



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

April 26, 1996

Mr. Jason C. Marshall
Nichols, Jackson, Dillard, Hager & Smith, L.L.P.
1800 Lincoln Plaza
500 North Akard
Dallas, Texas 75201

OR96-0612

Dear Mr. Marshall:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 38557.

The City of Coppell (the "city") received three open records requests for information related to particular incidents you claim are being investigated by the city's police department. Because of the numerous requests and the overlap in the investigations and items sought by the requester, this office will distinguish among the information sought in the requests based on the police investigation files -- shotgunning incident, shooting and assault incident and tampering with/concealing evidence incident-- and not based on the characterizations by the requestor or the city.

The first request, dated January 23, 1996, relates to records concerning the February, 1994 "shotgunning" of the requestor's car which, according to the requestor, are now part of the "8-14-94 assault investigation." The second request, dated January 24, 1996, is in reference to records concerning the "8-14-94 assault of John & Pamela Robinson;" however, the city characterizes the information sought as the tampering with evidence file. The third request, dated January 27, 1996, is in reference to the "shotgunning of Robinson vehicle," "shooting and assault of John/Pamela Robinson," and "concealing of Robinson vehicle."

You state that although you are submitting to this office for review the information responsive to the second request, you are not submitting the case file responsive to the third request because you have previously submitted a representative sample of these records to our office in response to an earlier request by the requestor. You contend that the submitted records are excepted from required public disclosure under sections 552.101 and 552.108 of the Government Code, subject to the disclosure requirements set out in Open Records Letter No. 95-1353 (1995).

The city asserts that the requested information concerns three active investigations. However, much of the submitted information concerns documents previously determined to be public in Open Records Letter No. 95-1353 (1995).¹ In that letter, we concluded that, as the city had failed to meet its ten-day deadline for requesting an opinion from this office, most of the information at issue was presumed public.² *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.—Austin 1990, *no writ*); Open Records Decision No. 319 (1982). Accordingly, you may not withhold information that was previously determined to be available to the public in Open Records Letter No. 95-1353 (1995).

As for the remaining documents, section 552.108 provides:

(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].

When applying section 552.108, this office distinguishes between cases that are still under active investigation and those that are closed. Open Records Decision No. 611 (1992) at 2. In cases that are still under active investigation, section 552.108 excepts from disclosure all information except that generally found on the first page of the offense report. *See generally Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976); Open Records Decision No. 127 (1976). Once a case is closed, information may be withheld under section 552.108 only if its release “will unduly interfere with law enforcement or crime prevention.” *See Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Attorney General Opinion MW-446 (1982); Open Records Decision Nos. No. 553 (1990) at 4 (and cases cited therein), 444 (1986), 434 (1986). Whether information falls within section 552.108 exception must be determined on a case-by-case basis. Open Records Decision No. 434 (1986) at 2.

We have examined the information submitted to us for review. It appears that the shotgunning and tampering with evidence incidents are not under active investigation.

¹In addition, in Open Records Letter No. 95-1353 (1995), this office ruled that certain information was excepted from disclosure: criminal history record information, polygraph results, social security numbers, and some documents protected by common-law or constitutional privacy. Also, in a letter, dated February 22, 1996, the city notified Mr. and Mrs. Robinson that documents related to polygraph tests and the shotgunning incident had been made available to the requestors.

²In Open Records Letter No. 96-0027 (1996), “we advise[d] the city to comply with Open Records Letter No. 95-1353 (1995) without further delay,” and in Open Records Letter No. 96-0132 (1996) our position with regards to the original request was once again restated. *Cf. Gov't Code* § 552.221.

You have not explained, nor is there an indication in the file, that release of this information will unduly interfere with law enforcement or crime prevention. We therefore conclude that you may not withhold any of the records which are part of the shotgunning or tampering with evidence investigations pursuant to section 552.108. However, the remaining records related to the shooting and assault of John and Pamela Robinson, specifically those records created subsequent to May 5, 1995, may be withheld as part of an active criminal investigation under section 552.108 of the Government Code.

In Open Records Letter No. 95-1353 (1995), we concluded that compelling reasons existed for withholding certain documents, as those documents were made confidential by section 552.101 or other statutes. Normally, a compelling interest is that some other source of law makes the information confidential or that third party interests are at stake. Open Records Decision No. 150 (1977) at 2. For the same reasons set out in Open Records Letter No. 95-1353 (1995), we conclude that compelling reasons exist for withholding the same types of documents submitted in response to the present requests.

Specifically, Texas law prohibits the public disclosure of the results of polygraph examinations. V.T.C.S. art. 4413(29cc).³ This includes the test results wherever they may appear. Additionally, Texas law prohibits the disclosure of criminal history record information ("CHRI"). Section 411.083 of the Government Code provides that any CHRI maintained by the Department of Public Safety ("DPS") is confidential. Similarly, CHRI obtained from the DPS pursuant to statute is also confidential and may only be disclosed in very limited instances. *Id.* § 411.084; *see also id.* § 411.087 (restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies).

Additionally, federal law may prohibit disclosure of social security numbers that appear in the submitted file. A social security number is excepted from required public disclosure under section 552.101 of the act in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), if it was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 (1994). Based on the information you have provided, we are unable to determine whether the social security numbers are confidential under this federal statute. We note, however, that section 552.352 of the Open Records Act imposes criminal penalties for the release of confidential information.⁴

³We note that article 4413(29cc) provides that the examinee of a polygraph examination has a special right of access to the results of his or her polygraph examination. V.T.C.S. art. 4413(29cc), § 19A(c)(1).

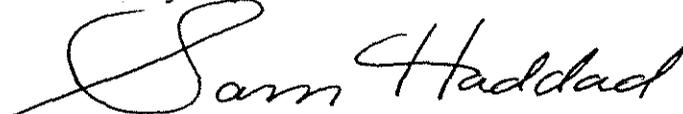
⁴We note that documents belonging to the Federal Bureau of Investigation are included within the submitted case file. You have not raised any federal statute that would make these documents confidential. However, we note that these documents indicate that they are not to be distributed to other parties. If a federal statute does make these documents confidential, we would remind you that disclosure of confidential information under the Open Records Act is a misdemeanor. Gov't Code § 552.352.

Therefore, to summarize the ruling by this office, we conclude that you may not withhold information that was previously determined to be available to the public in Open Records Letter No. 95-1353 (1995).⁵ You may not withhold the records which are part of the shotgunning or tampering with evidence files because you have not shown that they relate to active investigations, nor established that their release would unduly interfere with law enforcement or crime prevention. Finally, under section 552.108 the city may withhold documents related to the shooting and assault of John and Pamela Robinson that were created after May 5, 1995 and those documents which are made confidential pursuant to section 552.101.

Pursuant to section 552.301 of the Government Code, the city may rely on this ruling as a "previous determination" for requests to the city for information that is at issue in this ruling. Accordingly, the city need not seek a decision from this office for future requests for this information. However, if the city receives a request for this information once the investigation is closed, the city must seek a ruling from this office and explain how the release of this information would unduly interfere with law enforcement or crime prevention.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact our office.

Yours very truly,



Sam Haddad
Assistant Attorney General
Open Records Division

SH/ch

Ref: ID# 38577

Enclosures: Open Records Decision No. 127 (1976)
Open Records Letter No. 95-1353 (1995)
Submitted documents

cc: Mr. John Robinson
540 Christi
Coppell, Texas 75019
(w/o enclosures)

⁵We remind the city that the failure or refusal to provide access to or copying of public information is a criminal offense under chapter 552 of the Government Code.