



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 20, 2004

Ms. April M. Virnig
Taylor Olson Adkins Sralla Elam
6000 Western Place, Suite 200
Fort Worth, Texas 76107-4654

OR2004-4141

Dear Ms. Virnig:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 201926.

The City of Kennedale (the "city"), which you represent, received a request for several categories of information pertaining to city employees. You inform us the city does not maintain information responsive to several categories of the request. *See Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986) (governmental body not required to disclose information that did not exist at time request was received). In addition, you state that the city will release a requested report pertaining to the city's fire department in accordance with Open Records Letter No. 2002-3520 (2002). You claim that other requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.108, 552.111, 552.117, 552.130, and 552.136 of the Government Code. We have considered the exceptions 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 note that the records submitted at Tab 1 include information that is subject to section 552.022 of the Government Code. This section provides that "the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law: . . . (3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other

funds by a governmental body[.]” Gov’t Code § 552.022(a)(3). The submitted information includes a contract relating to expenditure of public funds, which is subject to section 552.022 and may only be withheld if confidential under other law. You claim that this document is excepted from disclosure under sections 552.103 and 552.108 of the Government Code. However, these sections constitute discretionary exceptions, which are intended to protect the interests of a governmental body, as distinct from exceptions that are intended to protect information deemed confidential by law or the interests of third parties. *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. 586 (1991) (governmental body may waive law enforcement exception), 522 at 4 (1989) (discretionary exceptions in general). Therefore these exceptions do not constitute other law that makes information confidential for purposes of section 552.022. Because you claim no other exceptions to disclosure for this document and it is not otherwise confidential by law, you must release this contract, which we have marked.

We turn now to your arguments regarding the remaining submitted information. Section 552.108(a)(1) excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime.” Gov’t Code § 552.108(a)(1). A governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See Gov’t Code §§ 552.108(a)(1), .301(e)(1)(A); see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977).

You inform us that the Federal Bureau of Investigation (the “FBI”) is currently conducting a criminal investigation involving present and former city employees and their activities while employed by the city. You have submitted a letter from an FBI agent who objects to release of the remaining requested information because it “relates to our ongoing investigation.”¹ Based on these representations and our review of the information at issue, we conclude that section 552.108(a)(1) is applicable to the remaining submitted information, and it may be withheld on this basis. *See 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. 372 (1983) (where incident involving allegedly criminal conduct is still under active investigation or prosecution, law enforcement exception may be invoked by any proper custodian of information which relates to incident).

¹The city informs us that the city’s fire department, which is the subject of a report the city is releasing, is not included in the FBI’s investigation.

In summary, the marked contract must be released pursuant to section 552.022. The remaining submitted information may be withheld under section 552.108. As our ruling on these issues is dispositive, we need not address your remaining 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).

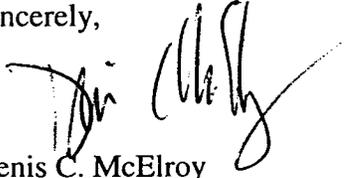
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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/krl

Ref: ID# 201926

Enc. Submitted documents

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