



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

November 23, 2015

Ms. Vanessa A. Gonzalez
Counsel for Baylor University
Bickerstaff Heath Delgado Acosta, LLP
3711 South MoPac Expressway, Building One, Suite 300
Austin, Texas 78746

OR2015-24571

Dear Ms. Gonzalez:

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# 588611.

The Baylor Police Department (the "department"), which you represent, received a request for police reports when use of force was used in the past year by a department officer. The department states it will provide some of the requested information to the requestor, but claims the submitted information is either not responsive to the request for information, or excepted from disclosure under sections 552.101, 552.103, and 552.108 of the Government Code. We have considered the submitted arguments and reviewed the submitted information.

Initially, the department asserts the submitted use-of-force administrative report forms are not responsive to the request for information. As noted above, the request for information asked for "[t]he police reports for all incidents when force was used in the past year by a university police officer." Upon review, we agree the submitted use-of-force administrative report forms do not consist of "police reports" and, thus, are not responsive to the request for information. This ruling does not address the public availability of any information that is not responsive to the request. Accordingly, the department is not required to release these use-of-force administrative report forms in response to this request.

Next, the department informs us it has redacted student-identifying information in the submitted responsive information pursuant to the Family Educational Rights and Privacy Act

("FERPA"), section 1232g of title 20 of the United States Code.¹ However, FERPA is not applicable to law enforcement records that are maintained and created by the department for a law enforcement purpose. *See* 20 U.S.C. § 1232g(a)(4)(B)(ii); 34 C.F.R. §§ 99.3, .8. The submitted responsive information consists of records that were created by the department for the purpose of law enforcement. Thus, these records are not subject to FERPA, and the department may not withhold any portion of them on that basis. We also note the department has redacted dates of birth and home addresses and telephone numbers of members of the public. The department does not assert, nor does our review of our records indicate, it has been authorized to withhold any such information without seeking a ruling from this office. *See* Gov't Code § 552.301(a); Open Records Decision No. 673 (2000). Because we are able to discern the nature of this redacted information, we are not prevented from determining whether that information falls within the scope of the department's exceptions to disclosure. Accordingly, we will address the department's arguments with respect to the information at issue, including the remaining redacted information. Nevertheless, we caution the department that a failure to provide this office with requested information generally deprives us of the ability to determine whether information may be withheld and leaves this office with no alternative other than ordering the redacted information to be released. *See* Gov't Code § 552.301(e)(1)(D) (governmental body must provide this office with copy of specific information requested or representative sample if information is voluminous).

We must next address the department's obligations under section 552.301 of the Government Code regarding report number 15-0552. Section 552.301 prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(e)(1)(D), a governmental body must submit to this office within fifteen business days of receiving an open records request a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. Gov't Code § 552.301(e)(1)(D). Gov't Code § 552.301(e). The department received the request for information on September 1, 2015. Although the department timely submitted report numbers 15-0048, 15-0549, 15-0550, and 15-0559, as of the date of this letter, the department has not submitted a copy or representative sample of report number 15-0552. Therefore, the department failed to comply with the procedural requirements mandated by section 552.301(e) regarding report number 15-0552.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 generally results in the waiver

¹The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that FERPA does not permit state and local educational authorities to disclose to this office, without parental consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act. The DOE has determined that FERPA determinations must be made by the educational authority in possession of the education records. We have posted a copy of the letter from the DOE to this office on the Attorney General's website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

of its claims to withhold the information at issue, unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). Although the department asserts report number 15-0552 is excepted from disclosure under sections 552.103 and 552.108 of the Government Code, these sections are discretionary exceptions to disclosure that protect a governmental body's interests. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 177 (1977) (statutory predecessor to section 552.108 subject to waiver); *see also* Open Records Decision No. 522 (1989) (discretionary exceptions in general). Thus, the department's claims under sections 552.103 and 552.108 are not compelling reasons to overcome the presumption of openness, and the department may not withhold the report at issue on either of those grounds. Accordingly, the department must release report number 15-0552 in accordance with section 552.302 of the Government Code.

Section 552.108(a) 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: (1) 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 information at issue 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, 710 (Tex. 1977). The department states the submitted information relates to pending criminal investigations or prosecutions. Based on this representation, we conclude the release of this information 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, 186-87 (Tex. Civ. App.—Houston [14th Dist.] 1975) (delineating law enforcement interests present in active cases), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976).

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*. *See* 531 S.W.2d at 186-88; Open Records Decision No. 127 at 3-4 (1976) (summarizing types of information deemed public by *Houston Chronicle*). Thus, with the exception of basic information, the department may withhold the submitted responsive information under section 552.108(a)(1) of the Government Code.

The department asserts some of the basic information at issue is excepted from disclosure under section 552.101 of the Government Code, which 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 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. Upon review, we find none of the submitted basic information satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the submitted basic information is not confidential under common-law privacy, and the department may not withhold it under section 552.101 on that ground.

To conclude, the department must release report number 15-0552 in accordance with section 552.302 of the Government Code. With the exception of basic information, which the department must release, the department may withhold the submitted responsive information under section 552.108(a)(1) 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.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,


James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/som

Ref: ID# 588611

Enc. Submitted documents

c: Requestor
(w/o enclosures)