OFFICE OF THE ATTORNEY GENERAL · STATE OF TEXAS
JOHN CORNYN

May 23, 2001

Ms. Lillian Guillen Graham
Assistant City Attorney
Office of the City Attorney
City of Mesquite
P.O. Box 850137
Mesquite, Texas 75185-0137

OR2001-2119

Dear Ms. Graham:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 147557.

The City of Mesquite Police Department (the "department") received a request for the security camera videotape related to a burglary at a gas station. You state that you have released the offense report, the call sheet, and the 911 audiotape to the requestor. You claim, however, that the submitted videotape is excepted from disclosure under sections 552.101, 552.103, 552.108, and 552.119 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). Although you state that you are submitting the written request for information as TAB #1, you did not actually submit the written request for our review as required by 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). You state that section 552.103 applies to the submitted information. Section 552.103 is a discretionary exception and does not provide a compelling reason to overcome the presumption of openness. *See* Open Records Decision No. 473 at 2 (1987) (discretionary exceptions under the Act can be waived). However, your remaining asserted exceptions may provide 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). Therefore, we will address the applicability of sections 552.101, 552.108, and 552.119 of the Government Code.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." You assert that the submitted videotape is excepted from disclosure under section 552.101 of the Government Code. We are unable to discern, however, what information responsive to the request would be considered confidential by law. Therefore, the submitted videotape may not be withheld from disclosure under section 552.101 of the Government Code.

Section 552.108(a) of the Government Code excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime." Section 552.108 is generally considered a discretionary exception and generally does not provide a compelling reason to overcome the presumption of openness. However, where an incident involving allegedly criminal conduct is still under active investigation or prosecution, section 552.108 may be invoked by any proper custodian of information that relates to the investigation or prosecution. *See, e.g.*, Open Records Decision Nos. 474 (1987), 372 (1983); *see also* Open Records Decision No. 586 (1991) (need of another governmental body to withhold requested information may provide compelling reason for nondisclosure under section 552.108).

You assert that the information the department seeks to withhold pertains to an ongoing investigation being conducted by officers with the Dallas police department, and that it is therefore excepted from disclosure under section 552.108(a)(1). However, while you indicate that the Dallas County district attorney has informed you that the requested videotape is evidence in the pending criminal investigation, you have not represented that the Dallas police department or district attorney has requested that this information be withheld from disclosure. Therefore, we find you have not demonstrated that the submitted videotape is excepted from disclosure under section 552.108(a)(1), and thus, the videotape may not be withheld under this subsection.

Section 552.119 excepts from public disclosure a photograph of a peace officer, that, if released, would endanger the life or physical safety of the officer unless one of three exceptions applies. The three exceptions are: (1) the officer is under indictment or charged with an offense by information; (2) the officer is a party in a fire or police civil service hearing or a case in arbitration; or (3) the photograph is introduced as evidence in a judicial proceeding. This section also provides that a photograph exempt from disclosure under this section may be made public only if the peace officer gives written consent to the disclosure. This office has determined that this provision excepts such photographs from disclosure without the need for any specific showing that release of the photograph would endanger the life or safety of the officer. Open Records Decision No. 502 (1988). A portion of the submitted videotape appears to include the images of several police officers. It does not appear that any of the exceptions to section 552.119 apply. Furthermore, you have not informed us that any of the police officers depicted in the videotape executed a written consent to disclosure of their pictures. Therefore, under section 552.119 of the Government Code, the department must withhold any portion of the videotape that includes the image of a peace officer. The remainder of the videotape, however, is not protected under section 552.119 and must be released to the requestor.

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 Hadassah Schloss at 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,

Karen A. Eckerle
Assistant Attorney General
Open Records Division

KAE/sdk

Ref: ID# 147557

Enc: Submitted documents

c: Mr. John Grantham
CBS 11 News
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(w/o enclosures)