



October 30, 2000

Mr. Richard C. Terrell
City of Alice
608 East Second
Alice, Texas 78332

OR2000-4212

Dear Mr. Terrell:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 140625.

The City of Alice (the "city") received a request for information. You state that you have released portions of the requested information. You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.102, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Pursuant to section 552.301(e)(1), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. Gov't Code § 552.301(e)(1)(A)-(D). Because you failed to submit a copy of the written request for information, you failed to comply with section 552.301(e).

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301(e) results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). However, you argue that the submitted information

is excepted under sections 552.101, 552.102, and 552.117 of the Government Code. The assertion of these sections of the Government Code provides a compelling reason to overcome the presumption of openness. See Open Records Decision No. 150 (1977) (presumption of openness overcome by a showing that the information is made confidential by another source of law or affects third party interests).

You inform us that a portion of the requested information, pertaining to the internal investigation of Judy Diebel, is subject to a court order. Section 552.107(2) provides that information is excepted from required disclosure if "a court by order has prohibited disclosure of the information." Gov't Code § 552.107(2). You have provided a copy of the court's judgement in a suit by Judy Diebel against the city which provides the following:

IT IS, THEREFORE, DECLARED, ORDERED, ADJUDGED, AND DECREED that the written statements, summary reports and written conclusions and recommendations that were made by investigators and witnesses during the Internal Affairs investigation in this case are protected from public disclosure pursuant to Chapter 552 of the Texas Government Code as well as the plaintiff's right to privacy under the United States Constitution.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendant, CITY OF ALICE, TEXAS be, and hereby is, commanded to desist and refrain from releasing any of the internal investigation file and records made the subject of this suit to the *Alice Echo News* or to any other person or entity.

We note that the information protected by the court order appears to be a completed investigation. Section 552.022 provides the following:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by section 552.108[.]

Further, section 552.022(b) provides the following:

A court in this state may not order a governmental body or an officer for public information to withhold from public inspection any category of public information described by Subsection (a) or to not produce the category of public information for inspection or duplication, unless the category of information is expressly made confidential under other law.

However, in this instance the court order is based on constitutional privacy, which constitutes “other law” that makes the investigation materials confidential. Therefore, we conclude that the city must withhold the 49 pages of the Diebel investigation.¹

You also assert that information which identifies informants is excepted under section 552.101. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Although you do not specifically argue that the informer’s privilege excepts the information, we assume that you intend to assert this privilege which is incorporated under section 552.101. The Texas courts have recognized the informer’s privilege. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969). It protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided that the subject of the information does not already know the informer’s identity. Open Records Decision Nos. 515 at 3(1988), 208 at 1-2 (1978). The informer’s privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to “administrative officials having a duty of inspection or of law enforcement within their particular spheres.” Open Records Decision No. 279 at 2 (1981) (citing Wigmore, Evidence, § 2374, at 767 (McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. *See* Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5 (1988).

You explain that the information identifies informants for the city’s police department that have provided information concerning illegal narcotics trafficking. Thus, we agree that the city must withhold the highlighted information and additional identifying information which we have marked under section 552.101 and the informer’s privilege.

Further, you assert that polygraph information pertaining to a complaint against Officer O’Neal is excepted under section 552.101. Section 552.101 also excepts information protected by statute. Section 1703.306 of the Occupations Code provides the following:

¹Because you must withhold the entire internal investigation file, we need not address the applicability of sections 552.101, 552.102, and 552.117 to the Diebel investigation.

A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person may not disclose information acquired from a polygraph examination to another person

Occ. Code § 1703.306. You claim that the requestor is not listed as a person or entity who can receive polygraph information. Accordingly, the city must withhold the highlighted polygraph information under section 1703.306 of the Occupations Code in conjunction with section 552.101 of the Government Code.

You also assert that the submitted information contains information excepted by section 552.117(2) of the Government Code. Section 552.117(2) excepts from public disclosure a peace officer's home address, home telephone number, social security number, and information indicating whether the peace officer has family members regardless of whether the peace officer complied with section 552.024 of the Government Code. Thus, you must withhold the highlighted home addresses, home telephone numbers, social security numbers, and information regarding family membership under section 552.117(2) of the Government Code.

In conclusion, you must withhold the information pertaining to the Diebel investigation. Further, you must withhold the highlighted information pertaining to informants under section 552.101 and the informer's privilege. You must withhold the highlighted polygraph test information under section 1703.306 of the Occupations Code in conjunction with section 552.101 and withhold the highlighted information under section 552.117(2). You must release the remaining information.

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).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to the General Services Commission at 512/475-2497.

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,



Jennifer Bialek
Assistant Attorney General
Open Records Division

JHB\er

Ref: ID# 140625

Encl: Marked documents

cc: Ms. Matilde Villarreal
c/o Richard C. Terrell
City of Alice
608 East Second
Alice, Texas 78332
(w/o enclosures)