



August 16, 2000

Ms. Elaine Hengen
Assistant City Attorney
City of El Paso
2 Civic Center Plaza
El Paso, Texas 79901-1196

OR2000-3142

Dear Ms. Hengen:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your requests were assigned ID# 137644 and ID# 137856.

The City of El Paso (the "city") received numerous requests for various records pertaining to investigations into complaints regarding the city's chief of police, his assistant and deputy chiefs, and his administrative assistant. You state that the city has released some of the responsive information to the requestors. You contend, however, that other requested information, including certain taped interviews of police personnel, is excepted from disclosure under sections 552.101, 552.103, 552.106, 552.108, 552.111, 552.117, and 552.130 of the Government Code.¹

Because your section 552.108 claims are the most inclusive, we will address them first. Section 552.108 of the Government Code excepts from required public disclosure information held by a law enforcement agency, including an internal record or notation, that deals with the detection, investigation, or prosecution of crime if release of the information would interfere with the detection, investigation, or prosecution of crime. Gov't Code § 552.108(a)(1), (b)(1). You have demonstrated that much of the information at issue pertains to pending criminal investigations; consequently, the city may withhold all such information from the public at this time pursuant to section 552.108. We note that section 552.108(c) requires the release of "basic information about an arrested person, an arrest, or a crime." Some of the basic information regarding the criminal investigations has been

¹A summary of the applicability of these exceptions to the particular documents at issue is included at the end of this ruling.

released. However, you have demonstrated that the release of additional basic information would interfere with law enforcement. *See* Open Records Decision No. 508 (1988). The city may withhold the remaining basic information.

We note that although you state that the city has not officially released any documents regarding the personnel under investigation other than those released in response to the open records requests, some of the documents that pertain to pending criminal investigations were allegedly “leaked” by someone within the department to the *El Paso Times* and other media² and that the *El Paso Times* has issued news stories that reference those “leaked” documents.³ In Open Records Decision No. 376 (1973), this office addressed a governmental body’s ability to raise exceptions to disclosure for information that had previously been released to the public in an unauthorized manner and concluded that:

[a]lthough this office has held that a governmental body that voluntarily furnishes information to a newspaper may not later claim that that information may be withheld from others, Open Records Decision No. 162 (1977), it has never held that information which is not voluntarily released by a governmental body, but which nevertheless finds its way into the hands of a member of the general public, is henceforth automatically available to everyone. In our opinion, the Open Records Act does not preclude a governmental body from invoking one or more of the act’s exceptions to protect from further public disclosure information which has been released on a limited basis through no official action, and against the wishes and policy of, the governmental body.

Open Records Decision No. 376 at 2 (1983) (emphasis in original). We therefore conclude that the prior unauthorized release of some of the documents at issue does not affect the city’s ability to invoke the protection of section 552.108 for those documents now. Accordingly, the city may continue to withhold those documents, as well as the other requested information pertaining to pending criminal investigations, pursuant to section 552.108.

On the other hand, significant portions of the requested records pertain to internal affairs investigations that concern purely administrative matters. Section 552.108 does not protect the subject matter of such investigations except to the extent they are directly related to a criminal investigation. *See Morales v. Ellen*, 840 S.W.2d 519, 526 (Tex. App.--El Paso 1992, writ denied) (predecessor statute to section 552.108 not applicable when no criminal

²The city has issued a press release acknowledging the “leak” and a resulting criminal investigation.

³In fact, the *El Paso Times* reproduced one of those documents in its June 16, 2000, edition.

investigation resulted). Because you have not demonstrated that the administrative aspects of the internal affairs investigations pertain to a pending criminal investigation or prosecution, the city may not withhold those portions of the internal affairs investigations pursuant to any subsection of section 552.108.

