



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 21, 2010

Ms. Martha T. Williams
Olson & Olson, L.L.P.
For City of Rosenberg
2727 Allen Parkway, Suite 600
Houston, Texas 77019

OR2010-09063

Dear Ms. Williams:

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# 383462.

The Rosenberg Police Department (the "department"), which you represent, received a request for any disciplinary records, complaints, and sustained IAD complaints for four named police officers; four specified case reports; 9-1-1 tapes, MDTs, and voice dispatch tapes for a specified case number; and all calls for service, incident reports, and 9-1-1 calls for two specified addresses. You state the department has released or will release most of the requested information. You claim that the submitted 9-1-1 recordings are excepted from disclosure under sections 552.101, 552.103, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, you acknowledge that the department failed to comply with the procedural requirements of section 552.301 of the Government Code. *See* Gov't Code § 552.301(b), (e). A governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption that the information is public and must be released. *Id.* § 552.302. In order to overcome the presumption that the requested information is public information, a governmental body must provide a compelling reason why the information should not be disclosed. *See Simmons v. Kuzmich*, 166 S.W.3d 342 (Tex. App.—Fort Worth 2005, no pet.); *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); *see also* Open Records Decision No. 319 (1982). You raise section 552.101 of the Government Code in conjunction with the informer's privilege. Normally, a compelling interest is demonstrated when some other source of law makes the information at issue confidential or third-party interests are

at stake. *See* Open Records Decision No. 150 at 2 (1977). Because the purpose of the informer's privilege is to protect the flow of information to a governmental body, rather than to protect the interests of a third person, the informer's privilege, unlike other claims under section 552.101, can be waived. *See* Open Records Decision No. 549 at 6 (1990). Therefore, the informer's privilege may not serve as a compelling reason for overcoming the presumption of openness under section 552.302, and the department may not withhold any of the submitted information on that basis. You also raise sections 552.103 and 552.108 of the Government Code. These sections are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *See* Gov't Code § 552.007; *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. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 177 at 3 (1977) (statutory predecessor to section 552.108 subject to waiver). However, the interests of a governmental body other than the one that failed to comply with section 552.301 can provide a compelling reason for non-disclosure under section 552.302. *See* Open Records Decision Nos. 586 (1991), 469 (1987). You inform us, and have provided a representation, that the Fort Bend County District Attorney's Office (the "district attorney") asserts an interest under sections 552.103 and 552.108 of the Government Code in the information at issue. Therefore, we will consider whether the department may withhold the information under sections 552.103 and 552.108 on behalf of the district attorney.

Section 552.108 of the Government Code provides:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime[.]

...

(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(a)(1), (b)(1). Section 552.108 protects certain specific types of law enforcement information. Section 552.108(a)(1) is applicable if release of the information would interfere with a pending criminal investigation or prosecution. *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). Section 552.108(b)(1) is applicable to internal records of a law enforcement agency, the release of which would interfere with law enforcement and crime prevention. See *City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.) (section 552.108(b)(1) protects information that if released would permit private citizens to anticipate weaknesses in police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate state laws). A governmental body that raises section 552.108 must reasonably explain how and why this exception is applicable to the information at issue. See Gov't Code § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977).

The district attorney states that the submitted 9-1-1 recordings relate to a criminal case that is currently being prosecuted. Based on this representation and our review, we conclude that 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. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases). Accordingly, we conclude that section 552.108(a)(1) is applicable to the submitted information, and the department may withhold the submitted information on behalf of the district attorney under section 552.108(a)(1) of the Government Code.¹

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, toll free at (888) 672-6787.

Sincerely,



Kate Hartfield
Assistant Attorney General
Open Records Division

KH/dls

¹As our ruling is dispositive, we need not address the district attorney's remaining argument against disclosure.

Ref: ID# 383462

Enc. Submitted documents

c: Requestor
(w/o enclosures)