ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 6, 2005

Ms. Alison Holland
Olson & Olson L.L.P.
2727 Allen Parkway, Suite 600
Houston, Texas 77019

OR2005-09095

Dear Ms. Holland:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 234076.

The City of Tomball (the "city"), which you represent, received a request for information regarding the rental and use of the Tomball Community Center. The city claims the requested information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.108, 552.111, 552.117, 552.1175, and 552.119 of the Government Code. We have considered the city's claimed exceptions to disclosure and have reviewed the submitted information. We have also considered the requestor's comments, which clarifies that the requestor does not seek the peace officers' personal telephone numbers. *See* Gov't Code § 552.304 (person may submit comments regarding why information should or should not be released). Thus, the submitted personal telephone numbers are not responsive to the request, and the city need not produce them.

Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply not later than the tenth business day after the date of receiving the written request. The city received the request for information on July 28, 2005. However, the city did not assert section 552.103 until August 17, 2005, which is beyond the tenth business day. Further, pursuant to section 552.301(e)(1), the city is required to submit to this office within fifteen business days of receiving an open records request written comments stating the reasons why the stated exceptions apply. To date, the city has not submitted its arguments explaining the applicability of sections 552.101, 552.102, 552.111, and 552.119. Consequently, the city failed to comply with section 552.301 of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 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 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 Gov't Code § 552.302); Open Records Decision No. 319 (1982). This office has held that a compelling reason exists to withhold information when the information is confidential by another source of law. *See* Open Records Decision No. 150 (1977) (presumption of openness overcome by a showing that the information is made confidential by another source of law or affects third party interests). Because sections 552.103 and 552.111 are discretionary exceptions that may be waived by the city, the city may not withhold the information under sections 552.103 and 552.111. Open Records Decision No. 473 (1987) (sections 552.103 and 552.111 are discretionary exceptions that may be waived). In addition, because the city has not shown the applicability of sections 552.101, 552.102, and 552.119, the city may not withhold the information under these exceptions.

Next, the city asserts section 552.108(b)(1) excepts Exhibits C - E from public disclosure. Section 552.108(b)(1) provides:

> (b) An 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 is excepted from [required public disclosure] if:
>
> > (1) release of the internal record or notation would interfere with law enforcement or prosecution[.]

Gov't Code § 552.108(b)(1). Generally, a governmental body claiming section 552.108(b)(1) must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See* Gov't Code §§ 552.108(b)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). The statutory predecessor to section 552.108(b)(1) protected information that would reveal law enforcement techniques. *See, e.g.*, Open Records Decision Nos. 531 (1989) (release of detailed use of force guidelines would interfere with law enforcement), 456 (1987) (release in advance of information regarding location of off-duty police officers would interfere with law enforcement), 252 (1980) (statutory predecessor was designed to protect investigative techniques and procedures used in law enforcement), 143 (1976) (disclosure of specific operations or specialized equipment directly related to investigation or detection of crime may be excepted).

The city explains the deployment plan used for the June 11, 2005 event would also be used "if the same situation were to arise in the future." The city further argues that

> release of these documents could be used to determine, predict, and to exploit weaknesses in the screen of protection provided by the police department for similar future events. This would allow individuals to determine how to best time criminal activity so as to avoid confrontation with police officers and to evade capture and arrest, and how best to impair the police department's ability to protect the city through its police officer deployment plan. . . . Additionally, knowledge of the names of officers operating in an undercover capacity would jeopardize investigations generally and would put the safety of those officers at risk.

Based on these representations, we conclude that the identities of the undercover officers found in Exhibits C and E may be withheld pursuant to section 552.108(b)(1). *See* Open Records Decision Nos. 456 at 2 (1987) (statutory predecessor to section 552.108 protected information that, if revealed, might endanger life or physical safety of law enforcement personnel), 211 at 4 (1978) (statutory predecessor protected identities of members of Attorney General's Organized Crime Task Force engaged in undercover narcotics work). Moreover, the city may withhold the portions of the deployment plan we have marked in Exhibit C and all of Exhibit D under section 552.108(b)(1).

Lastly, we note Exhibit B contains a private e-mail address. Section 552.137 of the Government Code provides:

> (a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
>
> (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code §552.137. You do not inform us that a member of the public has affirmatively consented to the release of the e-mail address. The city must, therefore, withhold the e-mail address we have marked in Exhibit B under section 552.137.

In summary, the city must withhold the private e-mail address we have marked under section 552.137. The city may withhold the information we have marked and the names of undercover officers under section 552.108(b)(1). The city must release the remaining information.

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).

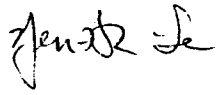
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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); *Tex. 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,



Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/sdk

Ref: ID# 234076

Enc: Marked documents

c: Ms. Jean Kosela
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(w/o enclosures)