the bank account number we have marked under section 552.136 of the Government Code.

Section 552.137 of the Government Code provides, “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act],” unless the owner of the e-mail address has affirmatively consented to its release or the e-mail address is specifically excluded by subsection (c). Gov’t Code § 552.137(a)–(c). The department must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses have affirmatively consented to their release.

Section 552.152 of the Government Code 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 § 552.152. Upon review, we find you have failed to demonstrate that release of any of the remaining information in Exhibit F would subject any officer to a substantial threat of physical harm. Accordingly, the department may not withhold any of the submitted information under section 552.152 of the Government Code.

In summary, the department must withhold the information you have redacted, and the additional information we have marked, under section 552.1175 of the Government Code if the individuals are currently licensed as peace officers and elected to restrict access to their information in accordance with section 552.1175(b). With the exception of basic information, the department may withhold Exhibit E under section 552.108(a)(2) of the Government Code. The department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The department must withhold the photograph you have redacted under section 552.101 of the Government Code in conjunction with section 143.090 of the Local Government Code. The department must withhold the dates of birth you have redacted under section 552.102 of the Government Code. The department must withhold the named officer’s information that we have marked under section 552.117(a)(2) of the Government Code. The department must withhold the personal information of other department officers that you have redacted under

⁶The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

section 552.117(a)(2) of the Government Code if the individuals at issue are currently licensed peace officers as defined by article 2.12. However, if the individuals at issue are no longer licensed peace officers, the department must withhold the information you have redacted under section 552.117(a)(1) of the Government Code, to the extent the employees timely elected to keep such information confidential under section 552.024. The department must withhold the information we have marked under section 552.136 of the Government Code. The department must also withhold the e-mail addresses we have marked under section 552.137 of the Government Code unless the owners affirmatively consent to their release. 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 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,



Britni Fabian
Assistant Attorney General
Open Records Division

BF/dls

Ref: ID# 494151

Enc. Submitted documents

c: Requestor
(w/o enclosures)