ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 6, 2007

Ms. Stephanie Berry
Assistant City Attorney
City of Denton
215 East McKinney
Denton, Texas 76201

OR2007-02553

Dear Ms. Berry:

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# 272804.

The Denton Police Department (the "department") received a request for a complete copy of two named officers' personnel or civil service files, and the two officers' disciplinary and internal affairs files. The department claims that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, and 552.117 of the Government Code.[1] We have considered the exceptions you claim and reviewed the submitted information.[2] We have also considered comments submitted by the Denton County Criminal District Attorney's Office (the "district attorney"). *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

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[1]Although you also cite sections 552.1175 and 552.122 of the Government Code, your arguments under these exceptions are properly raised under section 552.117. Accordingly, we will consider these arguments under section 552.117.

[2]We 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.

Initially, we address the department's procedural obligations under section 552.301 of the Government Code. Section 552.301(b) requires a governmental body to ask for the attorney general's decision and state the exceptions to disclosure that it claims not later than the tenth business day after the date of its receipt of a written request for information. *See* Gov't Code § 552.301(b). Although you timely raised the exceptions the department claims, the department has not raised section 552.108 of the Government Code, an exception raised by the district attorney. Section 552.108 is a discretionary exception to disclosure that protects a governmental body's interests and may be waived by the governmental body. *See id.* § 552.302 (governmental body's failure to comply with the procedural requirements of Gov't Code § 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); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 177 (1977) (governmental body may waive statutory predecessor to Gov't Code § 552.108); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Thus, in failing to raise section 552.108 within the deadline prescribed by section 552.301(b), the department has waived any claim it would have under section 552.108. *See generally* Open Records Decision No. 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions). However, the need of another governmental body to withhold information under section 552.108 can provide a compelling reason to withhold information. *See* Open Records Decision No. 586 at 3 (1991). Because the district attorney objects to the release of the submitted information under section 552.108, we will consider the applicability of section 552.108 along with the exceptions raised by the department.

Section 552.108 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." Gov't Code § 552.108(a)(1). Generally, 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). The district attorney informs us that the information at issue pertains to a pending criminal prosecution being handled by the district attorney. The district attorney states that the requested information pertains to the investigating officers involved in the arrest that resulted in this criminal prosecution. The district attorney further states that release of the requested information would interfere with the prosecution of the case by circumventing the formal discovery process. Based on the district attorney's representations, we find that the district attorney has demonstrated the applicability of section 552.108 to the submitted information. *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); *see also* Open

Records Decision Nos. 474 (1987), 372 (1983) (where an incident involving allegedly criminal conduct is still under active investigation or prosecution, section 552.108 may be invoked by any proper custodian of information that relates to the incident); Open Records Decision No. 586 (1991). Thus, the submitted information may be withheld under section 552.108 of the Government Code. As our ruling on this issue is dispositive, we need not address the exceptions to disclosure raised by the department.

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).

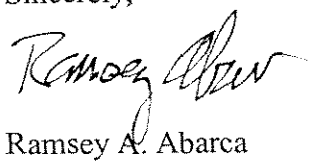
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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,



Ramsey A. Abarca
Assistant Attorney General
Open Records Division

RAA/eb

Ref: ID# 272804

Enc. Submitted documents

c: Mr. Neil Durrance
1108 North Locust Street
Denton, Texas 76201
(w/o enclosures)