



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 18, 2019

Ms. Kristie L. Lewis
HPD Staff Attorney
Houston Police Department
1200 Travis, 21st Floor
Houston, Texas 77002-6000

OR2019-10522

Dear Ms. Lewis:

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# 760085 (Ref Nos. 19-01080, 19-01081, 19-01142, 19-01754, and 19-01200).

The City of Houston (the "city") received five requests from four requestors for specified information pertaining to a specified incident. The fifth requestor additionally requested information pertaining to a specified individual. You state you have released some information. You claim the submitted information is excepted from disclosure under sections 552.101, 552.108, and 552.152 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, we note the department has redacted portions of the submitted information. You do not assert, nor does our review of the records indicate, you have been authorized to withhold this information without seeking a ruling from this office. *See* Gov't Code § 552.301(a); Open Records Decision No. 673 (2001). Therefore, 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. In this instance, we can discern the nature of the redacted information; thus, being deprived of this information does not inhibit our ability to make a ruling. In the future, however, the department should refrain from redacting any

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

information that it is not authorized to withhold in seeking an open records ruling. Failure to do so may result in the presumption the redacted information is public. *See* Gov't Code § 552.302.

Next, we note the submitted information includes police officers' body worn camera recordings. Body worn cameras are subject to chapter 1701 of the Occupations Code. Chapter 1701 provides the procedures a requestor must follow when seeking a body worn camera recording. Section 1701.661(a) provides:

A member of the public is required to provide the following information when submitting a written request to a law enforcement agency for information recorded by a body worn camera:

- (1) the date and approximate time of the recording;
- (2) the specific location where the recording occurred; and
- (3) the name of one or more persons known to be a subject of the recording.

Occ. Code § 1701.661(a). In this instance, the third and fourth requestors do not give the requisite information under section 1701.661(a). As the third and fourth requestors did not properly request the body worn camera recordings at issue pursuant to chapter 1701, our ruling does not reach this information with respect to these requestors and it need not be released to them.² However, pursuant to section 1701.661(b), a "failure to provide all the information required by Subsection (a) to be part of a request for recorded information does not preclude the requestor from making a future request for the same recorded information." *Id.* § 1701.661(b). We note the second requestor provided the requisite information under section 1701.661(a) for the body worn camera recordings at issue. Accordingly, the second requestor properly requested the body worn camera recordings at issue, and we will consider the department's remaining arguments against disclosure of this information.

Next, we note the department seeks to withhold a press release that may have been released to the public. The Act does not permit selective disclosure of information to the public. *See* Gov't Code §§ 552.007(b), .021; Open Records Decision No. 463 at 1-2 (1987). Information that has been voluntarily released to a member of the public may not subsequently be withheld from another member of the public, unless public disclosure of the information is expressly prohibited by law or the information is confidential under law. *See* Gov't Code § 552.007(a); Open Records Decision Nos. 518 at 3 (1989), 490 at 2 (1988). Although you raise section 552.108 of the Government Code for the information at issue, this section 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)

²As our ruling is dispositive, we need not address your arguments against disclosure of this information.

(waiver of discretionary exceptions), 586 (1991) (governmental body may waive section 552.108). Thus, to the extent the department voluntarily released the submitted press release to the public, the department may not now withhold such information under section 552.108 but must instead release it. However, to the extent the department has not voluntarily released the submitted press release to the public, we will consider your argument under section 552.108 of the Government Code.

We note some of the remaining information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body; [and]

...

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(3), (17). The submitted information includes information in an account, voucher, or contract relating to the expenditure of public funds that is subject to section 552.022(a)(3) of the Government Code and a court-filed document that is subject to section 552.022(a)(17) of the Government Code, which we have marked. This information must be released unless it is made confidential under the Act or other law. *See id.* § 552.022(a)(3), (17). You seek to withhold the information subject to section 552.022(a)(3) under sections 552.101 and 552.108 of the Government Code and the information subject to section 552.022(a)(17) under section 552.108 of the Government Code. However, section 552.108 is discretionary in nature and does not make information confidential under the Act. *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).* Therefore, the information at issue may not be withheld under section 552.108 of the Government Code. As you raise no other exceptions to disclosure of the marked court-filed document, it must be released pursuant to section 552.022(a)(17) of the Government Code. However, we will consider the applicability of section 552.101 of the Government Code for the information subject to section 552.022(a)(3). You also raise the common law informer's privilege, as incorporated by section 552.101 of the Government Code. The common law informer's privilege is "other law" for the purpose of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001); *Tex. Comm'n on Env'tl. Quality v. Abbott*, No. GN-204227 (126 th Dist. Ct., Travis County, Tex.). Thus, we will consider your arguments under the common law informer's

privilege for the information subject to section 552.022. Additionally, as section 552.152 of the Government Code makes information confidential for purposes of section 552.022, we will address the applicability of section 552.152 for the information at issue. We will also consider the arguments against disclosure of the submitted information not subject to section 552.022.

