



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 28, 2020

Ms. Stephanie M. Berry
Assistant City Attorney
City of Denton
215 East McKinney Street
Denton, Texas 76201

OR2020-21772

Dear Ms. Berry:

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# 839871 (Ref. No. R000552-052920).

The City of Denton (the "city") received six requests from the same requestor for information related to specified incidents, information related to a specified address during a certain date range, and other information related to the requestor.¹ You state the city has released some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101, 552.108, and 552.111 of the Government Code. You also claim some of the submitted information was not properly requested pursuant to section 1701.661(a) of the Occupations Code. We have considered your arguments and reviewed the submitted information, a portion of which consists of a representative sample.²

¹ We note the city 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 overbroad request for information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

² We assume 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 those records contain substantially different types of information than that submitted to this office.

Initially, we note some of the submitted information, which we marked and indicated, is not responsive to the instant requests for information because it was created after the date the city received clarification of the requests at issue, or it does not pertain to the requested incidents or address or relate to the requestor. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983). This ruling does not address the public availability of any information that is not responsive to the requests and the city is not required to release such information in response to these requests.

Next, we note, and you acknowledge, Exhibit F consists of peace 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) of the Occupations Code provides the following:

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, we agree the requestor does not provide the requisite information under section 1701.661(a) for Exhibit F. As the body worn camera recordings at issue were not properly requested pursuant to chapter 1701 of the Occupations Code, our ruling does not reach Exhibit F and it need not be released.³ However, pursuant to section 1701.661(b), a “failure to provide all the information required by [s]ubsection (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).

Next, we must address the city's obligations under section 552.301 of the Government Code, which prescribes the procedures a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. *See Gov't Code* § 552.301. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. *See id.* § 552.301(b). While you raised sections 552.101 and 552.108 of the Government Code within the ten-business-day time period as required by section 552.301(b), you did not raise section 552.111 of the Government Code until after

³ As we are able to make this determination, we need not address the arguments against disclosure of this information.

the ten-business-day deadline had passed. Accordingly, we conclude the city failed to comply with the requirements of section 552.301 in raising section 552.111.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumptions that the requested information is public and must be released unless there is 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). By failing to timely raise section 552.111 of the Government Code, we find the city has failed to establish a compelling reason to address its claim under this section. Consequently, the city may not withhold any of the responsive information at issue under section 552.111 of the Government Code. However, we will consider your timely raised arguments for the responsive information.

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 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). You state the information submitted as Exhibit E and the information related to incident #19009776 in Exhibit G relates to an ongoing prosecution, 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 information at issue would interfere with the 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 Exhibit E and the information related to incident #19009776 in Exhibit G.

Section 552.108(a)(2) of the Government Code excepts from disclosure information concerning an investigation that did not result in conviction or deferred adjudication. 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 has concluded in a final result other than a conviction or deferred adjudication. *See id.* § 552.301(e)(1)(A); Open Records Decision No. 434 (1986). You state the information submitted as Exhibits B, C, D, I, and J and the remaining responsive information in Exhibit G pertain to criminal investigations that did not result in conviction or deferred adjudication. Based on this representation, we agree section 552.108(a)(2) is applicable to the information at issue.

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 186-87; *see also* Open Records Decision No. 127 (1976) (summarizing types of information considered to be basic information). We note basic information does not include dates of

birth. *See* ORD 127 at 3-4. Accordingly, with the exception of basic information, the city may withhold Exhibit E and the information related to incident #19009776 in Exhibit G under section 552.108(a)(1) of the Government Code and Exhibits B, C, D, I, and J and the remaining responsive information in Exhibit G under section 552.108(a)(2) of the Government Code.⁴

Section 552.101 of the Government Code excepts “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 of the Government Code encompasses information made confidential by judicial decision and the common-law physical safety exception. The Texas Supreme Court has recognized, for the first time, a common-law physical safety exception to required disclosure. *Tex. Dep’t of Pub. Safety v. Cox Tex. Newspapers, L.P. & Hearst Newspapers, L.L.C.*, 343 S.W.3d 112, 118 (Tex. 2011). Pursuant to this common-law physical safety exception, “information may be withheld [from public release] if disclosure would create a substantial threat of physical harm.” *Id.* In applying this standard, the court noted “deference must be afforded” law enforcement experts regarding the probability of harm, but further cautioned, “vague assertions of risk will not carry the day.” *Id.* at 119. You assert a portion of the remaining responsive information is exempted from disclosure pursuant to section 552.101 of the Government Code in conjunction with the common-law physical safety exception. Upon review, we agree release of most of the information at issue would create a substantial threat of physical harm to an individual. Accordingly, except for the information we marked for release, we find the city must withhold the information we marked to withhold and Exhibit K under section 552.101 of the Government Code in conjunction with the common-law physical safety exception.⁵ However, we find you have failed to demonstrate release of any of the remaining responsive information would create a substantial threat of physical harm to an individual. Therefore, the city may not withhold any of the remaining responsive information under section 552.101 of the Government Code in conjunction with the common-law physical safety exception.

Section 552.101 of the Government Code also 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 you have failed to demonstrate any of the remaining responsive information is highly intimate or embarrassing and not of legitimate public concern. Therefore, none of the remaining responsive information may be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

⁴ As our ruling is dispositive, we need not address your remaining arguments against disclosure of the information at issue.

⁵ As our ruling is dispositive, we need not address your remaining argument against disclosure of the information at issue.

In summary, as the body worn camera recordings at issue were not properly requested pursuant to chapter 1701 of the Occupations Code, our ruling does not reach Exhibit F and it need not be released. With the exception of basic information, which must be released, the city may withhold Exhibit E and the information related to incident #19009776 in Exhibit G under section 552.108(a)(1) of the Government Code and Exhibits B, C, D, I, and J and the remaining responsive information in Exhibit G under section 552.108(a)(2) of the Government Code. Except for the information we marked for release, we find the city must withhold the information we marked to withhold and Exhibit K under section 552.101 of the Government Code in conjunction with the common-law physical safety exception. The city must release the remaining responsive information.⁶

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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

Deborah Southerland
Assistant Attorney General
Open Records Division

DS/be

Ref: ID# 839871

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁶ We note some of the information being released contains information to which the requestor has a right of access under section 552.023 of the Government Code. *See* Gov't Code § 552.023(a); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individuals request information concerning themselves). Accordingly, if the city receives another request for this same information from a different requestor, the city must again seek a ruling from this office.