ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 31, 2008

Ms. Evelyn Njuguna
Assistant City Attorney
City of Houston
Legal Department
P.O. Box 368
Houston, Texas 77001-0368

OR2008-17669

Dear Ms. Njuguna:

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# 331136.

The Houston Police Department (the "department") received a request for fifteen categories of information pertaining to the citizens' review committee, reports of use of force and officer involved shooting incidents, and specified policy and procedure documents. You state the department will provide some of the requested information to the requestor. You claim the submitted incident reports, review committee documents, and policy and procedure documents are excepted from disclosure under sections 552.101, 552.108, 552.117, 552.130, 552.137, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.[1]

Initially, we note that a portion of the submitted information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2005-06940 (2005). In that decision, we ruled that the department may withhold portions of its standard operating procedures regarding crime scene investigations conducted by the homicide division under section 552.108(b)(1) of the Government Code. As we have

[1] We assume 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 those records contain substantially different types of information than that submitted to this office.

by the homicide division under section 552.108(b)(1) of the Government Code. As we have no indication that the law, facts, or circumstances on which the prior ruling was based have changed, the department must continue to rely on that ruling as a previous determination and withhold or release the information contained in its standard operating procedures regarding crime scene investigations conducted by the homicide division in accordance with the prior ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

Next, we must address the department's obligations under the Act. Pursuant to section 552.301(b) of the Government Code, the governmental body must state the exceptions to disclosure that apply within ten business days after receiving the request. *See* Gov't Code § 552.301(b). Although you raised sections 552.101, 552.108, 552.117, and 552.130 of the Government Code by the appropriate deadline, you did not claim an exception under section 552.137 of the Government Code until after the ten-business-day deadline. Thus, we find the department failed to comply with the requirements of section 552.301 with respect to its claim under section 552.137.

Generally, a governmental body's failure to comply with section 552.301 results in the waiver of its claim under the exception at issue, unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *Cf. 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). Generally, a compelling reason exists when third party interests are at stake or when information is confidential under other law. Open Records Decision No. 177 (1977). Because section 552.137 is a mandatory exception to disclosure, we will consider the applicability of this exception, along with your timely submitted claims under sections 552.101, 552.108, 552.117, 552.130, and 552.147, to the remaining submitted information.

Section 552.108(b)(1) excepts from disclosure the internal records and notations of law enforcement agencies and prosecutors when their release would interfere with law enforcement and crime prevention. Gov't Code § 552.108(b)(1); *see also* Open Records Decision No. 531 at 2 (1989) (quoting *Ex parte Pruitt*, 551 S.W.2d 706, 710 (Tex. 1977)). Section 552.108(b)(1) 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." *See City of Ft. Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no writ). To demonstrate the applicability of this exception, a governmental body must meet its burden of explaining how and why release of the requested information would interfere with law enforcement and crime prevention. Open Records Decision No. 562 at 10 (1990). This

office has concluded section 552.108(b) excepts from public disclosure information relating to the security or operation of a law enforcement agency. *See, e.g.*, Open Records Decision Nos. 531 (release of detailed use of force guidelines would unduly interfere with law enforcement), 252 (1980) (Gov't Code § 552.108 is 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). Section 552.108(b)(1) is not applicable, however, to generally known policies and procedures. *See, e.g.*, Open Records Decision Nos. 531 at 2-3 (Penal Code provisions, common law rules, and constitutional limitations on use of force not protected), 252 at 3 (governmental body failed to indicate why investigative procedures and techniques requested were any different from those commonly known).

The department seeks to withhold the policies and procedures regarding officer-involved shooting investigations submitted as Exhibit 5. You have provided an affidavit from a department homicide division supervisor who argues disclosure of the submitted policies and procedures would provide aid and support to suspects, allowing "them to plan and carry out criminal activity, avoid detection, and hinder law enforcement investigative efforts." The supervisor further contends releasing the information in Exhibit 5 "would negatively affect the homicide division's ability to investigate, interdict[,] and prosecute crimes[,] and may endanger the safety of officers involved in the investigations." Based on these arguments and our review, we agree portions of Exhibit 5, which we have marked, are protected by section 552.108(b)(1) and may be withheld on that basis. However, we find you have failed to establish how public access to the remaining information in Exhibit 5 would interfere with law enforcement or endanger police officers. Accordingly, the department may not withhold the remaining information in Exhibit 5 under section 552.108(b)(1) of the Government Code. As you have claimed no other exceptions to disclosure for this information, it must be released.

