



February 25, 2015

Ms. Jordan M. Powell
Assistant Criminal District Attorney
Hays County Criminal District Attorney's Office
712 South Stagecoach, Suite 2057
San Marcos, Texas 78666

OR2015-03739

Dear Ms. Powell:

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# 554820 (Ref. No. 14-0419).

The Hays County District Attorney's Office (the "district attorney's office") received a request for e-mails to or from a named Hays County employee pertaining to a named individual for a specified time period.¹ We understand the district attorney's office will redact information subject to section 552.136(c) of the Government Code.² Further, you state, pursuant to the previous determination in Open Records Decision No. 684 (2009), the

¹We note the district attorney's office sought and received clarification of the information requested. *See Gov't Code* § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

²Section 552.136 of the Government Code permits a governmental body to withhold the information described in section 552.136(b) without the necessity of seeking a decision from this office. *See Gov't Code* § 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). *See id.* § 552.136(d), (e).

district attorney's office will redact personal e-mail addresses subject to section 552.137 of the Government Code.³ You claim the submitted information is excepted from disclosure under sections 552.108 and 552.130 of the Government Code. Further, you state release of the submitted information may implicate the privacy interests of the named individual. Accordingly, you state, and provide documentation showing, you notified the named individual of the request for information and of his right to submit arguments to this office as to why the information at issue should not be released.⁴ See Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released). We have considered the submitted arguments and reviewed the submitted information.

Initially, we note some of the submitted information, which we have marked, is not responsive to the instant request because it pertains to information that is outside of the requested date range. This ruling does not address the public availability of any information that is not responsive to the request and the district attorney's office is not required to release such information in response to this request.

We understand you to assert the submitted responsive information is excepted under section 552.108 of the Government Code as interpreted by *Holmes v. Morales*. See 924 S.W.2d 920 (Tex. 1996). In *Holmes*, the Texas Supreme Court held the plain language of section 552.108 did not require a governmental body to show release of the information would unduly interfere with law enforcement. *Id.* at 925. The *Holmes* case further held "section 552.108's plain language makes no distinction between a prosecutor's 'open' and 'closed' criminal litigation files" and concluded the Harris County District Attorney may withhold his closed criminal litigation files under that exception. *Id.* Subsequent to the interpretation of section 552.108 in *Holmes*, the Seventy-fifth Legislature extensively amended section 552.108. See Act of June 1, 1997, 75th Leg., R.S., ch. 1231, § 1, 1997 Tex. Gen. Laws 4697. As amended, section 552.108 now expressly requires a governmental body to explain, among other things, how release of the information would interfere with law enforcement. Accordingly, the court's ruling in *Holmes*, which construed former section 552.108, is superseded by the amended section 552.108.

Section 552.108 of the Government Code provides, in pertinent part, the following:

³Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including e-mail addresses of members of the public under section 552.137, without the necessity of requesting an attorney general decision.

⁴As of the date of this letter, we have not received comments from the third party explaining why the submitted information should not be released.

(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:

...

(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[.]

(b) An 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 is excepted from [required public disclosure] if:

...

(2) 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(a)(2), (b)(2). A governmental body raising section 552.108 must reasonably explain the applicability of section 552.108. *See id.* § 552.301(e)(1)(A) (governmental body must provide comments explaining why exceptions raised should apply to information requested). You assert the submitted responsive information is excepted under subsections 552.108(a)(2) and 552.108(b)(2) of the Government Code. You state the information at issue pertains to a case that concluded with a dismissal. However, you assert release of the responsive information "would be harmful to any future investigations or prosecutions stemming from the incident" at issue. Further, you submit an affidavit from an assistant criminal district attorney stating the case at issue resulted in a dismissal. However, the affidavit also states release of the submitted information would interfere with prosecution. We note subsections 552.108(a)(2) and 552.108(b)(2) are applicable only if the information at issue is related to a concluded criminal case "that did not result in conviction or deferred adjudication." *Id.* § 552.108(a)(2). Because you have provided this office with contradictory representations, we find you have failed to demonstrate the applicability of subsection 552.108(a)(2) or subsection 552.108(b)(2) to the information at issue. Accordingly, the district attorney's office may not withhold any of the submitted responsive information under subsection 552.108(a)(2) or subsection 552.108(b)(2) of the Government Code.

Section 552.101 of the Government Code excepts “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.”⁵ Gov’t Code § 552.101. Section 552.101 encompasses the doctrine of 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 satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Additionally, this office has found personal financial information not relating to a financial transaction between an individual and a governmental body is generally highly intimate or embarrassing. *See* Open Records Decision Nos. 523 (1989) (common-law privacy protects credit reports, financial statements, and other personal financial information), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy). Upon review, we find the information we marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Therefore, the district attorney’s office must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy.

You state you will redact federal tax identification numbers pursuant to section 552.130 of the Government Code. Section 552.130 provides information relating to a motor vehicle operator’s license, driver’s license, motor vehicle title or registration, or personal identification document issued by an agency of this state or another state or country is excepted from public release. *See* Gov’t Code § 552.130. Upon review, we find none of the remaining responsive information consists of motor vehicle record information subject to section 552.130. Accordingly, none of the remaining responsive information may be withheld under section 552.130 of the Government Code.

In summary, the district attorney’s office must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. The district attorney’s office must release the remaining responsive information.

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.

⁵The 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).

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,

A handwritten signature in black ink, appearing to read "Paige Thompson". The signature is written in a cursive style with a large initial "P" and a long, sweeping underline.

Paige Thompson
Assistant Attorney General
Open Records Division

PT/akg

Ref: ID# 554820

Enc. Submitted documents

c: Requestor
(w/o enclosures)