



August 23, 2001

Ms. Bonnie Lee Goldstein
Brown & Hofmeister, L.L.P.
1717 Main Street, Suite 4300
Dallas, Texas 75201

OR2001-3743

Dear Ms. Goldstein:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 151101.

The City of McKinney (the "city"), which you represent, received six requests for information relating to a shooting incident involving a police officer.¹ You inform this office that the city has released basic information in response to the first, fifth, and six requests.² You also state that the city has released police department procedures in response to the sixth request. You indicate that the city is not in possession of the medical examiner's report and the autopsy report to which the sixth request seeks access. Chapter 552 of the Government Code does not require a governmental body that receives a request for information to make available information that does not exist or to prepare new information. *See Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App. – San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 362 at 2 (1983). You claim that the remaining information responsive to these requests is excepted from disclosure under sections 552.103 and 552.108 of the Government Code. We have considered the exceptions you

¹The six requests, in the order of their receipt by this office, are for the following information: (1) information concerning 911 calls and police radio calls and transmissions and any other documents, documentation, or materials, including offense, supplemental, prosecution, and arrest reports ("first request"); (2) all radio traffic and any 911 calls ("second request"); (3) all radio transmissions between police officers and dispatch and between EMS and dispatch ("third request"); (4) the 911 tape, calls received, and police dispatch/radio transmissions ("fourth request"); (5) all basic information about the incident and 911 and police dispatch tapes and transcriptions ("fifth request"); and (6) the police, medical examiner's, and autopsy reports, records of a named police officer's cell phone calls, and city police department procedure relating to an accidental shooting ("sixth request").

²*See Gov't Code § 552.108(c); Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177, 186-87 (Tex. Civ. App.--Houston [14th Dist.] 1975), writ refused n.r.e. per curiam, 536 S.W.2d 559 (Tex. 1976); Open Records Decision No. 127 (1976) (summarizing the types of information deemed public by *Houston Chronicle*).

raise and have reviewed the representative samples of information you submitted.³ We also received comments regarding the fifth request. *See* Gov't Code § 552.304 (permitting interested person to submit written comments to this office stating why information at issue in request for attorney general decision should or should not be released).

We first note that the city did not timely request our decision with respect to the fifth request. Section 552.301 prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information may be withheld from public disclosure. Section 552.301(b) provides that "[t]he governmental body must ask for the attorney general's decision and state the exceptions that apply . . . not later than the 10th business day after the date of receiving the written request [for information]." Section 552.301(e)(1)(B) requires the governmental body to submit a copy of the request for information to this office not later than the 15th business day after the date of its receipt of the request. Section 552.302 provides that "[i]f a governmental body does not request an attorney general decision as provided by Section 552.301 . . . the information requested in writing is presumed to be subject to required public disclosure and must be released unless there is a compelling reason to withhold the information."

You inform this office that the city received the fifth request on June 6, 2001. You requested our decision with respect to the fifth request and submitted a copy of this request by letter dated July 6, 2001. The city thus failed to comply with section 552.301 with respect to this request for information. Therefore, any responsive information held by the city that is encompassed by the fifth request is presumed to be public and must be released under section 552.302, unless there is a compelling reason to withhold any of that information from public disclosure. *See also Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.--Austin 1990, no writ).

The presumption that information is public under section 552.302 can generally be overcome by demonstrating that the information is confidential by law or that third party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). Sections 552.103 and 552.108 are discretionary exceptions to disclosure that protect the governmental body's interests and may be waived. *See* Open Records Decision Nos. 542 at 4 (1990) (stating that litigation exception does not implicate third party rights and may be waived by governmental body), 177 (1977) (stating that governmental body may waive statutory predecessor to section 552.108). A claim under section 552.103 is not a compelling reason for non-disclosure under section 552.302. The need of another governmental body to withhold information under section 552.108 can provide a compelling reason under section 552.302. *See* Open Records Decision No. 586 at 3 (1991) (stating that the need of a governmental body, other than the one that

³This letter ruling assumes that the submitted representative sample of information is truly representative of the responsive information as a whole. This ruling neither reaches nor authorizes the city to withhold any responsive information that is substantially different from the submitted information. *See* Gov't Code § 552.301(e)(1)(D); Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

failed to timely seek an open records decision, may in appropriate circumstances be a compelling reason for non-disclosure). Although you raise section 552.108, you do not demonstrate a compelling reason under this exception.

