



December 12, 2001

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

OR2001-5796

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# 156138.

The City of Allen (the "city"), which you represent, received a request for ten categories of information pertaining to a vehicular accident on a specified date, in which three individuals were killed. You indicate the city has released some of the requested information. You represent that the city has no information responsive to the request category seeking certain theft reports, and no information responsive to the request category seeking an analysis of the speed of the vehicle. You assert that photographs of the scene, statements regarding the incident, autopsy reports, and a police report (other than the front page) are excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and we have reviewed the submitted information.

We first note that information that is specifically made public by another statute may not be withheld on the basis of exceptions contained in the Public Information Act. Section 11 of article 49.25 of the Code of Criminal Procedure provides as follows:

The medical examiner shall keep full and complete records properly indexed, giving the name if known of every person whose death is investigated, the place where the body was found, the date, the cause and manner of death, and shall issue a death certificate. . . . *The records are subject to required public disclosure in accordance with Chapter 552, Government Code*, except that a photograph or x-ray of a body taken during an autopsy is excepted from required public disclosure in accordance with Chapter 552, Government Code, but is subject to disclosure:

- (1) under a subpoena or authority of other law; or

- (2) if the photograph or x-ray is of the body of a person who died while in the custody of law enforcement.

Code Crim. Proc. art. 49.25, § 11 (emphasis added). This provision specifically makes public the contents of an autopsy report as defined above, other than photographs or x-rays taken during the autopsy.¹ Thus, we conclude that the submitted autopsy reports must be released.

Next, we must address a procedural matter. Included in the submitted information is a letter to the city police department dated August 22, 2001 and a letter to the city police department dated August 28, 2001. Each letter contains a written request for information pertaining to the same incident as the present request. The first letter seeks “all materials contained in the [police department] file, including drawings, field notes, interview notes, witness statements, and photographs related to the investigation.” The second letter seeks a copy of the police report and autopsy report, including the toxicology report from the medical examiner.

Absent a previous determination, a governmental body that receives a written request for information that it wishes to withhold from public disclosure and that it considers to be within an exception to disclosure “must ask for a decision from the attorney general” about whether the information is excepted from disclosure. Gov’t Code § 552.301(a). Not later than the tenth business day after the date of receiving the written request, the governmental body “must ask for the attorney general’s decision and state the exceptions that apply[.]” *Id.* § 552.301(b); *see also id.* § 552.301(d), (e).

In addition to being responsive to the present request for which you have requested a decision under section 552.301, the submitted documents, evidently, also are responsive to one or both of the above-stated requests contained in the letters dated August 22, 2001 and August 28, 2001. Yet, this office has no record of a request under section 552.301 from the city, or the city police department, in connection with either of these earlier written requests.² Thus, the city did not comply with section 552.301 with reference to either of the earlier requests.³

¹We have no indication that any of the submitted photographs were taken during an autopsy. Thus, none of the photographs are excepted from disclosure pursuant to Section 11 of article 49.25 of the Code of Criminal Procedure.

²Nor do we have any indication that this office issued the city a previous determination that would apply to any of the information responsive to the earlier requests. *See* Open Records Decision No. 673 (2001) (defining previous determination).

³We note that if the city was not required to comply with section 552.301 with regard to the earlier requests because the city released the information responsive to those requests, the city may not now withhold that information from the present requestor. *See* Gov’t Code § 552.007 (prohibiting selective public disclosure).

If a governmental body does not request a decision from this office in accordance with section 552.301, the requested information "must be released unless there is a compelling reason to withhold the information." Gov't Code § 552.302; *see also Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.--Austin 1990, no writ); Open Records Decision No. 630 (1994). This office has found such a compelling reason only where the information is confidential by law or its release implicates third party interests. *See, e.g.*, Open Records Decision No. 150 (1977).

You assert section 552.103, the "litigation exception." However, we note that section 552.103 is a discretionary exception⁴ that does not make information confidential. Accordingly, the applicability of section 552.103 does not demonstrate a compelling reason sufficient to overcome the section 552.302 requirement that the information be released. Because you have demonstrated no compelling reason for withholding any of the submitted information, and because this information evidently is responsive to either or both of the earlier requests, we conclude that it must be released in its entirety pursuant to section 552.302 of the Government Code.

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

⁴Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)); 592 at 8 (1991) (governmental body may waive section 552.104, information relating to competition or bidding); 549 at 6 (1990) (governmental body may waive informer's privilege); 522 at 4 (1989) (discretionary exceptions in general).

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,



Michael Garbarino
Assistant Attorney General
Open Records Division

MG/seg

Ref: ID# 156138

Enc. Submitted documents

c: Mr. Richard C. Connelly
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(w/o enclosures)