



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

August 29, 1995

Mr. Kevin B. Laughlin
First Assistant City Attorney
City of Midland
P.O. Box 1152
Midland, Texas 79702-1152

OR95-907

Dear Mr. Laughlin:

You have asked whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 28389.

The City of Midland (the "city") received three requests for records concerning a Midland police officer. You contend that information responsive to these requests is not subject to disclosure pursuant to sections 552.101, 552.103, 552.108, 552.111, and 552.119.¹

We note initially that you contend the city has no information responsive to the third request you received, in which the requestor asked for information concerning the named officer's alleged "sexual encounters in a Midland Police squad car in the parking lot of Midland's Museum of the Southwest," accident and driving while intoxicated ("DWI") reports concerning the officer, and the officer's photograph. You indicate that the city has already released the accident report. You contend that the police officer's photograph is excepted from disclosure pursuant to section 552.119 of the Government Code. As to the request for a DWI report and information about alleged sexual encounters, you state that the city has no documents responsive to those requests.

The city is not required to provide information that is not in its possession or to compile new information to comply with an open records request. Open Records Decision Nos. 561 (1990) at 9 (city does not have to obtain new information); 362 (1983)

¹You have advised this office that you obtained a release from one individual in regard to his or her privacy interests. You indicate that this information was released to the requestor and not submitted to this office for review.

at 2 (city does not have to supply information that does not exist). However, the city must make a good faith effort to relate a request to information held by the city. Open Records Decision No. 87 (1975). If the city does not have a responsive DWI report, it is not obligated to supply a document that does not exist. However, our review of the information submitted in response to the prior two open records requests shows that the city has records concerning alleged "sexual encounters" that may be responsive to the request. Thus, we will consider the records you submitted in response to the first two requests as also being responsive to the third request.²

As to the photograph of the police officer, it must be withheld from disclosure. Section 552.119 provides, except under certain circumstances, an exception from disclosure for "[a] photograph that depicts a peace officer as defined by Article 2.12, Code of Criminal Procedure." The article 2.12 definition includes a "police officer of an incorporated city, town, or village." A photograph of a peace officer may be released when the officer (1) is under indictment or charged with an offense by information, (2) is a party in a civil service hearing or a case in arbitration, (3) gives consent to release, or when (4) the photograph is introduced as evidence in a judicial proceeding. Gov't Code § 552.119; see Open Records Decision No. 502 (1988). You do not indicate that any of the listed exceptions allowing release of the photograph are applicable.

You also marked several documents as being excepted from disclosure under section 552.108, which excepts from disclosure the following information:

(a) A record of a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure].

(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].

To assert this exception, it must be clear from the information itself or you must demonstrate how a release of the information will unduly interfere with law enforcement or prosecution. Open Records Decision Nos. 518 (1989) at 6 (if not apparent on the face of the information, governmental body must show how release will interfere with law enforcement); 434 (1986) at 2 (relevant question is whether release will undermine law enforcement or prosecution). Section 552.108 also protects information which, if revealed, could endanger the health or safety of police officers. Open Records Decision No. 456 (1987).

²You submitted several documents to this office that you indicate are not responsive to the request. You do not have to supply non-responsive documents. We did not review information you indicated was non-responsive.

We have reviewed marked portions of a document that you indicate provides "comments on police patrol strength" and agree that these portions may be withheld from disclosure pursuant to section 552.108. You also assert that several pages showing police calls and police patrol transmissions are excepted from disclosure under section 552.108. However, it is not obvious to this office nor do you explain how release of these pages would interfere with law enforcement or prosecution. You may withhold the marked sections providing "comments on police patrol strength" but not the information about police calls and police patrol transmissions.

The other information at issue may be withheld from disclosure pursuant to section 552.103(a). To show that section 552.103(a) is applicable, a governmental body must demonstrate that (1) litigation is pending or reasonably anticipated and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. You have submitted to this office information showing that the city is engaged in pending litigation. Our review of the responsive information at issue indicates that all of the information, except for the documents discussed under section 552.108, is related to the pending litigation.

We also note that much of the information at issue is confidential under section 552.101 as it incorporates common-law privacy. Thus, some of the information at issue may not be released even if the other parties to the litigation have seen the information and after the litigation has concluded. Generally, once information has been obtained by all parties to the litigation, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). The applicability of section 552.103(a) also usually ends once the litigation has concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982) at 3. However, confidential information may not be disclosed even if the information has been obtained by the other parties or the litigation has concluded.³

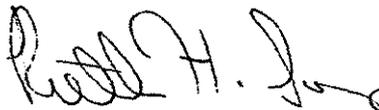
Pursuant to section 552.119, the city must withhold from disclosure the police officer's photograph. The marked information on patrol strength may be withheld under section 552.108, but the information about police calls and patrol transmissions may not be withheld from disclosure. The other information at issue may be withheld from disclosure pursuant to section 552.103(a), though we note that the city has discretion to release non-confidential information.⁴ See Open Records Decision No. 542 (1990) at 4 (the section 552.103(a) exception is discretionary and may be waived).

³We have marked a sample of some of the types of information that may be confidential.

⁴Because this information may be withheld pursuant to section 552.103(a), we need not address your other arguments against disclosure.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Ruth H. Soucy
Assistant Attorney General
Open Government Section

RHS/rho

Ref.: ID# 28389

Enclosures: Marked documents

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