



OFFICE of the ATTORNEY GENERAL  
GREG ABBOTT

January 31, 2003

Ms. Barbara G. Heptig  
Assistant City Attorney  
City of Arlington  
P.O. Box 1065  
Arlington, Texas 76004-1065

OR2003-0668

Dear Ms. Heptig:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 175825.

The Arlington Police Department (the "department") received a request for any and all records pertaining to a certain officer during a specified time frame and copies of two named officers' personnel files. You claim that the requested information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.108, 552.117, and 552.119 of the Government Code. We have also received comments from a prosecuting attorney. *See* Gov't Code § 552.304 (providing for submission of public comments). We have considered all of the submitted arguments and reviewed the submitted information.

Initially, we note that the submitted information includes a completed evaluation and a completed report, which are both subject to section 552.022 of the Government Code. This section provides that "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body," is public and may not be withheld unless it is expressly confidential under other law or excepted from disclosure by section 552.108. Gov't Code § 552.022(a)(1). You assert that the submitted information is excepted under section 552.103. This section is a discretionary exception and is not "other law" for the purpose of section 552.022. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App-Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 663 (1999) (governmental body may waive section 552.103), 522 at 4 (1989) (discretionary exceptions in general). Therefore the

evaluation and report may not be withheld on the basis of section 552.103. However, we have also received arguments that the submitted information is excepted under sections 552.101, 552.102, 552.108, 552.117, and 552.119, and we will address those arguments.

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). When an incident is still under active investigation or prosecution, section 552.108 may be invoked by any proper custodian of information relating to the incident. *See* Open Records Decision Nos. 474 at 4-5 (1987), 372 (1983); *see also* Open Records Decision No. 586 (1991).

The prosecuting attorney informs us that the named officers were involved in a particular arrest that is currently pending prosecution. The prosecuting attorney states that she is handling the case and objects to release of the requested information on the basis that it would interfere with the prosecution and could undermine the officers’ effectiveness as witnesses. Based on the information provided and our review of the documents in question, we find that the release of most of the submitted information would interfere with the detection, investigation, or prosecution of crime. *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); *see also* Open Records Decision No. 586 (1991) (need of another governmental body to withhold information may provide compelling reason for nondisclosure).

We note, however, that only a portion of the submitted tapes directly concern the arrest that is currently being prosecuted. You have failed to explain how release of the remainder of the tapes would interfere with the detection, investigation, or prosecution of crime. Accordingly, we conclude that the submitted tapes may only be withheld to the extent that they directly concern the arrest that is the subject of the present prosecution. The remaining responsive portions of the tapes must be released.

In summary, responsive portions of the tapes that do not directly relate to the arrest that is currently pending prosecution must be released. You may withhold all other submitted information in accordance with section 552.108. As our ruling on this issue is dispositive, we need not address your other arguments.

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).

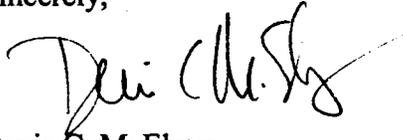
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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,



Denis C. McElroy  
Assistant Attorney General  
Open Records Division

DCM/seg

Ref: ID# 175825

Enc. Submitted documents

c: Mr. Craig Crockett  
McKnight, DeHart & Crockett, L.L.P.  
1320 South University Drive, Suite 804  
Fort Worth, Texas 76107  
(w/o enclosures)