



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 11, 2007

Ms. Jacqueline Cullom Murphy  
Assistant Criminal District Attorney  
Bexar County District Attorney's Office  
300 Dolorosa, Suite 4049  
San Antonio, Texas 78205-3030

OR2007-11875

Dear Ms. Murphy:

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# 288729.

The Bexar County Fire Marshal's Office (the "fire marshal") received a request for sixteen categories of information pertaining to a specified fire. You claim that some of the submitted information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we must address the fire marshal's obligations under section 552.301 of the Government Code. 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. *See Gov't Code* § 552.301(b). In this instance, you state that the fire marshal received the instant request on June 18, 2007. However, the fire marshal did not request a decision from this office until July 3, 2007. *See id.* § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Consequently, we find that the fire marshal failed to comply with the requirements of section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ); Open Records Decision No. 319 (1982). A compelling reason exists when

third-party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977). Section 552.108 of the Government Code is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See* Open Records Decisions No. 177 at 3 (1977) (statutory predecessor to section 552.108 subject to waiver); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Thus, the fire marshal may not withhold any of the submitted information under section 552.108 of the Government Code. However, section 552.101 of the Government Code can provide a compelling reason to overcome this presumption; therefore, we will consider the fire marshal's claim under this exception.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes, such as chapter 352 of the Local Government Code. Subchapter B of chapter 352 pertains to the powers and duties of county fire marshals. The subchapter provides that the marshal shall investigate the cause, origin, and circumstances of fires that destroy property within the marshal's jurisdiction. Local Gov't Code § 352.013. In certain cases, such as where arson is suspected, the marshal may determine that further investigation is necessary and, in such cases, is granted subpoena powers and the authority to administer oaths and gather and preserve evidence. *Id.* § 352.015.

We understand you to claim that the submitted information is made confidential under section 352.017 of the Local Government Code. Section 352.017, in relevant part, provides:

- (a) In a proceeding under this subchapter, the county fire marshal may:
  - (1) conduct an investigation or examination in private;
  - (2) exclude a person who is not under examination; and
  - (3) separate witnesses from each other until each witness is examined.

*Id.* § 352.017(a). You argue, relying on *Ex parte Pruitt*, 551 S. W.2d 706 (Tex. 1977), that subchapter B of chapter 352 makes the information in Exhibits C, D, E, and F confidential. In *Pruitt*, the Texas Supreme Court interpreted the statutory predecessor to subchapter B of Chapter 352 of the Local Government Code. The court held that the legislature's intent was "to allow public access to [certain basic information, but not] to allow access to *active* investigatory records of the county fire marshal." 551 S.W.2d at 710 (emphasis added). The court further concluded that the purpose of the statute was to preclude interference with the fire marshal's law enforcement duties. *Id.* You state that the fire marshal will release Exhibit B, which includes a document entitled "Bexar County Fire Marshal Alarm and Fire Record for Structure Fires" in accordance with the court's ruling in *Pruitt*. You further state

that the fire marshal's arson investigation is ongoing and that release of Exhibits C, D, E and F would interfere with the investigation.<sup>1</sup> Accordingly, based upon your arguments and our review of the information at issue, we conclude that Exhibits C, D, E and F must be withheld under section 552.101 of the Government Code in conjunction with section 352.017 of the Local Government Code and the holding in *Pruitt*.

We note that portions of Exhibit B appear to be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, Exhibits C, D, E and F must be withheld under section 552.101 of the Government Code in conjunction with section 352.017 of the Local Government Code and the holding in *Pruitt*. Exhibit B must be released, but any information protected by copyright must be released in accordance with copyright law.

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

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<sup>1</sup>You state that Exhibit C consists of the names and statements of witnesses, Exhibit D consists of handwritten notes compiled by the fire marshal investigator, Exhibit E consists of the fire marshal investigator's reports, and Exhibit F consists of other evidentiary information relating to the fire.

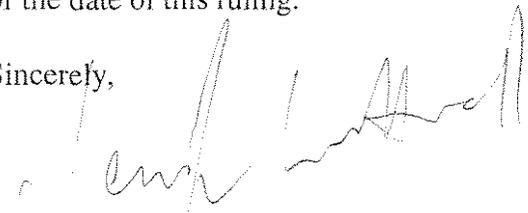
Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor 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,



Jennifer Luttrall  
Assistant Attorney General  
Open Records Division

JL/eeg

Ref: ID# 288729

Enc. Submitted documents

c: Mr. Tom Reed  
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(w/o enclosures)