



OFFICE *of the* ATTORNEY GENERAL  
GREG ABBOTT

August 13, 2003

Ms. Pamela Smith  
Assistant General Counsel  
Texas Department of Public Safety  
P. O. Box 4087  
Austin, Texas 78773-0001

OR2003-5654

Dear Ms. Smith:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 185885.

The Texas Department of Public Safety (the "department") received a request for all records related to an investigation of a particular homicide. You advise that you are releasing a portion of the requested information. You claim that the remaining requested information is excepted from disclosure under section 552.108 of the Government Code. We have considered the exception you claim and have reviewed the submitted representative sample of information.<sup>1</sup> We have also considered written comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that member of public may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."<sup>2</sup> This section encompasses information protected by other statutes. Section 1703.306 of the Occupations Code provides as follows:

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<sup>1</sup> We assume that the "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). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

<sup>2</sup> The Office of the Attorney General will raise a mandatory exception such as section 552.101 of the Government Code on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

(a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:

- (1) the examinee or any other person specifically designated in writing by the examinee;
- (2) the person that requested the examination;
- (3) a member, or the member's agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner's activities;
- (4) another polygraph examiner in private consultation; or
- (5) any other person required by due process of law.

(b) The [Polygraph Examiners B]oard or any other governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information.

(c) A polygraph examiner to whom information acquired from a polygraph examination is disclosed under Subsection (a)(4) may not disclose the information except as provided by this section.

Occ. Code § 1703.306. *See also* Open Records Decision No. 562 at 11 (1990) (polygraph examiner's report confidential pursuant to predecessor statute). The submitted documents include information acquired from a polygraph examination. Subsection (b) requires any governmental body that acquires information from a polygraph examination to keep the information confidential. Occ. Code § 1703.306(b). It does not appear that any of the exceptions to confidentiality in section 1703.306 applies. *See* Open Records Decision 565 (1990) (construing predecessor statute). Accordingly, the polygraph information that we have marked is confidential pursuant to section 1703.306 of the Occupations Code, and is therefore excepted from disclosure under section 552.101 of the Government Code.

We now turn to your claim under section 552.108 of the Government Code in relation to the remaining submitted information. Section 552.108 states that 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 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 sufficiently explain, if the responsive information does not provide an explanation on its face, how and why section 552.108 is applicable to the information. *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). You inform us that the submitted information pertains to criminal investigations conducted by the Texas Rangers that resulted in a case that is currently on appeal. However, the requestor contends that there are no longer any pending state proceedings resulting from the Texas Rangers' investigations. We understand the requestor to claim that, as a result, there are no pending cases resulting from these investigations for purposes of section 552.108. Thus, we are faced with a factual dispute between the department and the requestor regarding whether the requested information relates to any pending criminal case. We cannot resolve disputes of fact in the open records process, and therefore, we must rely on the representations of the governmental body requesting our opinion. Open Records Decision Nos. 554 (1990), 552 (1990). Therefore, based on the department's representations, we conclude that the release of the remaining submitted information "would interfere with the detection, investigation, or prosecution of crime." 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); Open Records Decision No. 216 at 3 (1978).

However, section 552.108 does not except from disclosure "basic information about an arrested person, an arrest, or a crime." Gov't Code § 552.108(c). Section 552.108(c) refers to the basic "front-page" offense and arrest report information held to be public in *Houston Chronicle*. The department must therefore release basic information, including a detailed description of the offense, whether or not the information actually appears on the front page of a police report. *See Houston Chronicle*, 531 S.W.2d at 186-87; Open Records Decision No. 127 at 3-4 (1976) (summarizing types of information deemed public by *Houston Chronicle*). The department may generally withhold the remaining information under section 552.108(a)(1).

However, we note that if the department has previously voluntarily released any of the information at issue to the public, it may not now withhold such information under section 552.108. *See* Gov't Code §552.007 (prohibiting selective disclosure of information); Open Records Decision Nos. 490 (1988), 463 (1987) (if governmental body voluntarily releases information to one member of public, the Public Information Act's exceptions to disclosure are waived unless information is deemed confidential), 177 at 3 (1977) (stating that governmental body may waive statutory predecessor to section 552.108). However, polygraph information must be withheld under section 552.101 absent the applicability of an access provision, regardless of any previous release to the public. *See* Gov't Code § 552.007; Open Records Decision No. 400 (1983) (while governmental body may waive right to claim permissive exceptions to disclosure under the Public Information Act by selectively disclosing information, it is prohibited from disclosing information made confidential by law). *See also* Gov't Code § 552.352 (imposing criminal penalties for release of confidential information).

In summary, the department must withhold the polygraph information we have marked under section 552.101 in conjunction with section 1703.306 of the Occupations Code. The department may generally withhold the remaining information under section 552.108, with the exception of basic information, which must be released. However, the department must release any information that has previously been voluntarily released to the public, other than information made confidential by law.

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).

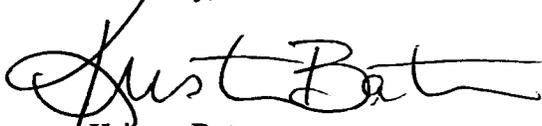
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 Dep't of Pub. 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,



Kristen Bates  
Assistant Attorney General  
Open Records Division

KAB/lmt

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Enc. Submitted documents

c: Mr. David L. Botsford  
Attorney at Law  
1307 West Avenue  
Austin, Texas 78701  
(w/o enclosures)