



May 2, 2002

Ms. Ann-Marie P. Sheely
Assistant County Attorney
Travis County
P.O. Box 1748
Austin, Texas 78767

OR2002-2293

Dear Ms. Sheely:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 162226.

The Travis County Sheriff's Office (the "sheriff") received, from the same individual, two requests concerning a certain incident. In the first, the requestor asked for copies of two police officers' personnel files, radio communications made to the department regarding the incident, all incident and public information reports, and names of responding department officers and supervisors. You raise several exceptions to disclosure of portions of the requested information. In the second request, which you submitted to this office after the ten business day deadline, the requestor seeks copies of patrol car videotapes of the incident, information concerning a witness, racial profile reports submitted by Officer Taylor, and all of Officer Taylor's arrest reports since 1/1/01. You assert a compelling reason to withhold the information at issue in the second request.

With regard to the second request, you state that the sheriff has no arrest records of Deputy Taylor or racial profiling reports submitted by Deputy Taylor.¹ You also state that, because one of the named officer's video equipment was not working on the date of the incident, only one of the requested videos exists. The Public Information Act applies only to information in existence at the time the governmental body receives the request for information. *See* Open Records Decision Nos. 452 at 2-3 (1986) (document is not within the purview of the act if, when a governmental body receives a request for it, it does not exist), 342 at 3 (1982)

¹You state that sheriff's deputies complete incident reports if involved in an incident in which the sheriff is called for assistance, but do not complete a racial profiling report. You note that local law enforcement agencies are required to begin collecting racial profiling information beginning January 1, 2002. This information is taken from incident reports and compiled by the sheriff; individual deputies do not submit racial profiling reports.

(Act applies only to information in existence, and does not require the governmental body to prepare new information). Furthermore, the act does not require a governmental body to create information in response to a request. *See* Open Records Decision 452 (1986). Therefore, the Act does not apply to the arrest reports and racial profiling reports described by the second request.

Initially, we note that the second request for information is partially redundant of the first, in that the witness statements sought in the second request are contained in the timely submitted offense reports sought in the first request. Accordingly, we find that you have timely submitted the witness statements.

Additionally, you state that you submitted the videotape to this office for review in another file that was pending in this office at the time of this request, ID# 161951. This office closed this file with the issuance of Open Records Letter No. 2002-1286 (2000).² Accordingly, we consider the earlier-submitted videotape to have been timely submitted to this office for review.

We now address the delinquency of your second request letter to this office. You state that the sheriff received the second request on February 15, 2002. However, the sheriff did not submit to this office a request for an open records ruling for this request until March 12, 2002. Therefore, the sheriff failed to submit the second request within the fifteen-business-day deadline as required by section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 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). *See also* Open Records Decision No. 150 (1977) (presumption of openness overcome by showing that information is made confidential by another source of law or affects third party interests).

In Open Records Decision No. 586 (1991), we concluded that the need of a governmental body, other than the one that has failed to timely comply with the requirements for requesting an attorney general decision under the Public Information Act, to withhold information from disclosure may be a compelling reason to overcome the presumption that the information is public. You state that the district and county attorney's offices are currently conducting a criminal investigation of the incident. Additionally, you state that you have confirmed with

² In Open Records Letter No. 2002-1286 (2002), we held that the video was excepted from disclosure under section 552.108.

the District Attorney's Office that they are currently seeking an indictment in this case, and that the County Attorney's Office relates that they are currently prosecuting the DWI charge. You also state that representatives from the County and District Attorney's Offices believe that release of the requested information would interfere with their prosecution of the underlying crimes. Thus, as for the second untimely request, we find that the sheriff has shown a compelling reason for nondisclosure under section 552.108.

You state that you will release the majority of the requested information described in the first request. You claim, however, that some of the requested information in the two requests is excepted from disclosure under sections 552.101, 552.103, 552.108, 552.119, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.108(a) 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." 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). You state that much of the information described in both requests relates to a pending investigation. Based upon this representation, we conclude that the release of the information related to the incident which you describe as the videotape, incident report, which you state includes witness statements, radio logs, and 911 tapes would interfere with the detection, investigation, or prosecution of crime. *See 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). Thus, the sheriff may withhold this information from disclosure based on section 552.108(a)(1).