Section 552.108(a)(2) 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 it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication[.]" *Id.* § 552.108(a)(2). Section 552.108(a)(2) is applicable only if the information at issue relates to a concluded criminal case that did not result in a conviction or a deferred adjudication. 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 the governmental body seeks to withhold. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You assert the submitted incident reports in Exhibits 3 and 4 pertain to criminal investigations that did not result in convictions or deferred adjudication. Therefore, we agree section 552.108(a)(2) is applicable to these reports.

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). Basic information refers to the information

held to be public in *Houston Chronicle Publishing 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). *See* Open Records Decision No. 127 (1976) (summarizing types of information made public by *Houston Chronicle*). Thus, with the exception of basic information, which includes a detailed description of the offense, the department may withhold the submitted incident reports in Exhibits 3 and 4 pursuant to section 552.108(a)(2) of the Government Code.[2] We note the department has the discretion to release all or part of this information that is not otherwise confidential by law. Gov't Code § 552.007.

Section 552.101 of the Government Code 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. You state the City of Houston is a civil service city under chapter 143 of the Local Government Code. Section 143.1214 of the Local Government Code provides in part:

> (b) The department shall maintain an investigatory file that relates to a disciplinary action against a fire fighter or police officer that was overturned on appeal, or any document in the possession of the department that relates to a chargeof misconduct against a fire fighter or police officer, regardless of whether the charge is sustained, only in a file created by the department for the department's use. The department may only release information in those investigatory files or documents relating to a charge of misconduct:
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> > (1) to another law enforcement agency or fire department;
> >
> > (2) to the office of a district or United States attorney; or
> >
> > (3) in accordance with Subsection (c).
>
> (c) The department head or the department head's designee may forward a document that relates to disciplinary action against a fire fighter or police officer to the director or the director's designee for inclusion in the fire fighter's or police officer's personnel file maintained under Sections 143.089(a)-(f) only if:
>
> > (1) disciplinary action was actually taken against the fire fighter or police officer;
> >
> > (2) the document shows the disciplinary action taken; and

[2] As our ruling for this information is dispositive, we need not address your remaining arguments against disclosure for this information.

> (3) the document includes at least a brief summary of the facts on which the disciplinary action was based.

Local Gov't Code § 143.1214(b)-(c). You state the case review forms and internal affairs department investigative summary reports in Exhibits 3 and 4 relate to investigations of alleged misconduct by department officers in which the allegations were not sustained and did not result in disciplinary action. You also state this information is maintained by the department in its departmental files and is not part of the officers' civil service personnel files. *See id.* § 143.1214(c); *see also id.* § 143.089(a)-(f). Based on your representations and our review, the case review forms and internal affairs department investigative summary reports in Exhibits 3 and 4 must be withheld under section 552.101 of the Government Code in conjunction with section 143.1214 of the Local Government Code. *See* Open Records Decision No. 642 (1996) (concluding that files relating to investigations of Houston Fire Department personnel by Public Integrity Review Group of Houston Police Department were confidential under section 143.1214).

Section 552.101 also encompasses laws that make criminal history record information ("CHRI") confidential. CHRI generated by the National Crime Information Center ("NCIC") or by the Texas Crime Information Center ("TCIC") is confidential under federal and state law. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI states obtain from the federal government or other states. Open Records Decision No. 565 at 7 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI the Department of Public Safety ("DPS") maintains, except DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov't Code § 411.083. Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090-.127. Similarly, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. Accordingly, you must withhold the criminal history record information we have marked in Exhibit 2 under section 552.101 of the Government Code in conjunction with federal law and chapter 411 of the Government Code.

