



October 8, 2002

Mr. Brad Norton
Assistant City Attorney
City of Austin - Law Department
P.O. Box 1546
Austin, Texas 78767-1546

OR2002-5703

Dear Mr. Norton:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 170411.

The Austin Police Department (the “department”) received a request for “‘Use of force’ reports from the [department], starting in the year 1999-July 2002.” We note that you have included with the responsive information two pages of email that were created after this request for information was received. Because this information is not subject to the instant request, we do not address it in this ruling. *See Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986) (governmental body not required to disclose information that did not exist at time request was received). You claim that the requested information is 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.¹

Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses statutory

¹We assume that the sample of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

confidentiality provisions such as section 58.007 of the Family Code, which provides that juvenile law enforcement records relating to conduct that occurred on or after September 1, 1997 are confidential. Section 58.007 states in pertinent part:

(c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

(1) if maintained on paper or microfilm, kept separate from adult files and records;

(2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and

(3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapter B.

Fam. Code § 58.007(c). Report numbers 02-4200307, 02-1101959, 01-2500569, 01-1191478, 01-0571226, and 00-2291426 involve allegations of conduct in violation of penal statutes by persons who were between the ages of ten and sixteen at the time the conduct occurred. Thus, these reports and the "Use of Force Report" forms associated therewith are "law enforcement records and files" subject to section 58.007 as information concerning juvenile conduct that occurred after September 1, 1997. See Fam. Code § 51.02(2) (providing that in title 3 of Family Code, "child" means person who is ten years of age or older and under seventeen years of age). It does not appear that any of the exceptions in section 58.007 apply; therefore, these documents are confidential in their entirety pursuant to section 58.007(c) of the Family Code. You must withhold these records, which we have marked, under section 552.101 of the Government Code.

You also contend that some of the submitted reports are protected under common law privacy principles. Common law privacy, which is also encompassed by section 552.101 of the Government Code, protects information if it (1) contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person and (2) is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). The types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. We have reviewed offense report numbers 02-1820646, 02-1091285, 02-0351603, and 02-0281780 and the associated "Use of Force Report" forms that you assert

are excepted under common law privacy. Although common law privacy does not make these reports confidential in their entirety, we have marked portions of them that are protected by privacy principles and must therefore be withheld pursuant to section 552.101.

You assert that information relating to offense report number 02-1620377 is excepted under sections 552.103 and 552.108. We note that this office recently ruled on the offense report itself. In Open Records Letter No. 2002-5174 (2002), we determined that the department may withhold this report, with the exception of basic information, pursuant to section 552.108 of the Government Code. As the facts and circumstances surrounding that ruling do not appear to have changed, you may withhold report number 02-1620377, with the exception of basic information, in accordance with our previous ruling. *See* Open Records Decision No. 673 at 6-7 (2001) (criteria of previous determination regarding specific information previously ruled on).

We now address your argument for withholding information associated with offense report number 02-1620377 that was not subject to our previous ruling. You have submitted a "Use of Force Report" that was incomplete at the time this request for information was received. You assert that this document is excepted under section 552.103, which excepts from disclosure information relating to pending litigation and provides in part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

The department has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or is reasonably anticipated on the date the governmental body receives the request for information and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The department must meet both prongs of this test for information to be excepted under section 552.103(a).

In this case, you inform us that an individual had filed suit against the city prior to the date the department received this request. We therefore find that you have met the first prong of the section 552.103 test. Furthermore, after reviewing your arguments and the document at issue, we agree that the incomplete "Use of Force Report" that pertains to offense number 02-1620377 is related to the pending litigation for purposes of section 552.103(a).

You assert that other submitted offense reports are excepted under section 552.108 of the Government Code. Section 552.108 provides in pertinent part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime; (2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication; (3) it is information relating to a threat against a peace officer collected or disseminated under Section 411.048; or (4) it is information that: (A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or (B) reflects the mental impressions or legal reasoning of an attorney representing the state.

....

(c) This section does not except from the requirements of Section 552.021 information that is basic information about an arrested person, an arrest, or a crime.

