



January 16, 2002

Ms. Kelly S. Ripley  
Records Management Coordinator  
City of Irving Police Department  
305 North O'Connor Road  
Irving, Texas 75061

OR2002-0263

Dear Ms. Ripley:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your requests were assigned ID#s 157401 and 157402. We have combined these files and will consider the issues presented in this single ruling assigned ID# 157401.

The City of Irving Police Department (the "department") received two requests for information relating to burglaries that occurred between October 15, 2001, and October 21, 2001, and between October 22, 2001, and October 28, 2001. Specifically, the requestor seeks the name, telephone number, and address of the complainants in those burglary cases. You seek to withhold the requested information under section 38.18 of the Penal Code and section 552.108 of the Government Code. We have considered your arguments and reviewed the submitted information.

We begin by noting that you did not meet your burden under section 552.301 of the Government Code with respect to the first request for information. Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general 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. In this case, you provided us with contradictory statements regarding the date on which the department received the request for information regarding burglaries between October 15 and October 21. In your letter to this office dated October 30, 2001, you state that the department received the request on October 23, 2001;

which, if correct, means the department was required to submit its arguments and a copy or representative sample of the requested information to this office by November 13, 2001. Your follow-up letter to our office, however, states that the department received the request on October 22, 2001; which contradicts your earlier representation and, if correct, means the department did not timely submit its arguments and a copy or representative sample of the requested information under section 552.301(e). Because of your contradictory statements, we are unclear regarding when the department actually received the request for information. Accordingly, we conclude that you failed to comply with the procedural requirements of section 552.301(e) in timely submitting arguments and a copy or representative sample of the requested information to this office.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to submit to this office the information required in section 552.301(e) results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See 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 contend that the requested information is excepted under section 552.108 of the Government Code. However, you have not demonstrated a compelling reason for withholding the requested information under section 552.108. *See Open Records Decision No. 473 at 2 (1987)* (discretionary exceptions under the Public Information Act can be waived); *but see Open Records Decision No. 586 (1991)* (when a governmental body fails to timely seek an attorney general decision under the Public Information Act, the need of another governmental body may provide a compelling reason for withholding the requested information). Therefore, the department may not withhold the requested information regarding burglaries that occurred between October 15, 2001, and October 21, 2001, under section 552.108. However, a demonstration that information is confidential or affects the interests of a third party may provide a compelling reason for overcoming the presumption of openness. *See Open Records Decision No. 150 (1977)*. Therefore, we will address your argument under section 38.18 of the Penal Code with respect to all of the submitted information. We will also address your argument under section 552.108 with respect to the information responsive to the second request.

Section 38.18 of the Penal Code provides, in relevant part:

(a) This section applies to:

(1) information described by Section 550.065(a), Transportation Code;

(2) information reported under chapter 772, Health and Safety Code, other than information that is confidential under that chapter; and

(3) information contained in a dispatch log, a towing record, or a record of a 9-1-1 service provider, other than information that is confidential under chapter 772, Health and Safety Code.

(b) A person commits an offense if:

(1) the person obtains information described by Subsection (a) from the Department of Public Safety of the State of Texas or other governmental entity; and

(2) the information is subsequently used for the direct solicitation of business or employment for pecuniary gain by:

(A) the person;

(B) an agent or employee of the person; or

(C) the person on whose behalf the information was requested.

You indicate that you have determined that the requestor is a licensed, active alarm salesperson, and you question whether the department could withhold the requested information from such a person if the department determined that the "requestor is soliciting business from the information obtained through his requests." First, we note that a governmental body is prohibited from inquiring into the motives of a requestor for seeking information. Gov't Code § 552.222(a). Thus, we are unclear as to how the department would determine that the requestor is seeking the information for the purpose of soliciting business. Second, section 38.18 clearly applies only to three categories of information: "(1) information described in section 550.065 of the Transportation Code; (2) information reported under Chapter 772, Health and Safety Code, other than information that is confidential under that chapter; and (3) information contained in a dispatch log, a towing record, or a record of a 9-1-1 service provider, other than information that is confidential under chapter 772, Health and Safety Code." You do not indicate, nor is it apparent, that the submitted information falls under any of these categories of information. Finally, and most importantly, section 38.18 of the Penal Code criminalizes the use of information obtained from the Department of Public Safety or another governmental entity for direct solicitation of business or employment; it does not require a governmental entity to withhold information from a requestor. *See* Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality provision must be express and cannot be implied), 478 at 2 (1987) (language of confidentiality statute controls scope of protection), 465 at 4-5 (1987) (statute explicitly

required confidentiality). Indeed, the statute specifically contemplates the release of the three types of information listed in subsection (a) to a requestor. Therefore, we find that the department may not withhold the requested information under section 38.18 of the Penal Code.

Next, we address your argument that the requested information regarding burglary cases from October 22, 2001, to October 28, 2001, is excepted from public disclosure under section 552.108(a)(1) and (2) of the Government Code. Section 552.108 provides, in relevant part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

- (1) release of the information would interfere with the detection, investigation, or prosecution of crime;
- (2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication . . . .

Generally, a governmental body claiming section 552.108(a)(1) 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). A governmental body claiming section 552.108(a)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. You do not indicate which, if any, of the cases are pending or have reached a final result other than conviction or deferred adjudication. Nor is it apparent from the face of the information whether the cases are pending or have reached a result other than conviction or deferred adjudication. Therefore, we find that you have not adequately demonstrated that any of the requested information regarding burglaries that occurred between October 22, 2001, and October 28, 2001, is excepted from disclosure under section 552.108(a)(1) or (2). Consequently, the department must release all of the submitted 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 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,



Nathan E. Bowden  
Assistant Attorney General  
Open Records Division

NEB/sdk

Ref: ID# 157401

Enc: Submitted documents

c: Mr. Bill Fawcett  
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(w/o enclosures)