



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 29, 2009

Ms. Cecilia Gamez
Crime Records Bureau
City of McAllen
P.O. Box 200
McAllen, Texas 78501

OR2009-05661

Dear Ms. Gamez:

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# 341459.

The McAllen Police Department (the "department") received a request for thirty-three specified police reports. You state you have released three of the requested reports to the requestor. You claim the remaining requested reports are 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 department's obligations under the Act. Section 552.301 of the Government Code prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See Gov't Code* § 552.301(e)(1)(D). The department, however, did not submit a copy of Police Report No. 2004-00007290 for our review. Thus, the department failed to comply with the procedural requirements mandated by section 552.301(e) with respect to this report.

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) (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). 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). Although you raise section 552.108 for this report, section 552.108 is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See* Gov't Code § 552.007; 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). In failing to comply with section 552.301, the department has waived its claim under section 552.108 for this report. Accordingly, Police Report No. 2004-00007290 may not be withheld under section 552.108. Furthermore, as you have not submitted the report at issue for our review, we have no basis for finding any such information confidential by law. Thus, we have no choice but to order the department to release Police Report No. 2004-00007290 pursuant to section 552.302.

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. Section 552.101 encompasses information made confidential by other statutes, such as section 58.007 of the Texas Family Code. The relevant language of section 58.007 provides:

(c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

- (1) if maintained on paper or microfilm, kept separate from adult files and records;
- (2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and
- (3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapter B, D, and E.

Fam. Code § 58.007. Police Report Nos. 2005-00080850, 2005-00061685, and 2006-00081023 pertain to juvenile delinquent conduct that occurred after September 1, 1997. *See id.* § 51.03(a) (defining "delinquent conduct" for purposes of Fam. Code § 58.007): For purposes of section 58.007, a "child" is a person who is ten years of age or older and under seventeen years of age. *See id.* § 51.02(2). It does not appear that any of the exceptions in section 58.007 of the Family Code apply. Accordingly, we conclude the reports at issue must

be withheld in their entirety under section 552.101 of the Government Code in conjunction with section 58.007 of the Family Code.¹

Section 552.108(a)(1) 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[.]” Gov’t Code § 552.108(a)(1). Generally, 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 id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state that fifteen of the remaining reports relate to pending criminal prosecutions. You further contend that eleven of the remaining reports involve ongoing criminal investigations. Based on these representations, we agree that section 552.108 is applicable to the fifteen reports that involve pending criminal prosecutions, and seven of the reports that pertain to ongoing criminal investigations. *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. per curiam, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases). We have marked the reports to which section 552.108(a)(1) is applicable.

However, we note that the remaining four reports you argue involve ongoing criminal investigations relate to offenses for which the statute of limitations period has run. Police Report No. 2004-00003200 pertains to an aggravated robbery that occurred on January 20, 2004. The longest possible statute of limitations for this offense is five years. *See* Penal Code § 29.02 (robbery is a felony); *see also* Crim. Proc. Code art. 12.01 (indictment or information for robbery must be brought within five years). Police Report No. 2004-00065218 relates to an aggravated assault which occurred on December 26, 2004. Aggravated assault is a felony, which carries a maximum limitation of three years. *See* Penal Code § 22.02 (aggravated assault is a felony); *see also* Crim. Proc. Code art. 12.01 (indictment or information for felony must be brought within three years). Police Report No. 2005-00035033 involves deadly conduct which occurred on April 9, 2005. This offense carries the maximum limitation of two years. *See* Penal Code § 22.05(a) (deadly conduct is a Class A misdemeanor); *see also* Crim. Proc. Code art. 12.02 (an indictment or information for a misdemeanor must be brought within two years). Additionally, Police Report No. 2006-00020017 pertains to a “Class A assault” which occurred on February 20, 2006. This offense also has a limitations period of two years. *See* Crim. Proc. Code art. 12.02. You have not informed this office that any criminal charges were filed within the limitations period for any of these cases. Furthermore, you have not otherwise explained how release of these reports would interfere with the detection, investigation, or prosecution of a crime. Thus, the reports at issue may not be withheld under section 552.108(a)(1). However,

¹As our ruling is dispositive, we need not address your remaining arguments against disclosure of these reports.

because you also assert section 552.108(b)(1), we will address its applicability to the reports at issue.

Section 552.108(b)(1) encompasses internal law enforcement and prosecution records, the release of which would interfere with ongoing law enforcement and prosecution efforts in general. *See 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). To claim section 552.108(b)(1), 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). Further, commonly known policies and techniques may not be withheld under section 552.108. *See, e.g.*, Open Records Decision Nos. 531 at 2-3 (1989) (Penal Code provisions, common-law rules, and constitutional limitations on use of force are not protected under section 552.108), 252 at 3 (1980) (governmental body did not meet burden because it did not indicate why investigative procedures and techniques requested were any different from those commonly known with law enforcement and crime prevention). To prevail on its claim that section 552.108(b)(1) excepts information from disclosure, a law-enforcement agency must do more than merely make a conclusory assertion that releasing the information would interfere with law enforcement. The determination of whether the release of particular records would interfere with law enforcement is made on a case-by-case basis. Open Records Decision No. 409 at 2 (1984). We find the department has not demonstrated how release of Police Report Nos. 2004-00003200, 2004-00065218, 2005-00035033, and 2006-00020017 would interfere with law enforcement and crime prevention. Accordingly, the department may not withhold the reports at issue under section 552.108(b)(1) of the Government Code.

As you acknowledge, 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*. Thus, with the exception of the basic front-page offense and arrest information, which you state will be released, the department may withhold the twenty-two reports that we have marked under section 552.108(a)(1).

We note that Police Report Nos. 2004-00003200, 2004-00065218, 2005-00035033, and 2006-00020017 contain Texas motor vehicle record information, which is excepted from public disclosure under section 552.130 of the Government Code.² Section 552.130 excepts

²The Office of the Attorney General will generally raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

from disclosure information that relates to a motor vehicle operator's or driver's license or permit issued by an agency of this state. Gov't Code § 552.130. Accordingly, the department must withhold the Texas motor vehicle record information that we have marked under section 552.130 of the Government Code.

In summary, because the department did not submit Police Report No. 2004-00007290 for our review, it must be released to the requestor. Police Report Nos. 2005-00080850, 2005-00061685, and 2006-00081023 are confidential pursuant to section 58.007 of the Family Code and must be withheld under section 552.101 of the Government Code. With the exception of basic information, the department may withhold the twenty-two reports that we have marked under section 552.108(a)(1) of the Government Code. The department must withhold the Texas motor vehicle record information that we have marked in Police Report Nos. 2004-00003200, 2004-00065218, 2005-00035033, and 2006-00020017; however, the remaining information in these reports must be released to the requestor.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Ana Carolina Vieira
Assistant Attorney General
Open Records Division

ACV/eeg

Ref: ID# 341459

Enc. Submitted documents

c: Requestor
(w/o enclosures)