We also note the remaining information includes custodial death reports. Article 49.18(b) of the Code of Criminal Procedure provides that with the exception of any portion of the custodial death report the Office of the Attorney General (the "OAG") determines is privileged, the OAG shall make the report public. *See* Crim. Proc. Code art. 49.18(b). The format of the report was revised in May 2006 and now consists of four pages and an attached summary of how the death occurred. The OAG has determined the four-page report and summary must be released to the public but any other documents submitted with the revised report are confidential under article 49.18(b). Although the department claims the submitted custodial death reports are excepted from disclosure under section 552.108 of the Government Code, exceptions to disclosure found in the Act do not generally apply to information that other statutes make public. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Therefore, the department must release the submitted custodial death reports pursuant to article 49.18(b) of the Code of Criminal Procedure.

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). Generally, a governmental body claiming section 552.108(a)(1) must 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). You state the remaining information relates to an ongoing investigation, and release of that information would interfere with the investigation and prosecution of the case. Based upon this representation, we conclude the release of the remaining 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 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests that are present in active cases), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Thus, section 552.108(a)(1) is applicable to the remaining information.

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). Section 552.108(c) refers to the basic information held to be public in *Houston Chronicle*. *See* 531 S.W.2d at 186-187; *see also* Open Records Decision No. 127 (1976) (summarizing types of information considered to be basic information). Accordingly, with the exception of basic information,

the department may withhold the remaining information not subject to section 552.022 of the Government Code under section 552.108(a)(1) of the Government Code.³

Section 552.101 of the Government Code excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This exception encompasses the informer’s privilege, which has long been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). The informer’s privilege protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided the subject of the information does not already know the informer’s identity. *See* Open Records Decision No. 208 at 1-2 (1978). The informer’s privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to “administrative officials having a duty of inspection or of law enforcement within their particular spheres.” Open Records Decision No. 279 at 1-2 (1981) (citing 8 John H. Wigmore, *Evidence in Trials at Common Law*, § 2374, at 767 (J. McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. *See* Open Records Decision Nos. 582 at 2 (1990), 515 at 4 (1988).

You state some of the remaining information reveals the identity of a complainant who reported a possible violation of state law that carries criminal penalties to police officers of the department, which are authorized to enforce the laws and ordinances at issue. There is no indication the subject of the complaint knows the identity of the complainant. Based on your representations and our review, we conclude the information at issue identifies the complainant; thus, the department may withhold the information you have redacted in the information subject to section 552.022(a)(3) of the Government Code under section 552.101 of the Government Code in conjunction with the common-law informer’s privilege.

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 [required public disclosure] 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. The department represents the release of the undercover officers’ identities would subject the officers to a substantial threat of physical harm. Therefore, we find section 552.152 is applicable to the identities of the undercover officers within the information at issue. Accordingly, the department must withhold the identifying information of the undercover officers under section 552.152 of the Government Code.

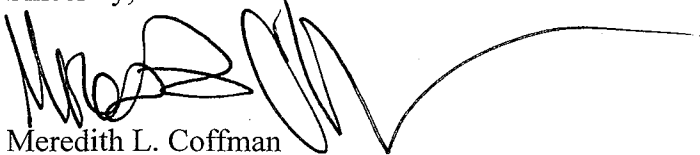
³As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

In summary, as the third and fourth requestors did not properly request the body worn camera recordings at issue pursuant to chapter 1701, our ruling does not reach this information and it need not be released. To the extent the department voluntarily released the submitted press release to the public, the department must release the submitted press release pursuant to section 552.007 of the Government Code. The department must release the marked court-filed document pursuant to section 552.022(a)(17) of the Government Code. The department must release the submitted custodial death reports pursuant to article 49.18(b) of the Code of Criminal Procedure. With the exception of basic information, which must be released to the first and fourth requestors, the department may withhold the remaining information under section 552.108(a)(1) of the Government Code. The department may withhold the information you have redacted in the information subject to section 552.022(a)(3) of the Government Code under section 552.101 of the Government Code in conjunction with the common-law informer's privilege. The department must withhold the identifying information of the undercover officers under section 552.152 of the Government Code. The department must release the remaining 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.

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,



Meredith L. Coffman
Assistant Attorney General
Open Records Division

MLC/mo

Ref: ID# 760085

Enc. Submitted documents

c: 4 Requestor
(w/o enclosures)