You also contend that information revealing the identities of automobiles used in undercover operations is protected by section 552.108. We have reviewed your arguments for withholding the information at issue and conclude that you have established how the release of some of the information pertaining to undercover vehicles would interfere with law enforcement. You may, therefore, withhold the information we have marked pertaining to the undercover vehicles under section 552.108. In addition, you claim that release of some of the tape-recorded information would interfere with law enforcement by disclosing confidential investigative techniques and procedures. We note in our summary chart which tape-recorded information the city may withhold under section 552.108.

We now address the applicability of the other exceptions you raise. You contend that some of the information at issue should be withheld from disclosure under section 552.101 of the Government Code. Section 552.101 protects “information considered to be confidential by law, either constitutional, *statutory*, or by judicial decision.” (Emphasis added.) A small portion of the information at issue pertains to an arrest that was the subject of an expunction order. Article 55.04 of the Code of Criminal Procedure provides:

Sec. 1. A person who acquires knowledge of an arrest while an officer or employee of the state or of any agency or other entity of the state or any political subdivision of the state and who knows of an order expunging the records and files relating to that arrest commits an offense if he knowingly releases, disseminates, or otherwise uses the records or files.

Sec. 2. A person who knowingly fails to return or to obliterate identifying portions of a record or file ordered expunged under this chapter commits an offense.

Sec. 3. An offense under this article is a Class B misdemeanor.

We agree that the information you have highlighted in Exhibit J, and the corresponding information contained in Exhibit C, pertains to expunged arrest records and therefore must be withheld from the public pursuant to section 552.101 of the Government Code in conjunction with article 55.04 of the Code of Criminal Procedure.

Section 552.101 also excepts from disclosure information coming within the common law right to privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex.

1976), *cert. denied*, 430 U.S. 931 (1977). Common law privacy protects information if it is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, *and* it is of no legitimate concern to the public. *Id.* at 683-85.

In *Industrial Foundation*, the Texas Supreme Court considered intimate and embarrassing information that relates to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. This office has also determined that common law privacy protects the following information: the kinds of prescription drugs a person is taking, Open Records Decision No. 455 (1987); the results of mandatory urine testing, *id.*; illnesses, operations, and physical handicaps of applicants, *id.*; the fact that a person attempted suicide, Open Records Decision No. 422 (1984); the names of parents of victims of sudden infant death syndrome, Attorney General Opinion JM-81; and information regarding drug overdoses, acute alcohol intoxication, obstetrical/gynecological illnesses, convulsions/seizures, or emotional/mental distress. Open Records Decision No. 343 (1982).

The information you seek to withhold on privacy grounds pertains solely to police department employees' actions as public servants, and as such cannot be deemed to be outside the realm of public interest. *See* Open Records Decision No. 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees); *see also* Open Records Decision No. 269 (1981). The only information at issue that the city must withhold from the public on privacy grounds is the identity of an alleged victim of sexual harassment, which protection has been acknowledged by judicial decision. *See Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied). The remaining information for which you raise common law privacy must be released.

You contend that certain portions of the information at issue are excepted from public disclosure pursuant to section 552.103 of the Government Code. To secure the protection of section 552.103(a), a governmental body must demonstrate that the requested information relates to pending or reasonably anticipated litigation to which the governmental body is a party. Open Records Decision No. 588 (1991). Additionally, the governmental body must demonstrate that the litigation was pending or reasonably anticipated as of the day it received the records request. Gov't Code § 552.103(c). This office has previously determined that other records pertaining to the same subject matter of that information which you seek to withhold are excepted from public disclosure under section 552.103. *See* Open Records Letter No. 2000-0723 (2000). Based on your representation that litigation regarding this matter is still reasonably anticipated, we conclude that the city may withhold the information you have highlighted in Exhibit I, and the corresponding information contained in Exhibit F, pursuant to section 552.103.

