



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 4, 2005

Mr. Craig A. McNeil
Assistant District Attorney
Johnson and Somervell Counties
204 South Buffalo, Suite 209
Cleburne, Texas 76033

OR2005-09016

Dear Mr. McNeil:

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# 232555.

The STOP Task Force (the "task force") received a request for nine categories of information pertaining to task force case logs, agents, and confidential informants, excluding the names and identifying information of any current informants. You state that the task force does not possess some of the requested information.¹ You claim that the remaining requested information is excepted from disclosure under sections 552.102 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.²

¹The Act does not require a governmental body to disclose information that did not exist at the time the request was received, nor does it require a governmental body to prepare new information in response to a request. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Attorney General Opinion H-90 (1973); Open Records Decision Nos. 452 at 2-3 (1986), 342 at 3 (1982), 87 (1975); *see also* Open Records Decision Nos. 572 at 1 (1990), 555 at 1-2 (1990), 416 at 5 (1984).

²We assume that the "representative 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.

Initially, we note that the submitted documents include information that is specifically excluded by the precise language of the request. The requestor has excluded the names and identifying information of current confidential informants. Accordingly, any of this information within the requested documents is not responsive to the present request. This ruling does not address the public availability of any information that is not responsive to the present request, and the task force need not release that information in response to this request.

You state that the task force does not object to the release of the requested annual or quarterly progress reports, “however, [the task force] is not the proponent agency or the custodial agency of this document.” Thus, we understand you to assert that the progress report is not subject to the Act. The Act is applicable to “public information.” *See* Gov’t Code § 552.021. “Public information” is defined as information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

- (1) by a governmental body; or
- (2) for a governmental body and the governmental body owns the information or has a right of access to it.

Gov’t Code § 552.002(a). Thus, virtually all information in the physical possession of a governmental body is public information that is encompassed by the Act. *Id.* § 552.022(a)(1); *see also* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). Likewise, the Act is applicable to information that a governmental body does not physically possess, if the information is collected, assembled, or maintained for a governmental body, and the governmental body owns the information or has a right of access to it. Gov’t Code § 552.002(a)(2); *see also* Open Records Decision No. 462 at 4 (1987) (Act applies to information collected or maintained by consultant if information relates to governmental body’s official duties or business, consultant acts as agent of governmental body in collecting information, and governmental body has or is entitled to access to information). However, the Act does not require a governmental body to release information if the governmental body that receives the request has neither possession of the information nor a right of access to it. *See* Open Records Decision Nos. 534 at 2-3 (1989), 518 at 2-3 (1989).

Having considered your assertion and reviewed the progress report at issue, we conclude that the submitted progress report constitutes “public information” of the task force. *See* ORD 534 at 2-3, 518 at 2-3. Consequently, the task force may only withhold this information from public disclosure if it is subject to an exception under chapter 552 of the Government Code.

Next, we note that portions of the submitted information are subject to section 552.022 of the Government Code, which provides in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, 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 vouchers and receipts relating to the expenditure of public funds by the task force. Accordingly, the task force must release this information unless it is confidential under other law. Although you argue that this information is excepted from disclosure under section 552.108 of the Government Code, this section is discretionary and, therefore, does not constitute "other law" for purposes of section 552.022. *See* Open Records Decision No. 177 (1977) (governmental body may waive statutory predecessor to section 552.108); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Thus, the task force may not withhold the information subject to section 552.022(a)(3) under section 552.108 of the Government Code.

We next note that the portions of the submitted information are subject to the Medical Practice Act (the "MPA"), Occ. Code §§ 151.001-165.160. Section 159.002 of the Occupations Code provides in part:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(b), (c). Medical records must be released upon the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. *Id.* §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). We

have marked the submitted information that constitutes medical records that may only be released in accordance with the MPA.

You claim that the submitted information is excepted from disclosure under section 552.108 of the Government Code. 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* Gov't Code § 552.301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986). Section 552.108(b)(1) excepts from disclosure “[a]n internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution . . . if: (1) release of the internal record or notation would interfere with law enforcement or prosecution.” Gov't Code § 552.108(b)(1). This section is intended to protect “information which, if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate the laws of this State.” *City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.). This office has concluded that this provision protects certain kinds of information, the disclosure of which might compromise the security or operations of a law enforcement agency. *See, e.g.*, Open Records Decision Nos. 531 (1989) (detailed guidelines regarding police department's use of force policy), 508 (1988) (information relating to future transfers of prisoners), 413 (1984) (sketch showing security measures for forthcoming execution), 211 (1978) (information relating to undercover narcotics investigations), 143 (1977) (log revealing use of electronic eavesdropping equipment).

The task force claims that portions of the submitted information are excepted from disclosure under section 552.108(b)(1). You state that the task force officers depicted in the submitted information “are currently engaged in active undercover operations[.]” You further state that release of the task force undercover officers' identities would “jeopardize the operations and endanger the lives of Texas peace officers.” You also state that “use of any portion of the information contained in the active and ‘retired’[confidential informant] files will likely jeopardize current law enforcement and prosecutorial efforts.” Based on your representations, we conclude that the portions of the submitted information that identify task force undercover officers and the identifying information of past confidential informants may be withheld under section 552.108(b)(1). As for the remaining information, we find you have failed to explain how its release “would interfere with law enforcement or prosecution.” Therefore, none of the remaining information may be withheld under section 552.108(b)(1).³

Next, we address the task force's section 552.108(b)(3) claim for the remaining information. The task force asserts the information is excepted from disclosure under section 552.108(b)(3) because “the presumed ultimate user of all information sought are the

³We do not address the task force's claim under section 552.102 because the privacy interest of task force officers is sufficiently protected by the redaction of identifying information under section 552.108(b)(1).

respective district and county attorneys[.]” Section 552.108(b)(3) excepts from public disclosure a law enforcement agency’s internal record that is prepared by a prosecutor in anticipation of criminal litigation or that reflects the mental impressions or legal reasoning of a prosecutor. Gov’t Code § 552.108(b)(3). However, the task force does not inform us that the submitted information was prepared by a prosecutor in anticipation of criminal litigation or that it reflects the mental impressions or legal reasoning of a prosecutor. Because the task force failed to demonstrate the applicability of section 552.108(b)(3), the task force may not withhold the information under this provision.

In summary, the information we have marked must be released only in accordance with the MPA. The identifying information of officers working undercover and confidential informants is excepted from disclosure under section 552.108(b)(1) of the Government Code. The remaining responsive information must be released to the requestor.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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. 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,



L. Joseph James
Assistant Attorney General
Open Records Division

LJJ/seg

Ref: ID# 232555

Enc. Submitted documents

c: Mr. Scott Henson
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(w/o enclosures)