



September 3, 2002

Mr. Steven D. Monté
Assistant City Attorney
City of Dallas
2014 Main Street, Room 501
Dallas, Texas 75201

OR2002-4935

Dear Mr. Monté:

You have asked whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 170783.

The Dallas Police Department ("department") received a request for a photograph of Deputy Chief W.T. McClain. You claim that the requested information is excepted from required public disclosure by section 552.119 of the Government Code. We have considered the exception you claim and have reviewed the submitted information.

Initially, we note, and you acknowledge, that the department has not sought an open records decision from this office within the ten business day time period prescribed by section 552.301 of the Government Code. When a governmental body fails to comply with the procedural requirements of section 552.301, the information at issue is presumed public. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, *no writ*); *City of Houston v. Houston Chronicle Publ'g Co.*, 673 S.W.2d 316, 323 (Tex. App.--Houston [1st Dist.] 1984, *no writ*); Open Records Decision No. 319 (1982). The governmental body must show a compelling interest to withhold the information to overcome this presumption. *See id.* Normally, a compelling interest exists when some other source of law makes the information confidential or when third party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). As the presumption of openness can be overcome by a showing that information is confidential by law, we will consider your arguments under section 552.119.

Section 552.119 excepts from public disclosure a photograph of a peace officer that, if released, would endanger the life or physical safety of the officer unless one of three exceptions applies. The three exceptions are: (1) the officer is under indictment or charged

with an offense by information; (2) the officer is a party in a fire or police civil service hearing or a case in arbitration; or (3) the photograph is introduced as evidence in a judicial proceeding. This section also provides that a photograph exempt from disclosure under this section may be made public only if the peace officer gives written consent to the disclosure. *See Open Records Decision No. 502 (1988)*. There need not be a threshold determination that release of the photograph would endanger the officer. *See id.*

The submitted image depicts a peace officer and it does not appear that any of the exceptions are applicable. You have not informed us that the peace officer has executed any written consent to disclosure. Thus, we agree that you must withhold the photograph depicting the peace officer.

In addition, you request that this office issue a previous determination related to the withholding of photographs of peace officers under section 552.119. Having considered your request, we decide that this letter ruling shall serve as a previous determination under section 552.301(a) that photographs of peace officers as defined by article 2.12 of the Code of Criminal Procedure are excepted from disclosure under section 552.119, provided: (a) the peace officer is not under indictment or charged with an offense by information; (b) the peace officer is not a party in a fire or police civil service hearing or a case in arbitration; (c) the photograph is not introduced as evidence in a judicial proceeding; or (d) the peace officer has not given written consent to disclosure.

This previous determination applies only to photographs of peace officers as defined by article 2.12 of the Code of Criminal Procedure. *See Open Records Decision No. 673 at 7 (2001)*. Moreover, so long as the elements of law, fact and circumstances do not change so as to no longer support the findings set forth above, the Dallas Police Department need not ask for a decision from this office again with respect to this type of information requested of the Dallas Police Department. *See id.*

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records;

2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, *no writ*).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Jon Tate Self
Assistant Attorney General
Open Records Division

JTS/seg

Ref: ID# 170783

Enc: Submitted documents

c: Mr. Jay Cooper
1520 Janwood Drive
Plano, Texas 75075
(w/o enclosures)