



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 4, 2004

Mr. Charles H. Weir
Assistant City Attorney
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283-3966

OR2004-0828

Dear Mr. Weir:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 195521.

The San Antonio Police Department (the "department") received a request for several categories of information relating to a named police officer and various department policies including use of force and preservation of evidence. You indicate that some of the requested information will be released. We understand that you have informed the requestor that the department does not maintain information responsive to certain portions of his request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ *dism'd*); Open Records Decision No. 452 at 3 (1986) (governmental body not required to disclose information that did not exist at time request was received). You claim that the submitted offense report is excepted from disclosure under section 552.108 of the Government Code. We have considered the exception you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. *See Gov't Code* § 552.304 (providing for submission of public comments).

Initially, we address the department's obligations under the Act. Section 552.301(a) of the Government Code requires that a governmental body that receives a written request for information that it wishes to withhold and for which there has not been a previous determination to request a ruling from this office. Pursuant to section 552.301(e) the governmental body must submit the following information to this office within fifteen business days of its receipt of the request: (1) general written comments stating the reasons

why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See* Gov't Code § 552.301(a), (e).

In Open Records Decision No. 673 (2001), this office set forth the circumstances under which a governmental body may rely on a ruling from this office as a previous determination for purposes of section 552.301(a) of the Government Code. In that decision, this office noted that there are two types of previous determinations. The first type exists when the requested information is precisely the same information as was addressed in a prior attorney general ruling, the ruling was addressed to the same governmental body, the ruling concluded that the information is or is not excepted from disclosure, and the facts, circumstances, and law on which the prior ruling was based have not changed. The second type is an attorney general decision that explicitly grants a governmental body or class of governmental bodies a previous determination that may be relied upon to withhold a specific type of information without seeking an attorney general's ruling if certain conditions are met.

In its response to the requestor, the department states that it is withholding responsive department personnel files, to the extent that they exist, because they are confidential under section 143.089 of the Texas Local Government Code. The department also states that it is withholding certain names, addresses, and telephone numbers because they are confidential under section 772.318 of the Texas Health and Safety Code. You have not submitted any of these types of information for our review and do not inform us that such information does not exist. You do not inform us that this precise information is subject to a previous ruling from this office. Furthermore, you do not assert, nor has our review of our records indicated, that you have been granted a previous determination to withhold these types of information without seeking a ruling from this office. Because these types of information are not subject to either type of previous determination and you have not submitted them for our review, we find that you have failed to comply with section 552.301 with respect to this information.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301(e) results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *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 section 552.302); Open Records Decision No. 319 (1982). Normally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977).

Your letter to the requestor asserts that the department personnel files and names, addresses, and telephone numbers of 911 callers are confidential and therefore excepted from disclosure under section 552.101 of the Government Code.¹ Although this exception to disclosure can provide a compelling reason for withholding information, you have not submitted these records or a representative sample for our review. We therefore have no basis for finding such information confidential. Thus, we have no choice but to order you to comply with section 552.302 and release the responsive department personnel files and names, addresses, and telephone numbers, to the extent that they exist. If you believe such information is confidential and may not lawfully be released, you must challenge the ruling in court as outlined below.

Your letter to the requestor also states that the department is redacting portions of requested department policies and training materials and of the requested policy and procedures manual. In the letter you state that such redactions have “been previously authorized by the Texas Attorney General’s Office.” You have not described to us the information that you have redacted nor explained the nature of the so-called previous authorization. Thus, unless this precise information is subject to a previous ruling from this office or is otherwise the subject of a previous determination by this office, it must be released. *See Gov’t Code §§ 552.301, .302; see also, e.g., Open Records Decision No. 670 (2001) (concluding that all governmental bodies subject to Act may withhold under predecessor to section 552.117(a)(2) certain personal information relating to peace officers and security officers without necessity of seeking decision from this office).*

We turn now to the submitted documents and the requestor’s comments, which also pertain to the department’s obligations under section 552.301.² Pursuant to section 552.301(d) of the Government Code, a governmental body that requests an attorney general decision must provide the requestor “a written statement that the governmental body wishes to withhold the requested information and has asked for a decision from the attorney general [and] a copy of the governmental body’s written communication to the attorney general asking for the decision” within ten business days of the governmental body’s receipt of the written request for information. Whether a submission is timely is determined by section 552.308, which provides in pertinent part:

- (a) When this subchapter requires a request, notice, or other document to be submitted or otherwise given to a person within a specified period, the

¹Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision” and encompasses statutory confidentiality provisions.

