



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 21, 2011

Ms. Martha T. Williams
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Wortham Tower, Suite 600
2727 Allen Parkway
Houston, Texas 77019

OR2011-03852

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# 411755.

The Friendswood Police Department (the "department"), which you represent, received two similar requests for four categories of information relating to a specified incident involving a named person on a specified date; video recordings from a named officer's police vehicle during specified time periods; dispatch recordings for a specified time period, as well as recordings pertaining to a named individual on a specified date; Mobile Data Terminal or Mobile Data Computing transmissions between a named officer and any other officer or dispatcher for a specified time period, as well as pertaining to a named individual on a specified date; a list of "complaints, internal investigation findings, administrative inquiries or disciplinary actions" pertaining to specified officers; and the department's rules, regulations, and operations manual.¹ You state the department will release some of the requested information. You claim that the submitted information is excepted from disclosure

¹We understand the requestor clarified portions of the first request. *See* Gov't Code § 552.222(b) (stating that if information requested is unclear to governmental body or if a large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used).

under sections 552.101, 552.103, 552.108, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit written comments regarding why information should or should not be released).

Initially, we note that some of the submitted information is not responsive. The Act does not require a governmental body to release information that did not exist when it received a request or to create responsive information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983). One document is not responsive because it was created after the department received each of the present requests for information. Some of the submitted audio recordings are not responsive because they are not a type of information requested in either request. Some of the documents are not responsive because they were created after the department received the first request for information and are not a type of information requested in the second request. Therefore, this information, which we have marked, is not responsive to the present requests for information. This ruling does not address the public availability of any information that is not responsive to the request, and the department need not release such information.

Additionally, we note you have not submitted any "Mobile Data Terminal . . . or Mobile Data Computing transmissions" or the department's rules, regulations, and operations manual. Thus, to the extent such information existed and was maintained by the department on the date the department received the request for information, we presume the department has released it. If not, the department must do so at this time. *See* Gov't Code §§ 552.301, .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to the requested information, it must release the information as soon as possible).

Next, we must address the department's obligations under section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(e) requires the governmental body to submit to the attorney general, not later than the fifteenth business day after the date of the receipt of the request: (1) written comments stating why the governmental body's claimed exceptions apply to the information that it seeks to withhold; (2) a copy of the written request for information; (3) a signed statement of the date on which the governmental body received the request or evidence sufficient to establish that date; and (4) the specific information that the governmental body seeks to withhold or representative samples if the information is voluminous. Gov't Code § 552.301(e)(1)(A)-(D). You state the department received the first request for information on December 27, 2010. You state the department was closed on December 31, 2010, and we note January 17, 2011 was a state holiday. This office does

not count the date the request was received or holidays for the purpose of calculating a governmental body's deadlines under the Act. Thus, we find the department's fifteen-business-day deadline for the first request was January 19, 2011. Although you timely submitted some information responsive to the first request for information, we note that, in submitting information responsive to the second request for information in a letter postmarked March 9, 2011, you included additional information that was also responsive to the first request for information. Thus, this information should have been submitted to our office by January 19, 2011 as responsive to the first request for information. Consequently, we find the commission failed to comply with the requirements of section 552.301 as to this information.

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 information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *Id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (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); Open Records Decision No. 630 (1994). A compelling reason generally exists when information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3, 325 at 2 (1982). Although you raise sections 552.103 and 552.108 of the Government Code for this information, these sections are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 439, 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 in general), 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions), 177 at 3 (1997) (statutory predecessor to section 552.108 subject to waiver). Thus, in failing to comply with section 552.301, the department has waived its arguments under sections 552.103 and 552.108 for this information, and may not withhold this information on these bases. However, we note a portion of this information is subject to section 552.101 of the Government Code, which can provide a compelling reason to withhold information. Thus, we will consider the applicability of this exception to this portion of information. As the department raises no other exceptions to disclosure for the remaining information for which the department has waived its discretionary exceptions, the department must release this information, which we have marked for release.

