



May 3, 2002

Ms. J. Middlebrooks
Assistant City Attorney
City of Dallas
2014 Main Street, Room 501
Dallas, Texas 75201

OR2002-2339

Dear Ms. Middlebrooks:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 162317.

The Dallas Police Department (the “department”) received a request for “any and all confidential informant payment forms made by the Dallas Police Department Narcotics Division” for a specified period of time. You claim that the requested information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹ We have also considered the comments submitted to this office by the Federal Bureau of Investigations. *See* Gov’t Code § 552.304 (providing for submission of public comments).

Initially, we note that subsections 552.301(a) and (b) provide:

(a) 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 one of the [act’s] exceptions . . . must ask for a decision from the attorney general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions.

¹We assume that the “representative sample” of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). Here, we do not address any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

(b) The governmental body must ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the 10th business day after the date of receiving the written request.

The department received the instant request for information on February 7, 2002. You state that your office was closed for President's Day on February 18, 2002. Thus, the ten business day deadline for requesting a decision from this office was February 22, 2002. However, you did not request a decision until March 1, 2002. Consequently, you failed to request a decision within the ten business day period mandated by section 552.301(a) of the Government Code. Because the request for a decision was not timely received, the requested information is presumed to be public information. Gov't Code § 552.302.

In order to overcome the presumption that the requested information is public information, a governmental body must provide compelling reasons why the information should not be disclosed. *Id.*; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.--Austin 1990, no writ); see Open Records Decision No. 630 (1994). 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. The Dallas Division of the Federal Bureau of Investigation (the "FBI") has submitted a letter to this office contending that it has a law enforcement interest in the information at issue and that the information should be withheld under section 552.108. Therefore, we will address the FBI's argument under section 552.108. See ORD 586 at 3.

Section 552.108, the "law enforcement exception," excepts from required public disclosure "[i]nformation 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 responsive information does not do so on its face, how and why section 552.108 is applicable. 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). The FBI contends that the requested information relates to an ongoing public corruption investigation by the FBI and that disclosure of the information would therefore interfere with its investigative efforts. Based on these representations and our review of the information in question, we find that the release of that information would interfere with the investigation efforts of the FBI. 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); ORD 586 at 3 (addressing statutory predecessor to section 552.108); ORD 372 at 4 (1983) (stating that where incident involving

criminal conduct remains under active investigation or prosecution, section 552.108 may be invoked by any proper custodian of related information). Consequently, the department may withhold some of the submitted information under section 552.108(a)(1) of the Government Code.

However, we note that section 552.022 of the Government Code makes certain information public, unless it is expressly confidential under other law. One category of public information under section 552.022 is information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body. *See Gov't Code § 552.022(a)(3)*. Portions of the submitted information, which we have marked, are subject to section 552.022(a)(3). As section 552.108 is a discretionary exception, it is not considered "other law" for the purpose of section 552.022(a)(3). Consequently, the marked information may not be withheld under section 552.108. However, the department may withhold this information if it is confidential under other law.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses the common-law right of privacy. Ordinarily, information is protected by common-law privacy only if (1) the information contains highly intimate or embarrassing facts, the release of which would be highly objectionable to a reasonable person, *and* (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). However, information also may be withheld under section 552.101 in conjunction with common-law privacy upon a showing of certain "special circumstances." *See Open Records Decision No. 169 (1977)*. This office considers "special circumstances" to refer to a very narrow set of situations in which the release of information would likely cause someone to face "an imminent threat of physical danger." *Id.* at 6. Such "special circumstances" do not include "a generalized and speculative fear of harassment or retribution." *Id.* You inform us that the department's narcotics officers and informants have infiltrated criminal groups. You assert that the involved officers and informants would face an imminent threat of physical danger if their identities and specific undercover activities were released to the public. Because of your handling of the requested information and the particular circumstances present in this request for a decision, we conclude that in this instance only the badge numbers and names of the undercover narcotics officers and the names and numbers of the informants that we have marked are confidential under section 552.101 in conjunction with common-law privacy and must be withheld from the requestor. *See Open Records Decision No. 169 (1977)*.

To summarize, we conclude that: 1) the department may withhold the submitted information that is not subject to section 552.022(a)(3) under section 552.108(a)(1) of the Government Code; 2) in the section 552.022(a)(3) information, only the badge numbers and names of the undercover narcotics officers and the names and numbers of the informants that we have

marked are confidential under section 552.101 in conjunction with common-law privacy and must be withheld from the requestor; and 3) the remaining section 552.022(a)(3) 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. 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,



W. Montgomery Meitler
Assistant Attorney General
Open Records Division

WMM/sdk

Ref: ID# 162317

Enc: Submitted documents

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