



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

February 2, 1994

Ms. Melissa Winblood
Assistant City Attorney
The City of El Paso
2 Civic Center Plaza
El Paso, Texas 79901-1196

OR94-055

Dear Ms. Winblood:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act (the "act"), Government Code chapter 552.¹ We assigned your request ID# 24168.

The City of El Paso (the "city") has received a series of requests for certain criminal history record information (CHRI) and for a particular police department case file involving a murder, for which the requestor's client was convicted and is scheduled to be executed February 14, 1994. You do not object to release of some of the requested information, namely, information generally found on the first page of the offense report and specifically made 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). You seek to withhold the remaining information, however, and claim that sections 552.101, 552.103(a), 552.107, 552.108, and 552.111 of the act except it from required public disclosure.

Section 552.101 of the act excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." You seek to withhold the requested criminal history record information ("CHRI") in conjunction with federal regulations and common-law-privacy doctrine. The information submitted to us for review appears to include information generated by the National Crime Information Center ("NCIC"), the Texas Crime Information Center ("TCIC") files, and certain locally

¹We note that the Seventy-third Legislature repealed V.T.C.S. article 6252-17a. Acts 1993, 73d Leg., ch. 268, § 46. The Open Records Act is now codified in the Government Code at chapter 552. *Id.* § 1. The codification of the Open Records Act in the Government Code is a nonsubstantive revision. *Id.* § 47.

compiled CHRI. Title 28, Part 20 of the Code of Federal Regulations governs the release of CHRI which states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* We conclude, therefore, that if the CHRI data was generated by the federal government or another state, the city may not release it except in accordance with state law adopted pursuant to federal regulation. *See* Open Records Decision No. 565. CHRI generated within the state of Texas and TCIC files must be withheld from required public disclosure under section 552.101 in conjunction with common-law privacy doctrine. *See* Open Records Decision Nos. 565; 216 (1978); *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977) (information may be withheld on common-law privacy grounds only if it is highly intimate or embarrassing and is of no legitimate concern to the public). However, the city may not withhold CHRI generated within the state of Texas and TCIC files to the extent that it relates to the requestor's client here, because the latter has a special right of access to such information under section 552.023 of the act. *See* Open Records Decision No. 481 (1987) (common-law privacy does not provide a basis for withholding information from its subject).²

We next address your assertion that the city may withhold the submitted information under section 552.103(a) of the act. Section 552.103(a) excepts from required public disclosure information

- (1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employees of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and
- (2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

Section 552.103(a) was intended to prevent the use of the act as a method of avoiding the rules of discovery used in litigation. Attorney General Opinion JM-1048 (1989) at 4. The litigation exception enables a governmental body to protect its position in litigation by making parties seeking information relating to that litigation to obtain it through discovery. Open Records Decision No. 551 (1990) at 3. For information to be excepted from public disclosure by section 552.103(a), litigation must be pending or reasonably anticipated and the information must relate to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.). Section

²It is inconsequential here that the requestor's client addressed his waiver to the sheriff, and not the city; no "waiver" is required under section 552.023.

552.103(a) applies only where litigation involves or is expected to involve the governmental body that claims the exception. Open Records Decision No. 392 (1983) at 3; 132 (1976) at 2.

You advise us that the requestor's client was convicted of murder and is currently scheduled to be put to death February 14, 1994. You do not indicate, however, whether the requestor's client has filed a notice of appeal or an application for habeas corpus relief. Nor do you provide us with any other basis for concluding that *the city* is party to or may reasonably anticipate litigation with respect to this matter. We thus have no basis on which to conclude that the requested information may be withheld from required public disclosure under section 552.103(a) of the act. See Open Records Decision No. 518 (1988) (section 552.103(b) does not relieve governmental body from demonstrating general applicability of section 552.103(a)).

Next we address your assertion of section 552.108, the "law enforcement" exception. Section 552.108 excepts from required public disclosure:

(a) A record of a law enforcement agency or prosecutor that deals 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.

Gov't Code § 552.108. Traditionally, when applying section 552.108, our office has distinguished between cases that are still under active investigation and those that are closed. Open Records Decision No. 611 (1992) at 2. In cases that are still under active investigation, this section excepts from disclosure all information except that generally found on the first page of the offense report. See generally Open Records Decision No. 127 (1976) (citing *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)). Here, however, the case is no longer under active investigation. As a general matter, once a case is closed, information may be withheld under section 552.108 only if the law enforcement agency demonstrates or the information demonstrates on its face that its release "will unduly interfere with law enforcement and prevention." See Attorney General Opinion MW-446 (1982); Open Records Decision Nos. 444, 434 (1986); 366 (1983) at 3; 216 (1978) at 3; (citing *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977)). Whether information falls within the section 552.108 exception must be determined on a case-by-case basis. Open Records Decision Nos. 434 (1986) at 2; 287 (1981) at 1-2; *but see* Open Records Decision No. 408 (1984) (holding that possibility of a closed case being reopened may be a factor in determining applicability of section 552.108)).

We have examined the information submitted to us for review and have considered your section 552.108 claims. We conclude that you have not sufficiently

demonstrated that release of the submitted information would unduly interfere with law enforcement or crime prevention. Accordingly, the submitted information may not be withheld from required public disclosure under section 552.108 of the act.

You also assert that sections 552.107 and 552.111 of the act except the required information from required public disclosure. You do not indicate, however, how these exceptions apply. You are responsible for submitting in writing the reasons you believe the requested information is excepted from disclosure. Under the act, all information held by governmental bodies is open to the public unless it is within a specific exception to disclosure. The custodian of records has the burden of proving that records are excepted from public disclosure. Attorney General Opinion H-436 (1974). If a governmental body does not claim an exception or fails to show how it applies to the records, it will ordinarily waive the exception unless the information is deemed confidential by the act. *See* Attorney General Opinion JM-672 (1987). As you have not shown how sections 552.107 and 552.111 apply to the submitted information, we conclude that you have waived your right to do so. Accordingly, you may not withhold any of the submitted information under sections 552.107 and 552.111 of the act. Except as noted above, the requested information must be released in its entirety.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact this office.

Yours very truly,



William Walker
Assistant Attorney General
Open Government Section

WMW/GCK/rho

Enclosures: Submitted documents

Ref.: ID# 24168
ID# 24244
ID# 24254

cc: Ms. Jean Terranova
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