We note the responsive information for which the department has waived its discretionary exceptions includes the requestor's client's fingerprints. 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, such as section 560.003 of the

Government Code. Section 560.003 provides that “[a] biometric identifier in the possession of a governmental body is exempt from disclosure under [the Act].” Gov’t Code § 560.003; *see also id.* § 560.001(1) (defining “biometric identifier” to include fingerprints). Section 560.002 provides, however, that “[a] governmental body that possesses a biometric identifier of an individual . . . may not sell, lease, or otherwise disclose the biometric identifier to another person unless . . . the individual consents to the disclosure[.]” *Id.* § 560.002(1)(A). Therefore the requestor has a right of access to his client’s fingerprints under section 560.002(1)(A) of the Government Code, and the department must release this information to the requestor.

Section 552.108(a) 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: (1) 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 release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), (b)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977).

You state that the remaining information within the report for case number 10-2497, the corresponding video recordings, responsive corresponding audio recordings, and the dispatch recordings pertaining to the incident relate to a criminal case that is pending investigation and prosecution. The requestor asserts section 552.108(a)(1) is not applicable to the information because the case was dismissed on February 24, 2011. We note the Motion to Dismiss was filed after the department received the two present requests for information; thus, the criminal prosecution for this case was pending on the date the department received each request. You state the remaining unrelated dispatch audio recordings also relate to pending criminal investigations. Based upon your representations and our review, we conclude that release of the information at issue 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) (court delineates law enforcement interests that are present in active cases), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Thus, section 552.108(a)(1) is applicable to the information at issue.

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*. *See* 531 S.W.2d at 186-88. Thus, with the exception of the basic front page offense and arrest information, the department may withhold the remaining responsive information, which we have marked, based on section 552.108(a)(1) of the Government Code.²

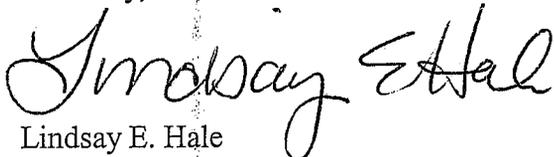
²As our ruling is dispositive, we need not address your remaining arguments under sections 552.101, 552.103, 552.108(b)(1) or 552.130 of the Government Code for this information except to note that basic information described in *Houston Chronicle* does not include information subject to section 552.130. We also note section 552.103 does not generally except from disclosure the same basic information that must be released

In summary: (1) the department must release the requestor's client's fingerprints under section 560.002(1)(A) of the Government Code; and (2) with the exception of basic information, the department may withhold the information we have marked under section 552.108(a)(1) of the Government Code. The department must release the remaining responsive information.³

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,



Lindsay E. Hale
Assistant Attorney General
Open Records Division

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under section 552.108(c). *See* Open Records Decision No. 597 (1991).

³We note the information being released contains the requestor's client's driver's license number and social security number, to which the requestor has a right of access under section 552.023 of the Government Code, and a fingerprint to which the requestor has a right of access under section 560.003 of the Government Code. *See* Gov't Code §§ 552.023(a) (person or person's authorized representative has special right of access, beyond right of general public, to information held by governmental body that relates to person and is protected from public disclosure by laws intended to protect person's privacy interests), .130, 560.003. This office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including: a fingerprint under section 552.101 in conjunction with section 560.003 of the Government Code and a Texas driver's license number under section 552.130 of the Government Code, without the necessity of requesting an attorney general decision. Accordingly, if the department receives another request for information from an individual other than this requestor or his client, the department is authorized to withhold the requestor's client's fingerprint under section 552.101 in conjunction with section 560.003 of the Government Code and the requestor's client's driver's license number under section 552.130 without the necessity of requesting an attorney general opinion. Furthermore, we note section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

Ref: ID# 411755

Enc. Submitted documents

c: Requestor
(w/o enclosures)