



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

February 7, 2005

Mr. Ernesto Rodriguez  
Assistant City Attorney  
City of El Paso  
2 Civic Center Plaza, 9<sup>th</sup> Floor  
El Paso, Texas 79901

OR2005-01088

Dear Mr. Rodriguez:

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# 217566.

The El Paso Police Department (the "department") received a request for information relating to a specific incident, including the police report, the audio recording of a 911 call, the computer-assisted dispatch ("CAD") report, and photographs of the complainant. You inform us that the department has released some of the requested information. You claim that the remaining information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and have reviewed the information you submitted.

We first note that the department has not fully complied with section 552.301 of the Government Code in requesting this decision. Section 552.301 prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(b) requires the governmental body to ask for the attorney general's decision and state the exceptions to disclosure that it claims not later than the tenth business day after the date of its receipt of the written request for information. *See* Gov't Code § 552.301(b). Section 552.301(e) requires the governmental body to submit to the attorney general, not later than the fifteenth business day after the date of its receipt of the request, (1) written comments stating why the governmental body's claimed exceptions apply to the information that it seeks to withhold; (2) a copy of the request for information; (3) a signed statement of the date on which the governmental body received the request, or evidence sufficient to establish that date; and

(4) the specific information that the governmental body seeks to withhold or representative samples of the information if it is voluminous. *See id.* § 552.301(e)(1)(A)-(D). Section 552.302 provides that if a governmental body does not request an attorney general decision as prescribed by section 552.301, the requested information is presumed to be subject to required public disclosure and must be released, unless there is a compelling reason to withhold the information. *See id.* § 552.302.

In this instance, you failed to submit the requested photographs within the fifteen-business-day period prescribed by section 552.301(e)(1)(D). Therefore, the photographs are presumed to be public under section 552.302 and must be released, unless there is a compelling reason to withhold any of the information. *See also Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ). The presumption that information is public under section 552.302 can generally be overcome by a demonstration that the information is confidential by law or that third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). Although we understand the department to claim that the submitted photographs are excepted from disclosure under section 552.108, this section is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See* Gov't Code § 552.007; Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 177 at 3 (1977) (statutory predecessor to Gov't Code § 552.108 subject to waiver). The department's claim under section 552.108 is not a compelling reason for non-disclosure under section 552.302. *See* Open Records Decision No. 586 at 2-3 (1991). In failing to comply with section 552.301, the department has waived its claim with respect to the submitted photographs under section 552.108. *See* Open Records Decision No. 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions).

However, the claim under section 552.108 of a governmental body other than the one that failed to comply with section 552.301 can provide a compelling reason for non-disclosure under section 552.302. *See* Open Records Decision No. 586 at 3 (1991) (interests of another law enforcement agency under statutory predecessor to Gov't Code § 552.108 overcame failure of governmental body that received request for information to timely seek attorney general decision). In this instance, you inform us that the District Attorney for the 34<sup>th</sup> Judicial District (the "district attorney") asserts a prosecutorial interest in the photographs. Therefore, we will consider whether the department may withhold the photographs on behalf of the district attorney under section 552.108. We also will consider your claim under this exception with regard to the remaining information that the department seeks to withhold under section 552.108.

Section 552.108 excepts from 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 claims an exception to disclosure under section 552.108 must reasonably explain how and why this exception is applicable to the information that the governmental body seeks to withhold. *See*

*id.* § 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 state that the documents submitted as Exhibit B relate to a pending criminal investigation and potential prosecution. You also have submitted a letter in which the district attorney's office states that the case in question has been accepted for prosecution, that the defendant has been indicted, and that the case remains pending for trial. The district attorney also asserts that public disclosure of the photographs would interfere with the prosecution of the case. Based on your representations and those of the district attorney, we find that section 552.108(a)(1) is applicable to Exhibit B and to the photographs. *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).

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 information held to be public in *Houston Chronicle*. The department must release basic information, including a detailed description of the offense, even if this information does not literally appear on the front page of an offense or arrest 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 withhold the rest of the information in Exhibit B and the photographs under section 552.108(a)(1).

