



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 22, 2008

Mr. David Hamilton  
City of Reno  
3430 Farm Road 195  
Paris, Texas 75462-3058

OR2008-11600

Dear Mr. Hamilton:

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# 320635.

The City of Reno (the "city"), which you represent, received a request for information pertaining to specified audio recordings. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.108, and 552.109 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.<sup>1</sup>

Initially, you question whether the Act is implicated here because the requestor made her request for information under the Freedom of Information Act, which is a federal law that governs the release of information held by federal governmental bodies. *See* 5 U.S.C. § 552 (Freedom of Information Act). The Act is implicated whenever a requestor submits to a Texas governmental body a request for inspection or copies of public information. *See* Gov't Code § 552.003(6) (defining "requestor"), § 552.301(a) (after receiving "a written request for information," a governmental body must ask for a decision from the attorney general if

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<sup>1</sup>We 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.

it wishes to withhold that information). The Act only requires the request be made in writing. *See id.* § 552.301(c). Whether the requestor asserts a right to inspect public information under the Freedom of Information Act or other, similar laws does not affect the rights and duties of a governmental body to release or withhold public information under the Act. The requestor here made a written request to the city to inspect public information; therefore, whether the city can withhold that information from release is determined by the Act.

Next, we understand you to claim that the requested recordings are 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.

*Id.* § 552.002(a). Information is generally subject to the Act when it is held by a governmental body, and it relates to the official business of a governmental body or is used by a public official or employee in the performance of official duties. *See Open Records Decision No. 635 (1995)*. Virtually all information that is in a governmental body's physical possession constitutes public information. *Id.* § 552.002(a)(1); *see also Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988)*. In this instance, you do not present any arguments that the requested information is not public information. Further, we determine that the information at issue is collected or maintained in connection with the transaction of official business of the city, and thus, is public information as defined by section 552.002. *Gov't Code* § 552.002(a). Therefore, the requested recordings are subject to the Act and may only be withheld if they are excepted from disclosure under the Act.

We next note that the purpose of the Act is to prescribe conditions under which members of the general public can obtain information from a governmental body. *See Attorney General Opinion JM-119 (1983)* (statutory predecessor). An official of a governmental body who, in an official capacity, requests information held by the governmental body does not act as a member of the public in doing so. Thus, exceptions to public disclosure under the Act do not control the right of access of an official of a governmental body to information maintained by the governmental body. *See id.* at 3 (member of community college district board of trustees, acting in official capacity, has an inherent right of access to information maintained by district). The release of this information in such an instance does not constitute a release to the general public and, as such, the city waives none of the possible exceptions to the disclosure of this information. *See Open Records Decision No. 666 at 4*

(2000) (municipality's disclosure to a municipally-appointed citizen advisory board does not constitute a release to the public as contemplated under section 552.007 of the Government Code). Because such a release of this information to a city employee acting in her official capacity is not a release to the public, the requestor must be cautious in maintaining the documents in the same manner as they are maintained by the department. *See generally* Gov't Code § 552.352 (criminal penalties imposed for release of confidential information). Therefore, we determine that to the extent the requestor is seeking the requested information in her official capacity, then she has an inherent right of access to it and it must be provided to her. To the extent the requestor is not seeking this information in her official capacity, then we will consider your arguments against disclosure.

We now must address the city's procedural obligations under the Act. Section 552.301 of the Government Code describes the procedural obligations placed on a governmental body that receives a written request for information that it wishes to withhold. Pursuant to section 552.301(e), within fifteen business days of receiving the request, the governmental body must submit to this office (1) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *Id.* § 552.301(e)(1)(A)-(D). The submitted request indicates that the city received the request by facsimile on June 11, 2008. However, you did not submit a representative sample of the requested information for our review until July 24, 2008. Thus, the city failed to comply with the procedural requirements mandated by section 552.301.

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) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). The presumption that information is public under section 552.302 can be overcome by demonstrating that the information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). Sections 552.103 and 552.108 of the Government Code are discretionary in nature; they serve only to protect a governmental body's interests and may be waived. *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. 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions), 177 (1977) (statutory predecessor to section 552.108 subject to waiver); *see also* Open Records Decision No. 522 (1989) (discretionary exceptions in general). However, the need of a governmental body, other than

the body that has failed to timely comply with the Act's procedures, may, in appropriate circumstances, be a compelling reason for non-disclosure. *See* Open Records Decision No. 586 (1991). In correspondence to this office, the Criminal Prosecutions Division of the Office of the Attorney General (the "CPD") raises section 552.108 on behalf of the Criminal Investigation Division of the Office of the Attorney General (the "CID") and informs us that it objects to the release of the requested information. Sections 552.101 and 552.109 of the Government Code also can provide compelling reasons to overcome this presumption. Therefore, we will consider whether the submitted information is excepted under sections 552.101, 552.108, or 552.109 of the Government Code.

Section 552.108(a)(1) of the Government Code excepts from 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." 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), (b)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). Section 552.108 may be invoked by the proper custodian of information relating to an investigation or prosecution of criminal conduct. *See* Open Records Decision No. 474 at 4-5 (1987). Where a governmental body possesses information relating to a pending case of a law enforcement agency, the governmental body may withhold the information under section 552.108 if (1) it demonstrates that the information relates to the pending case and (2) this office is provided with a representation from the law enforcement entity that the law enforcement entity wishes to withhold the information. The CPD asserts that release of the information at issue could interfere with an ongoing criminal investigation that the CID is conducting. Based on this representation, we conclude that the release of the submitted information would interfere with the detection, investigation, or prosecution of crime. *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., 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases). Therefore, the city may withhold the requested information under section 552.108(a)(1).<sup>2</sup>

You assert that sections 552.023 and 552.229 of the Government Code apply in the present situation. Under section 552.023, a person has a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect the person's privacy interests. Gov't Code § 552.023(a). Pursuant to section 552.229, consent for a governmental body to release information excepted from disclosure to the general public but available to a specific person under section 552.023 must be in writing and signed by the specific person. *See id.* § 552.229(a). In this instance the requested information is excepted from disclosure

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<sup>2</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure.

under section 552.108, which protects law enforcement interests rather than privacy rights. A requestor does not have a right of access under section 552.023 to information that is protected from public disclosure by a law that is not based exclusively on the requestor's privacy interests. *See, e.g.,* Open Records Decision Nos. 603 at 2-3 (1992) (no section 552.023 right of access to information encompassed by Health & Safety Code § 142.009, which protects integrity of investigatory process as well as individual's privacy interests), 587 at 3-4 (1990) (no right of access to information protected by former Fam. Code § 34.08, which protected law enforcement interests). Therefore, the requestor does not have a special right of access under section 552.023 to the requested 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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3). If the governmental body does not file suit over 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 challenge 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,



Paige Savoie  
Assistant Attorney General  
Open Records Division

PS/ma

Ref: ID# 320635

Enc. Submitted documents

c: Ms. Ruth Ashmore  
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(w/o enclosures)