Gov't Code § 552.108. Generally, a governmental body claiming section 552.108(a)(1) must reasonably explain, if the information does not supply the explanation on its face, how and why the release of the requested information would interfere with law enforcement. *See* Gov't Code §§ 552.108(a)(1), (b)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). A governmental body claiming section 552.108(a)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. However, section 552.108 is inapplicable to a police department's internal administrative investigations that do not involve the investigation or prosecution of crime. *See Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied).

We understand you to assert that offense report numbers 02-1761646, 02-1811640, 02-1831345, 02-1840110, and 02-1991609 relate to pending criminal investigations. Under these circumstances, we find that these five reports are subject to section 552.108(a)(1) because their release 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). You also indicate that report numbers 02-1220223 and 01-3591250 pertain to criminal investigations that have concluded in a result other than conviction or deferred adjudication. Based on your representation, and having reviewed the information at issue, we agree that section 552.108(a)(2) of the Government Code is applicable to these two offense reports.

We note, however, that information normally found on the front page of an offense or arrest report is not generally excepted under section 552.108. See generally Gov't Code § 552.108(c); *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); Open Records Decision No. 127 (1976). Thus, you must release the types of information that are considered to be front page offense or arrest report information, including a detailed description of each offense, even if this information is not actually located on the front page of the report. Although section 552.108 authorizes you to withhold the remaining information from the reports, you may choose to release all or part of the information that is not otherwise confidential by law. See Gov't Code § 552.007; Open Records Decision No. 177 (1977).

You also contend that the submitted "Use of Force Report" forms associated with the offense reports are excepted under section 552.108. However, these documents contain no indication that they pertain to criminal investigations and appear instead to be purely administrative in nature. Because the department has not explained, and the reports do not on their face reflect, how they relate to the detection, investigation, or prosecution of crime, we find that the department has failed to demonstrate that section 552.108 applies to the "Use of Force Report" forms. See *Morales*, 840 S.W.2d at 526 (law enforcement exception is inapplicable to police department's internal administrative investigations that do not involve investigation or prosecution of crime); see also Gov't Code § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977) (governmental body claiming law enforcement exception must reasonably explain, if information does not supply explanation on its face, how and why release of requested information would interfere with law enforcement).

In summary, information, including "Use of Force Report" forms, concerning case numbers 02-4200307, 02-1101959, 01-2500569, 01-1191478, 01-0571226, and 00-2291426 are confidential under section 58.007 and must be withheld pursuant to section 552.101. We have marked information in offense report numbers 02-1820696, 02-1091285, 02-0351603, and 02-0281780 and the associated "Use of Force Report" forms that is protected by common law privacy and must therefore be withheld under section 552.101. The department may withhold report number 02-1620377, with the exception of basic information, pursuant to Open Records Letter No. 2002-5174 and may withhold the "Use of Force Report" associated with this offense report under section 552.103. Report numbers 02-1761646, 02-1811640, 02-1831345, 02-1840110, and 02-1991609 may be withheld under

section 552.108(a)(1) while report numbers 02-1220223 and 01-3591250 may be withheld under section 552.108(a)(2); however, basic information must be released from all of these reports in accordance with section 552.108(c). The department must release the unmarked portions of offense reports 02-1820696, 02-0351603, 02-0281780, and 02-1091285 and the associated "Use of Force Report" forms as well as the entirety of the "Use of Force Report" forms associated with offense report numbers 02-1761646, 02-1811640, 02-1831345, 02-1840110, 02-1991609, 02-1220223, and 01-3591250.

This letter ruling is limited to the particular records 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 records or any other circumstances.

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).

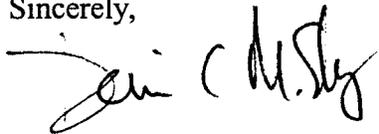
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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,

A handwritten signature in black ink, appearing to read "Denis C. McElroy". The signature is written in a cursive style with a large initial "D" and "M".

Denis C. McElroy
Assistant Attorney General
Open Records Division

DCM/seg

Ref: ID# 170411

Enc. Submitted documents

c: Ms. Holly Wisenhunt
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