



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

May 15, 1996

Mr. Jack Harwell  
McLennan County Sheriff  
Waco, Texas 76702

OR96-0711

Dear Sheriff Harwell:

You ask 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# 37731.

The City of Waco Police Department (the "city") received an open records request for a copy of a telephone call made to 9-1-1 requesting an ambulance in connection with the shooting of a state trooper. Because the shooting took place in a rural area of McLennan County, the investigation of the shooting is currently being conducted by the McLennan County Sheriff's Office ("your office"). You seek to withhold the tape recording from the public pursuant to the "law-enforcement" exception, section 552.108 of the Government Code.

When a governmental body claims section 552.108, the relevant question this office must address is whether the release of the requested information would undermine a legitimate interest relating to law enforcement or prosecution. Open Records Decision No. 434 (1986). Traditionally when applying section 552.108, our office has distinguished between cases that are under active investigation and those that are closed. In this instance, you describe your investigation of the shooting as "on-going." In cases that are under active investigation, this section exempts 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).

In Open Records Decision No. 287 (1981), this office observed that the best judge of whether the release of a law enforcement agency's records would unduly interfere with law enforcement was ordinarily the law enforcement agency possessing the record, but that the agency could not arbitrarily relegate information to that category. You

contend that "the content of the tape and its timing, and . . . the demeanor of the caller, the tone of the call, the background in the call, etc," all make this information a vital part of your office's investigation and the eventual prosecution of this matter. After listening to the tape recording we agree that the recording constitutes the type of evidence that section 552.108 was intended to protect. *Cf.* Attorney General Opinion MW-446 (1982) (evidence obtained at scene of crime is presumptively excepted by law-enforcement exception during pendency of criminal investigation and prosecution).

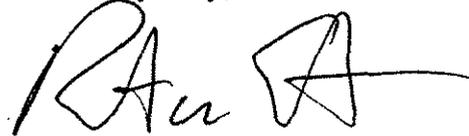
You explain, however, that copies of the requested tape recording are maintained by both the city and your office:

McLennan County and the City of Waco have a cooperative dispatching system. The City of Waco retains the original tapes and the County receives copies. Even though the request was made by the newspaper to the Waco Police Department, I believe I am entitled to seek exemption due to the ongoing criminal investigation of my department.

Where an incident involving allegedly criminal conduct is under active investigation or prosecution, the law-enforcement exception may be invoked by any proper custodian of information which relates to the incident. Open Records Decision Nos. 474 (1987), 372 (1983). The city, however, did not request an open records decision with regard to the current request. Although a governmental body's failure to timely request an open records decision normally results in the legal presumption that the information is public, *see* Gov't Code §§ 552.301-.302, the city may not waive your office's law-enforcement interest in keeping this information from the public. *See* Open Records Decision No. 586 (1991). Accordingly, we conclude that the protection of section 552.108 extends to the copies of the tape recordings held by the city as well as those held by your office.

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 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read "R. Schmidt", with a long horizontal flourish extending to the right.

Robert W. Schmidt  
Assistant Attorney General  
Open Records Division

RWS/RWP/rho

Ref.: ID# 37731

Enclosure: Tape recording

cc: Mr. Brad Reagan  
Reporter  
Waco Tribune-Herald  
P.O. Box 2588  
Waco, Texas 76702-2588  
(w/o enclosure)

Ms. Annette Jones  
Police Legal Advisor  
City of Waco  
Legal Services  
P.O. Box 2570  
Waco, Texas 76702-2570  
(w/o enclosure)