



December 10, 2001

Mr. Robert E. Hager
Nichols, Jackson, Dillard, Hager & Smith, LLP
1800 Lincoln Plaza
500 North Akard
Dallas, Texas 75201

OR2001-5755

Dear Mr. Hager:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 155951.

The City of Allen (the "city") received three requests for information regarding two police officers. The first request seeks sixteen categories of information concerning a named officer; the second request seeks an internal affairs investigation report involving the same officer; and the third request seeks information about the named officer and another unnamed officer. With respect to the first request, you inform us that you will release the information responsive to category numbers 1, 2, 4, 7, 8-10, and 14 and that you do not possess information responsive to category numbers 3 and 11-13. You claim that the submitted information is excepted from disclosure under sections 552.103, 552.108, and 552.119 of the Government Code.¹ We note that if the city maintains any other responsive information that was not submitted to this office, that information must be released at this time. *See* Gov't Code §§ 552.301, .302. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that the submitted information contains a completed internal affairs investigation. Section 552.022 of the Government Code makes certain information expressly public. One such category of expressly public information under section 552.022 is "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by [s]ection 552.108[.]" Gov't Code § 552.022(a)(1). Our office has

¹As for category number 16, we understand you have released information responsive to that category to the extent it does not overlap category numbers 5, 6, and 15 and the exceptions you claim for those categories.

previously concluded that section 552.103 is a discretionary exception. *See* Open Records Decision No. 551 (1990) (statutory predecessor to section 552.103 serves only to protect a governmental body's position in litigation, and does not itself make information confidential). This exception does not "expressly [make] information confidential under other law." Gov't Code § 552.022. Therefore, you may not withhold the submitted investigation under section 552.103.

You claim, however, that the internal affairs investigation is also excepted from disclosure under section 552.108, which provides in pertinent part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if:

(1) release of the information would interfere with the detection, investigation or prosecution of crime[.]

....

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from the requirements of section 552.021 if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution[.]

Gov't Code § 552.108(a)(1), (b)(1). Generally, a governmental body claiming section 552.108 must reasonably explain, if the information does not supply the explanation on its face, how and why the release of the requested information would interfere with law enforcement. *See* Gov't Code §§ 552.108(a)(1), (b)(1), .301(e)(1)(a); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). Here, you assert that section 552.108 is applicable because the internal affairs investigation has been forwarded to the Federal Bureau of Investigation ("F.B.I.") as part of a complaint filed with the F.B.I. by the city's police department. It is not clear, however, that the F.B.I. is conducting a criminal investigation into this matter. *See Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. Civ. App.--El Paso 1992, writ denied) (statutory predecessor not applicable to internal investigation that does not result in a criminal investigation or prosecution); Open Records Decision No. 350 at 3-4 (1982). Furthermore, we have not received any representation that the F.B.I. seeks to withhold this information from disclosure. *See* Open Record Decision Nos. 372 (1983) (deciding that where an incident involving allegedly criminal conduct is still under active investigation or prosecution, section 108 may be invoked by any proper custodian of information that relates to the incident), 474 (1987) (same), 586 (1991) (deciding that the need of another governmental body to withhold requested information may provide compelling reason for nondisclosure under section 552.108). You also assert that the release

of the information would interfere with another pending criminal case. However, we have not received a representation from the prosecuting entity that release of the submitted information would interfere with the prosecution of that case. After considering your assertions and the submitted internal affairs investigation, we find that neither explanation demonstrates how release of the information would interfere with law enforcement. We therefore conclude that section 552.108 is inapplicable.

We note that some of the requested information is confidential by law and is therefore not subject to release under section 552.022. First, 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. We point out that the city must also withhold an officer's former address from disclosure. *See* Open Records Decision No. 622 (1994). The term "peace officer" is used as defined by article 2.12 of the Code of Criminal Procedure. We have marked the submitted information that must be withheld under section 552.117(2).

Second, section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Within the submitted investigation are print-outs that appear to contain criminal history record information ("CHRI") generated by the Texas Crime Information Center ("TCIC") or the National Crime Information Center ("NCIC"). The dissemination of CHRI obtained from the NCIC network is limited by federal law. *See* 28 C.F.R. § 20.1; Open Records Decision No. 565 at 10-12 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. Open Records Decision No. 565 at 10-12 (1990). Sections 411.083(b)(1) and 411.089(a) of the Government Code authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release the information except to another criminal justice agency for a criminal justice purpose. Gov't Code § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090-.127. Thus, any CHRI generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations (*see* Open Records Decision No. 565 (1990)), and any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. We therefore conclude that the city must withhold from required public disclosure the criminal history information gathered by TCIC and NCIC under section 552.101. We have marked the investigation accordingly.

You also claim that the submitted photographs of the named officer are excepted from disclosure under section 552.119. Section 552.119 of the Government Code 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. *See* Open Records Decision No. 502 (1988). The submitted copies of photographs depict a peace officer, and it does not appear that any of the exceptions are applicable. You have not informed us that the officer has executed any written consents to disclosure. Thus, you must withhold the photographs depicting the named officer.

In sum, the submitted internal affairs investigation is subject to section 552.022(a)(1) of the Government Code and may not be withheld under section 552.108. You must, however, withhold the information we have marked under section 552.117(2) and section 552.101 in conjunction with Government Code chapter 411, subchapter F. In addition, you must also withhold the photographs depicting the named peace officer under section 552.119. The remaining information must be released.

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).

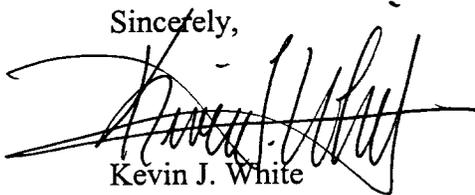
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 Texas Building and Procurement 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,

A handwritten signature in black ink, appearing to read "Kevin J. White", is written over a horizontal line.

Kevin J. White
Assistant Attorney General
Open Records Division

KJW/sdk

Ref: ID# 155951

Enc. Marked documents

c: Mr. Jim Bearden
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(w/o enclosures)