We note, however, that information normally found on the front page of an offense report is generally considered public. *See generally Gov't Code* § 552.108(c); *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); Open Records Decision No. 127 (1976). Thus, you must release the types of information that are considered to be front page offense report information, even if this information is not actually located on the front page of the offense report. Although section 552.108(a)(1) authorizes you to withhold the remaining information from disclosure, you may choose to release all or part of the information at issue that is not otherwise confidential by law.³ *See Gov't Code* § 552.007.

³ Generally, basic information may not be withheld from public disclosure under section 552.103. Open Records Decision No. 597 (1991). Thus, we need not consider your 552.103 claim. Additionally, because social security numbers are not considered basic information, we do not consider your argument under section 552.101 and the federal Social Security Act.

You next indicate that some of the submitted information is excepted from disclosure under 552.108(b)(1). Section 552.108(b)(1) excepts from disclosure the internal records and notations of law enforcement agencies and prosecutors when their release would interfere with law enforcement and crime prevention. Open Records Decision No. 531 at 2 (1989) (quoting *Ex parte Pruitt*, 551 S.W.2d 706, 710 (Tex. 1977)). The department is a law-enforcement agency for purposes of section 552.108. When this exception is claimed, the agency claiming it must reasonably explain, if the information does not supply the explanation on its face, how releasing the information would interfere with law enforcement. Open Records Decision No. 434 at 3 (1986).

This office has concluded that section 552.108 excepts from public disclosure information relating to the security or operation of a law enforcement agency. *See, e.g.*, Open Records Decision Nos. 531 (1989) (holding that section 552.108 excepts detailed guidelines regarding a police department's use of force policy), 508 (1988) (holding that release of dates of prison transfer could impair security), 413 (1984) (holding that section 552.108 excepts sketch showing security measures for execution). You state that this information was prepared for internal use by the sheriff and used for educational purposes, and that the "attached procedures identify specific methods used by [the sheriff] and would place an individual at an advantage in confrontation with [sheriff] deputies." You further state that release of this information would jeopardize the safety of law enforcement officers. Based on your representations and our review of the submitted information, we agree that allowing the public access to most of the submitted test questions numbers would interfere with law enforcement. Therefore, we conclude that the sheriff may withhold the marked portions of the information under section 552.108(b)(1) of the Government Code.

We now consider your arguments under section 552.101. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses common-law privacy. Common-law privacy excepts from disclosure private facts about an individual. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Therefore, information must be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685. The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683.

We have marked the information that is confidential under section 552.101. Accordingly, you must withhold from disclosure the marked information as subject to section 552.101 and the common-law right of privacy.

We note that some of the submitted information must be withheld under section 552.117(2) of the Government Code. Section 552.117(2) excepts from disclosure "information that

relates to the home address, home telephone number, or social security number” of a peace officer, or that reveals whether the peace officer has family members. Therefore, the city must withhold the information marked under section 552.117(2) of the Government Code.

You next argue that portions of the submitted information are excepted under section 552.119. 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 and referenced information contains (or apparently contains) the images of several peace officers. It does not appear that any of the exceptions to section 552.119 apply. Furthermore, you have informed us that none of the peace officers depicted in the submitted information executed a written consent to disclosure of his picture. Therefore, under section 552.119 of the Government Code, the department must withhold the images of peace officers located in the submitted personnel files.

Finally, section 552.130 of the Government Code excepts from public disclosure information relating to a driver’s license or motor vehicle title or registration issued by an agency of this state. Thus, the sheriff must withhold the bracketed driver’s license, license plate and vehicle license numbers from public disclosure pursuant to section 552.130.

To summarize: You must withhold the information we have marked under section 552.101 and the common-law right of privacy. With the exception of basic information, you may withhold the information under section 552.108. You must withhold the marked information under section 552.117(2). Copies of photos of peace officers must be redacted under section 552.119. Information relating to driver’s license numbers and motor vehicle title or registration information must be withheld under section 552.130.

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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,


V.G. Schimmel
Assistant Attorney General
Open Records Division

VGS/sdk

Ref: ID# 162226

Enc: Submitted documents

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