Section 552.101 also encompasses the doctrine of common-law privacy, which protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. A compilation of an individual's criminal history is highly embarrassing information, the publication of which

would be highly objectionable to a reasonable person. *Cf. U. S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (when considering prong regarding individual's privacy interest, court recognized distinction between public records found in courthouse files and local police stations and compiled summary of information and noted individual has significant privacy interest in compilation of one's criminal history). Moreover, we find a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. You claim the citizen review committee member's background check information in Exhibit 2 contains criminal history information protected by common-law privacy. Upon review, however, none of the information you have marked in Exhibit 2 constitutes criminal history information of an individual. Therefore, none of the information you have marked in Exhibit 2 may be withheld under section 552.101 in conjunction with common-law privacy.

Section 552.117(a)(1) of the Government Code excepts from disclosure the current and former home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). Additionally, section 552.117 encompasses personal cellular telephone numbers, provided the cellular telephone service is paid for by the employee with his or her own funds. *See* Open Records Decision No. 670 at 6 (2001) (extending section 552.117(a)(1) exception to personal cellular telephone number and personal pager number of employee who elects to withhold home telephone number in accordance with section 552.024). Whether information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). The department may only withhold information under section 552.117(a)(1) on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. You state one of the officials whose information is at issue timely chose to not allow public access to her personal information. Accordingly, the department must withhold the home telephone number, home address, social security number, and family information pertaining that official you have marked, and the additional information we have marked, in Exhibit 2 pursuant to section 552.117(a)(1) of the Government Code.[3] If the remaining officials whose information is at issue timely elected to withhold their information under section 552.024, the remaining marked home addresses, home telephone numbers, and personal cellular telephone numbers must be withheld under section 552.117(a)(1). If those officials did not make timely elections, the remaining marked addresses and telephone numbers may not be withheld under section 552.117(a)(1).

You claim some of the remaining information in Exhibit 2 is protected by section 552.130 of the Government Code, which provides information relating to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by a Texas agency is

[3] As our ruling is dispositive for this information, we need not address your remaining argument against disclosure of portions of this information.

excepted from public release. Gov't Code § 552.130(a)(1), (2). Therefore, the department must withhold the Texas motor vehicle record information you have marked in Exhibit 2 under section 552.130 of the Government Code.

You claim the remaining information in Exhibit 2 includes e-mail addresses subject to section 552.137 of the Government Code, which excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body," unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See id.* § 552.137(a)-(c). The e-mail addresses you have marked in Exhibit 2 are not specifically excluded by section 552.137(c). As such, these e-mail addresses must be withheld under section 552.137, unless the owners of the addresses have affirmatively consented to their release. *See id.* § 552.137(b).

In summary, the department must continue to rely on Open Records Letter No. 2005-06940 with regard to its standard operating procedures regarding crime scene investigations conducted by the homicide division. The department may withhold the information we have marked in Exhibit 5 under section 552.108(b)(1) of the Government Code. With the exception of basic information, the department may withhold the incident reports in Exhibits 3 and 4 pursuant to section 552.108(a)(2) of the Government Code. The department must withhold the case review forms and internal affairs department investigative summary reports in Exhibits 3 and 4 under section 552.101 of the Government Code in conjunction with section 143.1214 of the Local Government Code; the CHRI we have marked in Exhibit 2 under section 552.101 of the Government Code in conjunction with federal law and chapter 411 of the Government Code; the Texas motor vehicle record information you have marked in Exhibit 2 under section 552.130 of the Government Code; and the e-mail addresses you have marked in Exhibit 2 under section 552.137 of the Government Code, unless the owners of the addresses have affirmatively consented to their release. The department must also withhold the home telephone number, home address, social security number, and family information you have marked, and the additional information we have marked, of the official who timely elected confidentiality in Exhibit 2 pursuant to section 552.117(a)(1) of the Government Code. If the remaining officials whose information is at issue timely elected to withhold their information, the remaining marked home addresses, home telephone numbers, and personal cellular telephone numbers must be withheld under section 552.117(a)(1) of the Government Code. The remaining 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 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).

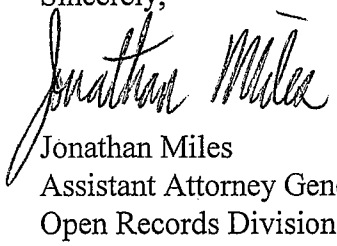
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records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



Jonathan Miles
Assistant Attorney General
Open Records Division

JM/cc

Ref: ID# 331136

Enc. Submitted documents

cc: Requestor
(w/o enclosures)