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ATTORNEY GENERAL OF TEXAS

September 8, 2016

Ms. Vanessa Gonzalez
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Building 1, Suite 300
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Austin, Texas 78746

OR2016-20295

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# 625628.

The Southern Methodist University Police Department (the "department"), which you represent, received a request for all records related to 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. We have also received and considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit written comments regarding why information should or should not be released).

Initially, we note some of the submitted information is not responsive to the request for information because it was created after the date the department received the request. This ruling does not address the public availability of any information that is not responsive to the request, and the department is not required to release this information in response to this request.

Next, we note some of the responsive information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2015-26415 (2015). In that ruling, we determined, with the exception of basic information, which we

ordered released, the department may withhold the submitted information under section 552.108(a)(1) of the Government Code. 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 id.* § 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 the previously released information, the basic information, under section 552.101 in conjunction with common-law privacy, section 552.101 in conjunction with the common-law informer's privilege, and section 552.108. 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; thus, the informer's privilege, unlike other claims under section 552.101 of the Government Code, neither prohibits release nor makes information confidential. *See* Open Records Decision No. 549 at 6 (1990). Therefore, the department may not now withhold any portion of the previously released information under section 552.101 of the Government Code in conjunction with the common-law informer's privilege. Further, section 552.108 also does not prohibit the release of information or make information confidential. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 177 at 3 (1977) (statutory predecessor to section 552.108 subject to waiver). Thus, the department may not withhold the previously released information under section 552.108 of the Government Code. However, as section 552.101 in conjunction with common-law privacy makes information confidential, we will consider your argument under section 552.101 in conjunction with common-law privacy for the previously released information. Furthermore, you previously represented the responsive information related to an open investigation subject to section 552.108(a)(1) of the Government Code. You now inform us the investigation is concluded and claim section 552.108(a)(2) of the Government Code. Thus, we find the circumstances have changed and the department may not rely on Open Records Letter No. 2015-26415 as a previous determination, in this instance. Additionally, some of the responsive information was created after the previous request was received by the department; thus, such information was not responsive to the previous request. Accordingly, we will consider your argument under section 552.101 in conjunction with common-law privacy for the previously released information, as well as the remaining responsive information. Additionally, we consider your remaining arguments for the information not previously released in Open Records Letter No. 2015-26415.

Section 552.108(a)(2) of the Government Code exempts 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 concluded in a final result other than a conviction or deferred adjudication. *See id.* § 552.301(e)(1)(A) (governmental body must provide comments explaining why exceptions raised should apply to information requested). You state the information at issue pertains to a concluded investigation that did not result in conviction or deferred adjudication. Based on your representation and our review, we find the department may withhold the responsive information not previously released under section 552.108(a)(2).

You argue section 552.101 in conjunction with common-law privacy for the remaining responsive information. Section 552.101 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 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. *See id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. In Open Records Decision No. 393 (1983), this office concluded that, generally, only that information which either identifies or tends to identify a victim of sexual assault or other sex-related offense may be withheld under common law privacy; however, because the identifying information was inextricably intertwined with other releasable information, the governmental body was required to withhold the entire report. Open Records Decision No. 393 at 2 (1983); *see* Open Records Decision No. 339 (1982); *see also Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied) (identity of witnesses to and victims of sexual harassment was highly intimate or embarrassing information and public did not have a legitimate interest in such information); Open Records Decision No. 440 (1986) (detailed descriptions of serious sexual offenses must be withheld). We note the information at issue meets the standard articulated by the Texas Supreme Court in *Industrial Foundation*. However, as you acknowledge, the requestor in this case is the victim and the individual whose privacy interest is implicated. Therefore, the requestor has a right of access to information concerning herself that would otherwise be withheld to protect her privacy. *See* Gov’t Code § 552.023(a) (person or person’s authorized representative has special right of access, beyond right of general public, to information held by governmental body that relates to person and is protected from public disclosure by laws intended to protect person’s privacy interests); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individuals request information concerning themselves). You argue release of the information at issue would harm the privacy interest of the suspect. However, we note the public has a legitimate interest in knowing the details of a crime. *See Lowe v. Hearst Communications, Inc.*, 487 F.3d 246, 250 (5th Cir. 2007) (noting a “legitimate public interest in facts tending to support an allegation of criminal activity” (citing *Cinel v. Connick*, 15 F.3d 1338, 1345-46 (1994))). Upon review, we find you have failed to demonstrate the remaining information at issue is highly intimate or embarrassing information of an

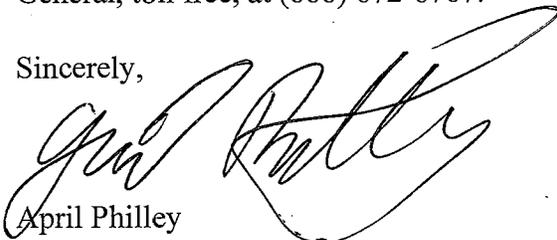
individual other than the requestor that is not of legitimate public interest. Therefore, the department may not withhold information at issue under section 552.101 of the Government Code in conjunction with common-law privacy.

In summary, the department may withhold the responsive information not previously released in Open Records Letter No. 2015-26415 under section 552.108(a)(2). The department must release the remaining responsive information pursuant to Open Records Letter No. 2015-26415.

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,



April Philley
Assistant Attorney General
Open Records Division

AP/eb

Ref: ID# 625628

Enc. Submitted documents

c: Requestor
(w/o enclosures)