Next, we note that Exhibit B includes an arrested person's social security number. Although the arrestee's social security number is basic information under section 552.108(c), it may be excepted from disclosure under section 552.101 of the Government Code in conjunction with federal law.<sup>1</sup> A social security number is confidential under section 552.101 in conjunction with 1990 amendments to the Social Security Act if it was obtained or is maintained by a governmental body under any provision of law enacted on or after October 1, 1990. *See* 42 U.S.C. § 405(c)(2)(C)(viii)(I); Open Records Decision No. 622 at 2-4 (1994). It is not apparent to this office that the social security number in question here is confidential under section 405(c)(2)(C)(viii)(I) of the federal law. You have cited no law, and we are aware of no law, enacted on or after October 1, 1990 that requires or authorizes the department to obtain or maintain a social security number. Thus, we have no basis for concluding that this social security number was obtained or is maintained under such a law and is therefore confidential under the federal law. We caution you, however, that the Act imposes criminal penalties for the release of confidential information. *See* Gov't Code §§ 552.007, .352. Therefore, before releasing this social security number, the department should ensure that it was not obtained and is not maintained by the department under any provision of law enacted on or after October 1, 1990.

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<sup>1</sup>Section 552.101 excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information that other statutes make confidential.

Lastly, we address the information that you seek to withhold under section 552.101 in conjunction with section 772.318 of the Health and Safety Code. Chapter 772 of the Health and Safety Code authorizes the development of local emergency communications districts. Sections 772.118, 772.218, and 772.318 of the Health and Safety Code apply only to an emergency 911 district established in accordance with chapter 772. *See* Open Records Decision No. 649 (1996). These sections make the originating telephone numbers and addresses of 911 callers that are furnished by a service supplier confidential. *Id.* at 2. Section 772.118 applies to an emergency communication district for a county with a population of more than two million. Section 772.218 applies to an emergency communication district for a county with a population of more than 860,000. Section 772.318 applies to an emergency communication district for a county with a population of more than 20,000.

We understand that the City of El Paso is part of an emergency communication district established under section 772.318. We note that the submitted CAD report contains the address and telephone number of a 911 caller. The department must withhold the address and telephone number of the 911 caller that appear in the CAD report under section 552.101 of the Government Code in conjunction with section 772.318 of the Health & Safety Code. Although the department also seeks to withhold information contained in the submitted audiotape under section 772.318, we note that the information in the audiotape was obtained from a 911 caller, rather than from a 911 service supplier, and thus is not confidential under the statute. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). Therefore, the department may not withhold information contained in the audiotape under section 552.101 of the Government Code in conjunction with section 772.318 of the Health and Safety Code.

In summary: (1) except for the basic information that must be released under section 552.108(c), the department may withhold Exhibit B and the related photographs under section 552.108(a)(1); (2) the department may be required to withhold the arrested person's social security number in Exhibit B under section 552.101 in conjunction with section 405(c)(2)(C)(viii)(I) of title 42 of the United States Code; and (3) the department must withhold the address and telephone number of the 911 caller that appear in the CAD report under section 552.101 of the Government Code in conjunction with section 772.318 of the Health and Safety Code. The rest of the 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).

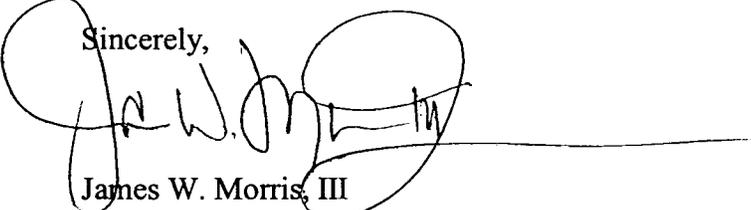
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following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



James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/sdk

Ref: ID# 217566

Enc: Submitted documents

c: Ms. Sandra L. Rivera  
Paralegal  
Gina Palafox Law Office  
4157 Rio Bravo  
El Paso, Texas 79902  
(w/o enclosures)

Ms. Melissa Winblood  
Assistant District Attorney  
34<sup>th</sup> Judicial District  
500 East San Antonio Street, 2<sup>nd</sup> Floor  
El Paso, Texas 79901-2420  
(w/o enclosures)