



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 4, 2013

Ms. Leticia Brysch
City Clerk
City of Baytown
P.O. Box 424
Baytown, Texas 77522-0424

OR2013-01987

Dear Ms. Brysch:

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# 477912 (PIR Nos. 497 and 502).

The City of Baytown and the Baytown Police Department (collectively, the "city") received two requests from the same requestor for certain records pertaining to a specified incident involving two named individuals. You claim the submitted information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we note some of the submitted information, which we have marked, is not responsive to the instant requests because it was created after the requests were received by the city. This ruling does not address the public availability of the information that is not responsive to the request, and the city is not required to release this information in response to this request.

Next, we note portions of the submitted information, which we have marked, were the subject of a previous request for information in response to which this office issued Open Records Letter No. 2013-00815 (2013). In this ruling, we concluded, the city (1) may withhold the information it marked under section 552.108(a)(1) of the Government Code; (2) must withhold the information we marked under section 552.101 in conjunction with common-law privacy; (3) must withhold the motor vehicle record information it marked and the additional information we marked under section 552.130 of the Government Code; (4) must withhold the information pertaining to undercover officers it marked under section 552.152 of the Government Code; and (5) must release the remaining responsive information. The city and the Harris County District Attorney's Office (the "district attorney's office") now seek to withhold the submitted information under sections 552.103

and 552.108 of the Government Code, respectively. Section 552.007 of the Government Code provides if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential under law. *See* Gov't Code § 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Because sections 552.103 and 552.108 do not prohibit the release of information or make information confidential, the city may not now withhold any previously released information under these exceptions. *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 Gov't Code § 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 586 (1991) (governmental body may waive section 552.108). Thus, as we have no indication the law, facts, and circumstances on which Open Records Letter No. 2013-00815 was based have changed, the city must continue to rely on Open Records Letter No. 2013-00815 as a previous determination and withhold or release the information at issue in accordance with the previous ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, 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). However, we will address the submitted arguments for the remaining information not encompassed by the previous ruling.

Next, we must address the city's procedural obligations under the Act. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. Gov't Code § 552.301(b). You state the requests for information were received on November 1, 2012, and November 5, 2012. We note 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, the city's ten-business-day deadlines to request a ruling were November 15, 2012, and November 19, 2012, respectively. However, the envelope in which the city submitted its request for a ruling bears a postmark of November 23, 2012. *See id.* § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Thus, the city failed to comply with the procedural requirements mandated by section 552.301.

Pursuant to section 552.302 of the Government Code, 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 unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See 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); Open Records Decision No. 630 (1994). Generally, a compelling reason to

withhold information exists where some other source of law makes the information confidential or where third party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). You assert the remaining information is excepted from disclosure under section 552.103 of the Government Code. Section 552.103 is a discretionary exception to disclosure and may be waived. *See* Gov't Code § 552.007; *Dallas Area Rapid Transit*, 4 S.W.3d at 475-76; ORDs 665 at 2 n.5, 663 at 5. In failing to comply with the requirements of section 552.301, you have waived your claim under section 552.103. However, the district attorney's office asserts a law enforcement interest in the information at issue. The interest under section 552.108 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* ORD 586 at 2-3. Therefore, we will consider whether the city may withhold the remaining information on behalf of the district attorney's office under section 552.108. Further, because section 552.130 of the Government Code can provide a compelling reason to withhold information, we will also consider the applicability of this exception to the remaining information.

A portion of the remaining information consists of a press release that was previously released to the news media. As previously noted, section 552.007 of the Government Code provides that if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential under law. *See* Gov't Code § 552.007; ORD 518 at 3; *see also* ORD 400. Because section 552.108 does not prohibit the release of information or make information confidential, the city may not now withhold the previously released information, which we have marked, under section 552.108 of the Government Code. ORDs 665 at 2 n.5, 663 at 5, 586. However, the press release includes information subject to section 552.130 of the Government Code. Because section 552.130 makes information confidential for purposes of section 552.007, we will address its applicability to this information.

Section 552.130 excepts from disclosure information that relates to a motor vehicle operator's or driver's license or permit, title, or registration issued by an agency of this state or another state or country. Gov't Code § 552.130. Accordingly, the city must withhold the motor vehicle record information we have marked in the press release under section 552.130 of the Government Code. As no other exceptions have been raised for this information, the rest of the press release must be released.

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[.]" *Id.* § 552.108(a)(1). 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 have submitted an affidavit from the district attorney's office stating the remaining information pertains to pending criminal prosecutions by the district attorney's office and release of the information would interfere

with those prosecutions. Based on these representations and our review, we agree release of the remaining 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) (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, we find section 552.108(a)(1) is applicable to the remaining responsive information and the city may withhold it under section 552.108(a)(1) of the Government Code on behalf of the district attorney's office.

In summary, the city must continue to rely on Open Records Letter No. 2013-00815 as a previous determination and withhold or release the information we have marked in accordance with this ruling. With the exception of the motor vehicle record information we have marked, which must be withheld under section 552.130 of the Government Code, the press release we have marked must be released. The city may withhold the remaining responsive information under section 552.108(a)(1) of the Government Code on behalf of the district attorney's office.

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,



Michelle R. Garza
Assistant Attorney General
Open Records Division

MRG/som

Ref: ID# 477912

Enc. Submitted documents

c: Requestor
(w/o enclosures)