You also contend that portions of the documents at issue are excepted from public disclosure pursuant to section 552.117 of the Government Code. Section 552.117(2) requires the city

to withhold all information that relates to the home address, home telephone number, social security number, and family information of a peace officer as defined by article 2.12, Code of Criminal Procedure. Unlike other public employees, a peace officer need not affirmatively claim confidentiality for this information. Open Records Decision No. 488 (1988); *see also* Open Records Decision No. 506 (1988). We agree that the city must withhold the types of information protected under section 552.117(2).

You also seek to withhold the license plate numbers of all the police vehicles identified in Exhibit P pursuant to section 552.130 of the Government Code. Section 552.130(a)(2) requires the withholding of information relating to "a motor vehicle title or registration issued by an agency of this state." Consequently, the city must withhold all of the license plate numbers listed in Exhibit P pursuant to section 552.130(a)(2).

Finally, you contend that some of the information contained in Exhibits W, X, and Y, which consist of a tape recording of an interview with the police chief and the related handwritten notes taken therefrom, are not responsive to the request for records of the internal affairs investigation because those exhibits were created after the city received the request. It is well established that a governmental body is not required to comply with a standing request for information to be collected or prepared in the future. *See* Attorney General Opinion JM-48 at 2 (1983). Because these exhibits did not exist at the time the city received the requests for records of the internal affairs investigations, we conclude that the city is not required to release those portions of Exhibits W, X, and Y at this time.⁴

We have summarized below the determinations we have made as to the required disposition of the submitted information.

⁴We note that the documents you have submitted as Exhibit PP is the same information at issue in a separate decision request you made to this office, assigned ID# 138705, and that the city has released redacted copies of those eight pages of documents. This office will address your claimed exceptions to required disclosure of the information you redacted from Exhibit PP in our response to ID# 138705.

SUMMARY

EXHIBIT EXCEPTION/EXPLANATION

C (tape)	CCP art. 55.04 (portion pertaining to expunged arrest records); Gov't Code § 552.108 (information relating to pending criminal investigation only)
D (tape)	Gov't Code § 552.108 (all)
E (tape)	Gov't Code § 552.108 (all)
F (tape)	Gov't Code §§ 552.103, 552.108 (portions corresponding with highlighted portions of Exhibits I and K)
G (tape)	Release
H (notes)	Gov't Code § 552.108 (all)
I (notes)	Gov't Code §§ 552.103, 552.108 (as highlighted); must release highlighted information on p. 12
J (notes)	Gov't Code §§ 552.101 (w/55.04 CCP), 552.108 (as highlighted)
K (documents)	Gov't Code § 552.108 (pp.1, 7, 13, and 14, as highlighted; pp. 16-21 (all)); release highlighted information on p. 11
P (documents)	Gov't Code § 552.108, 552.117, 552.130 only (as marked); no information protected by § 552.101
Q (documents)	Gov't Code § 552.108 (all)
W	Gov't Code § 552.108 (portions corresponding with marked portions of Exhibit Y); remaining portions are non-responsive and may be withheld
X	Gov't Code § 552.108 (portions corresponding with marked portions of Exhibit Y); remaining portions are non-responsive and may be withheld
Y	Gov't Code § 552.108 (as marked); remaining portions are non-responsive and may be withheld
CC (tape)	Gov't Code § 552.117 (remaining information must be released)
DD (tape)	Gov't Code § 552.108 (pending criminal investigation), 552.117; remaining information must be released (portions of tape unintelligible)
JJ (tape)	Gov't Code § 552.108 (pending criminal investigation, including police techniques and procedures), 552.117; remaining information must be released
LL (tape)	Gov't Code § 552.108 (entire first interview); 552.101 (name of sexual harassment victim only in second interview); entire third interview must be released
MM (tape)	Gov't Code § 552.108 (entire third interview only); first and second interviews must be released (portions of tape unintelligible)

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Patricia Michels Anderson
Assistant Attorney General
Open Records Division

PMA/RWP/er

Ref: ID# 137644

Encl. Submitted documents and tapes

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