²The requestor also raises concerns regarding the costs the department has quoted him. This office does not address such issue in the ruling process. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

requirement is met in a timely fashion if the document is sent to the person by first class United States mail or common or contract carrier properly addressed with postage or handling charges prepaid and:

- (1) it bears a *post office cancellation mark* or a receipt mark of a common or contract carrier indicating a time within that period; *or*
- (2) the person required to submit or otherwise give the document *furnishes satisfactory proof that it was deposited* in the mail or with a common or contract carrier *within that period*.

Gov't Code § 552.308(a) (emphasis added).

The requestor asserts that the department did not deposit its notice to him in the mail until November 24, 2003, the eleventh business day following the department's receipt of this request. Thus, he alleges the department failed to comply with section 552.301(d). In support of his assertion, the requestor has submitted a photocopy of the envelope in which he received his notice. Although the envelope in question was metered on November 21, 2003, it bears a post office cancellation mark of November 24, 2003. In response to the requestor's assertion, you wrote a letter to this office stating that the notice to the requestor "was mailed on November 21, 2003, the tenth business day following the receipt of his request." We find that the letter from the department does not constitute satisfactory proof that the department deposited its notice to the requestor in the mail on November 21, 2003. We therefore find that the department failed to comply with the requirements of section 552.301(d) with respect to the submitted information.

As noted above, when a governmental body fails to comply with the procedural requirements of section 552.301, the information at issue is presumed public and must be released unless there is a compelling reason to withhold it. You claim that the submitted information is excepted from disclosure under section 552.108 of the Government Code. This section is a discretionary exception that protects a governmental body's interests and may be waived. As such, it does not generally constitute a compelling reason to withhold information. *See* Open Records Decision No. 177 (1977) (governmental body may waive statutory predecessor to section 552.108); *see also* Open Records Decision No. 522 (1989) (discretionary exceptions in general). Under the present circumstances, the department's claim that the submitted information is excepted from disclosure under section 552.108 does not constitute a compelling reason to withhold the submitted information, and it may not be withheld on that basis. *But see* Open Records Decision No. 586 at 3 (1991) (need of another governmental body to withhold information under predecessor to section 552.108 provided compelling reason to withhold information)

We note, however, that the submitted information includes Texas-issued motor vehicle record information. Section 552.130 of the Government Code excepts from disclosure

“information [that] relates to . . . a motor vehicle operator’s or driver’s license or permit issued by an agency of this state [or] a motor vehicle title or registration issued by an agency of this state.” Pursuant to section 552.130, the department must withhold the information we have marked.

In summary, in accordance with section 552.302, the department must release responsive department personnel files and names, addresses, and telephone numbers of 911 callers, to the extent that they exist. The policy and training information must also be released unless that precise information is subject to a previous ruling from this office or is otherwise the subject of a previous determination by this office. Pursuant to section 552.130, the department must redact the Texas-issued motor vehicle record information we have marked in the submitted records. The remaining submitted 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).

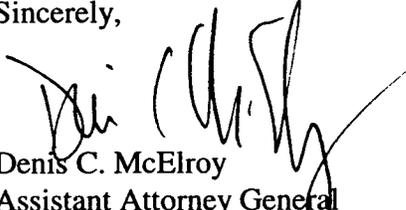
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental

body. *Id.* § 552.321(a); *Texas 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,



Denis C. McElroy
Assistant Attorney General
Open Records Division

DCM/lmt

Ref: ID# 195521

Enc. Submitted documents

c: Mr. David Kallus
P.O. Box 130751
The Woodlands, Texas 77393
(w/o enclosures)