



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 14, 2007

Mr. Rashaad V. Gambrell
Assistant City Attorney
City of Houston - Legal Department
P. O. Box 368
Houston, Texas 77001-0368

OR2007-01922

Dear Mr. Gambrell:

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# 271373.

The Houston Police Department (the "department") received two requests for all videos of any taser incidents within specific time periods, and the "numbers of police shootings this year versus last, and numbers of physical altercations this year versus last between police and citizens." You claim that the submitted information is excepted from disclosure under sections 552.108 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by one of the requestors. See Gov't Code § 552.304 (providing that any person may submit comments stating why information should or should not be released).

Initially, we note that the department has not submitted for our review the "numbers of police shootings this year versus last, and numbers of physical altercations this year versus last between police and citizens." Thus, we assume that any information maintained by the department that is responsive to these portions of the request has been released to the requestor, to the extent it exists. If not, the department must release such information immediately. See Gov't Code §§ 552.006, .301, .302; Open Records Decision No. 664 (2000) (concluding that section 552.221(a) requires that information not excepted from disclosure must be released as soon as possible under the circumstances).

Now we turn to your arguments for the submitted information. Section 552.108(b)(1) of the Government Code excepts from disclosure “[a]n 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 . . . if: (1) release of the internal record or notation would interfere with law enforcement or prosecution.” Gov’t Code § 552.108(b)(1). This section is intended to protect “information which, if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate the laws of this State.” *City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.). This office has concluded that this provision protects certain kinds of information, the disclosure of which might compromise the security or operations of a law enforcement agency. *See, e.g.*, Open Records Decision Nos. 531 (1989) (detailed guidelines regarding police department’s use of force policy), 508 (1988) (information relating to future transfers of prisoners), 413 (1984) (sketch showing security measures for forthcoming execution), 211 (1978) (information relating to undercover narcotics investigations), 143 (1977) (log revealing use of electronic eavesdropping equipment). To claim this aspect of section 552.108 protection, however, a governmental body must meet its burden of explaining how and why release of the requested information would interfere with law enforcement and crime prevention. Open Records Decision No. 562 at 10 (1990). Further, commonly known policies and techniques may not be withheld under section 552.108. *See, e.g.*, Open Records Decision Nos. 531 at 2-3 (1989) (Penal Code provisions, common law rules, and constitutional limitations on use of force are not protected under section 552.108), 252 at 3 (1980) (governmental body did not meet burden because it did not indicate why investigative procedures and techniques requested were any different from those commonly known with law enforcement and crime prevention). To prevail on its claim that section 552.108(b)(1) excepts information from disclosure, a law-enforcement agency must do more than merely make a conclusory assertion that releasing the information would interfere with law enforcement; the determination of whether the release of particular records would interfere with law enforcement is made on a case-by-case basis. Open Records Decision No. 409 at 2 (1984).

In this instance, you claim that release of the taser videos would impede law enforcement by informing suspects of [department] officers tactics in determining the appropriate time to employ the use of [department] taser devices.” Upon review of the taser videos, however, we find that at no time does anyone discuss the appropriate time to employ a taser. Further, no other information regarding the correct time to employ tasers is present. Therefore, you have failed to demonstrate that section 552.108(b)(1) is applicable to the submitted taser videos, and none of them may be withheld on that basis.

You claim that the submitted information is excepted from public disclosure under section 552.111 of the Government Code. Section 552.111 excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” Gov’t Code § 552.111. This exception encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). In Open

Records Decision No. 615 (1993), this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). In *Gilbreath*, the Third Court of Appeals found that the deliberative process privilege aspect of section 552.111 was analogous to Exemption 5 of the Freedom of Information Act, 5 U.S.C. § 552(b)(5). See ORD 615 at 2 (quoting *Gilbreath*, 842 S.W.2d.at 412). The court found that subsequent to the passage of the Act by the Texas Legislature, federal court decisions and decisions from this office were interpreting the deliberative process privilege too broadly, straying from the interpretation for Exemption 5 that Congress intended. See *id.* The court held that this privilege “exempts those documents, and only those documents, normally privileged in the civil discovery context.” *Id.* Therefore, at the direction of the court, this office narrowed the scope and interpretation of the deliberative process privilege, applying the same discovery-based approach applied by federal courts in early interpretations of this privilege. See *id.* at 3. The court in *Simons-Eastern Co. v. United States*, 55 F.R.D. 88, 88-89 (N.D. Ga. 1972), held that the privilege applies to “opinions, conclusions, and reasoning reached by Government officials in connection with their official duties.” ORD 615 at 5 (quoting *Simons-Eastern*, F.R.D. at 88-89). In *Ackerly v. Ley*, 420 F.2d 1336, 1341 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970), the court held that the privilege was intended to protect “those internal working papers in which opinions are expressed and policies formulated and recommended.” ORD 615 at 5 (quoting *Ackerly*, 420 F.2d at 1341). In light of these court decisions, this office has determined that section 552.111 excepts from disclosure only the advice, recommendations, and opinions of members of the governmental body at issue that relate to a policymaking matter. See ORD 615 at 5. Furthermore, the fact that a document may have been used in the policymaking process does not bring that information within the privilege.

You claim that the taser videos were created to explore and discuss the potential implementation and use of audio and video equipment on taser devices. Further, you state the videos consist of the body of work necessary to facilitate open and frank discussion necessary to determine whether the department should use this equipment. It is clear from both your arguments and our review, however, that the taser videos do not reveal the internal deliberations of the department, nor do they contain the advice, recommendations, or opinions of the department. Thus, the department may not withhold the submitted taser videos under section 552.111 of the Government Code. As you do not raise any other exceptions against disclosure, the submitted taser videos must be released.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Dep't of Pub. 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 Office of the Attorney General 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. 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,



Jaclyn N. Thompson
Assistant Attorney General
Open Records Division

JNT/krl

Ref: ID# 271373

Enc. Submitted documents

c: Mr. Wayne Dolcefino
KTRV-TV
3310 Bissonnet
Houston, Texas 77005
(w/o enclosures)

Ms. Roma Khanna
Houston Chronicle
801 Texas Avenue
Houston, Texas 77002
(w/o enclosures)