



November 27, 2002

Ms. Nancy O. Williams
Assistant City Attorney
City Attorney's Office
825 West Irving Blvd.
Irving, Texas 75060

OR2002-6793

Dear Ms. Williams:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 173190.

The City of Irving (the "city") received a request for a "[l]ist of in use back flow devices that need to be tested annually that are in [the] City of Irving, or any cross-connection database with name, address, and phone #'s." 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 information.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." You acknowledge that "there is no statute that directly makes [the requested] information confidential." You assert, however, that confidentiality can be implied from sections 341.0315 and 341.031 of the Health and Safety Code and section 402.017 of the Local Government Code. These provisions address the duties of certain providers of public drinking water. *See generally* Health & Safety Code §§ 341.031 (drinking water must be free from deleterious matter and must comply with standards established by Texas Natural Resource Commission or Environmental Protection Agency), 341.0315 (each public drinking water supply system shall provide adequate and safe drinking water supply); Local Gov't Code § 402.017 (home-rule municipality may take necessary action to operate and maintain water system). You argue that because the city is required to provide adequate and safe drinking water, it should be allowed to withhold any information that could be used to detrimentally affect the quality of the water it provides. In particular, you claim that the information at issue here could be used "to locate vulnerabilities and points in which the system might be compromised through contamination." However, this office has stated that statutory confidentiality must be express and cannot be implied from an overall statutory structure. *See, e.g.*, Open Records Decision

No. 658 at 4 (1998); *see also* Open Records Decision Nos. 478 at 2 (1987) (language of confidentiality statute controls scope of protection), 465 at 4-5 (1987) (statute explicitly required confidentiality). We therefore conclude that the requested information is not made confidential by statute.

You also assert that the requested information is excepted under section 552.101 on the basis of common law privacy concerns. In Open Records Decision No. 169 (1977), we considered the personal safety concerns of public employees, and we recognized that there may be specific instances where “special circumstances” exist to except from public disclosure some of the employees’ addresses. *See* Open Records Decision No. 123 (1976). In Open Records Decision No. 169, the employees demonstrated that their lives would be placed in danger if their addresses were released to the public. ORD 169 at 7. This office further noted that the initial determination of credible threats and safety concerns should be made by the governmental body to which a request for disclosure is directed, and this office will determine whether a governmental body has demonstrated the existence of special circumstances on a case-by-case basis. *Id.*

You express generalized concerns that the release of this information might expose the city’s water system to potential harm. However, you provide no specific information detailing particularized threats or safety concerns. Thus, the city has failed to articulate how release of the information would present an imminent credible threat to the integrity of its water supply system or its citizens. We therefore conclude that the city has not demonstrated “special circumstances,” and it may not withhold the requested information on this basis.

You also assert that, based on our rationale in Open Records Decision No. 401 (1983), the requested information should not be released. In that decision, this office held that a computer program could be withheld, in part, because its sole purpose was to be a means of accessing information. In Open Records Decision No. 598 (1990), this office considered a request for another computer program. Revisiting our previous decision, we revised our standard and concluded that “[w]here information has no significance other than its use as a tool for the maintenance, manipulation, or protection of public property,” it is not public information subject to disclosure under the Public Information Act. *See* Open Records Decision No. 581 (1990) (construing predecessor statute).

We understand you to assert that, like the computer programs at issue in those decisions, the information at issue here should be withheld because its release could potentially expose the city’s water system to unauthorized access and attack. However, you have not explained, nor does the information reflect, that it exists solely as a tool used to maintain, manipulate, or protect information. We understand you to represent that the city maintains the requested information as part of its Cross-Connection Control Program. Thus it is clear from your representations that the requested information has independent significance and value and does not exist solely as a tool for accessing information. *See generally* 30 Texas Administrative Code § 290.44 (h)(1)(B)(i)-(iii) (requiring water purveyor annually to test and

inspect backflow prevention assemblies used for health hazard protection and maintain records of such test and inspection). Accordingly, we find that our rationale in Open Records Decision Nos. 401 and 581 is not applicable in this instance.

You also contend that the information at issue is excepted from disclosure pursuant to section 552.108 of the Government Code. This section provides in 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; [or]

.....
(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 would interfere with law enforcement or prosecution of crime.

Gov't Code § 552.108. This section, also known as the "law enforcement exception," applies only to records that can be characterized as records of law enforcement agencies or prosecutors. *See* Open Records Decision Nos. 493 at 2 (1988), 287 at 2 (1981). Thus, section 552.108 applies to records created by an agency, or a portion of an agency, whose primary function is to investigate crimes and enforce the criminal law. *See* Open Records Decision No. 199 (1978). Furthermore, 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).

The request at issue is directed to the city as a whole. You do not inform us that the responsive information is maintained by a law enforcement entity within the city. We thus have no basis for concluding that the requested information constitutes law enforcement records. Furthermore, although you assert that "release of the requested documents would interfere with the detection of attacks upon the system of a criminal nature," you do not indicate that any law enforcement entity is currently investigating a criminal attack on the city's water system. Accordingly, even if the requested information could be characterized as law enforcement records, your assertion would be too speculative to provide a basis for withholding the requested information under section 552.108. In short, you have not

adequately explained how the requested information relates to law enforcement or how its release would interfere with the detection, investigation, or prosecution of crime. *See* Gov't Code § 552.108(a)(1). Thus, you may not withhold any of the requested information under section 552.108. As none of the exceptions you claim apply to the requested information, it 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).

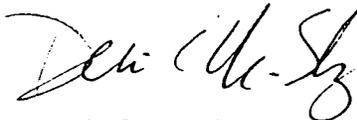
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following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

A handwritten signature in black ink, appearing to read "Denis C. McElroy". The signature is fluid and cursive, with the first name "Denis" being the most prominent.

Denis C. McElroy
Assistant Attorney General
Open Records Division

DCM/lmt

Ref: ID# 173190

Enc. Submitted documents

c: Mr. C. J. Charvez
9905 Township Lane
Rockwall, Texas 75088
(w/o enclosures)