Thus, the city has not demonstrated a compelling reason under section 552.302 that overcomes its failure to comply with section 552.301. Therefore, the city must release any other information it holds that is responsive to the fifth request.⁴ To the extent that any of the information that the city must release also is responsive to the other five requests, the release of this information under section 552.302 constitutes a waiver of the city's exceptions under sections 552.103 and 552.108. *See* Gov't Code § 552.007; *see also* Open Records Decision No. 400 at 2 (1983). Thus, to the extent that any of the other five requests seeks access to the information that is encompassed by the fifth request, the city must also make this information available to the other requestors.

Insofar as section 552.302 does not require the release of the information at issue, we address your claim under section 552.108 of the Government Code. Section 552.108, the "law enforcement exception," excepts from public disclosure "information held by a law enforcement agency or prosecutor 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). A governmental body that raises section 552.108 must reasonably explain, if the requested information does not supply an explanation on its face, how and why section 552.108 excepts the information from disclosure. *See* Gov't Code § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986). You inform this office that the release of the remaining information at issue would interfere with a pending criminal investigation. Based on this representation, we find that you have demonstrated that the release of the remaining information would interfere with the detection, investigation, or prosecution of crime. *See* Gov't Code § 552.108(a)(1); *Houston Chronicle Publ'g 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) (court delineates law enforcement interests that are present in active cases).

Section 552.108 does not except from disclosure "basic information about an arrested person, an arrest, or a crime." Gov't Code § 552.108(c). Section 552.108(c) refers to the basic front-page information held to be public in *Houston Chronicle*. The city must release the kind of information that is considered to be basic front-page information, including a detailed description of the offense, even if this information does not actually

⁴We note that the fifth request encompasses "911 tapes." You do not inform this office whether the responsive records include such information. Nevertheless, we note that information relating to 911 calls may be confidential under section 552.101 of the Government Code in conjunction with provisions of the Health and Safety Code. *See* Health & Safety Code §§ 771.061(a), 772.118, 772.218, 772.318; *see also* Open Records Decision Nos. 661 (1999), 649 (1996). We also caution the city that chapter 552 of the Government Code makes the release of confidential information a criminal offense.

appear on the front page of a police report. See *Houston Chronicle*, 531 S.W.2d at 186-87; Open Records Decision No. 127 at 3-4 (1976) (summarizing the types of information deemed public by *Houston Chronicle*). The remaining information that is not subject to release under section 552.302 is excepted from disclosure under section 552.108.

In summary, all additional information held by the city that is responsive to the fifth request must be released under section 552.302. To the extent that the information responsive to the fifth request also is responsive to the other five requests, that information also must be released to the other five requestors. The city may withhold the remaining requested information under section 552.108(a)(1), but must release basic information under section 552.108(c). As we are able to make this determination with regard to the remaining information under section 552.108, we need not address section 552.103.⁵

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).

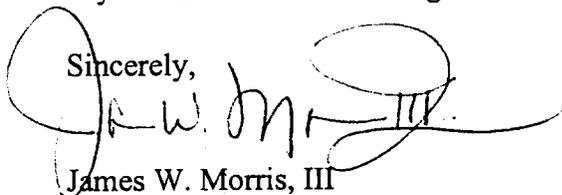
⁵We note that section 552.103 generally does not except from disclosure the same basic information that must be released under section 552.108(c). See Open Records Decision No. 597 (1991).

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,



James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

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