



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 25, 2008

Mr. Ernesto Rodriguez
Assistant City Attorney
City of El Paso
2 Civic Center Plaza, 9th Floor
El Paso, Texas 79901

OR2008-02467

Dear Mr. Rodriguez:

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# 303796.

The City of El Paso (the "city") received a request for information pertaining to a particular internal affairs investigation. You claim that the requested information is excepted from disclosure under sections 552.108 and 552.130 of the Government Code. In addition, the El Paso County District Attorney's Office (the "district attorney"), in a letter to the city you have forwarded to this office, raises sections 552.103 and 552.108 as exceptions to disclosure of the requested information. We have considered the exceptions raised and reviewed the submitted information.

Initially, we note that a portion of the submitted information, specifically, the El Paso police department's use of force policy contained in the internal affairs file, was the subject of a previous ruling from our office. In Open Records Letter No. 2006-00394 (2006), we ruled that portions of this policy were excepted from disclosure under section 552.108(b)(1). We note, however, that the policy at issue states that it was last revised on July 25, 2006, which was after the January 11, 2006 date of our ruling in Open Records Letter No. 2006-00394. We are unable to determine the extent to which those portions which we found to be

excepted from disclosure have been changed. Therefore, to the extent the portions of the policy at issue are unchanged since the issuance of Open Records Letter No. 2006-00394, those portions may be withheld from the requestor in accordance with that ruling. To the extent those portions were subsequently revised, then Open Records Letter No. 2006-00394 does not serve as a previous determination for that information, and it must be disposed of in accordance with the instant ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

Next, we note that the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides in part that

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). We find that the information you have submitted consists of completed reports and a completed investigation made for or by the city. The city must release information subject to section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code, or is expressly made confidential under other law. You claim that this information is excepted from disclosure under section 552.108 of the Government Code. As previously noted, the district attorney, in a letter to the city you have forwarded to this office, raises sections 552.103 and 552.108 of the Government Code as exceptions to disclosure of the requested information. Section 552.103 is a discretionary exception to disclosure that protects the governmental body's interests and is therefore not "other law" that makes information expressly confidential for purposes of section 552.022(a). *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.- Dallas 1999, no pet.) (governmental body may waive section 552.103); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Consequently, the city may not withhold the completed reports and investigation pursuant to section 552.103 of the Government Code. However, as information subject to section 552.022(a)(1) may be withheld under

sections 552.101, 552.108, 552.117, 552.130, and 552.136,¹ we will consider the applicability of these exceptions to the submitted information.

Section 552.108(a)(1) 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: (1) release of the information would interfere with the detection, investigation, or prosecution of crime.” Gov’t Code § 552.108(a)(1). 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 Gov’t Code §§ 552.108(a)(1), 301(e)(1)(A); see also *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). This exception is generally not applicable to the records of an internal affairs investigation that is purely administrative in nature. See *City of Fort Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no pet.), *Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. Civ. App.—El Paso 1992, writ denied) (statutory predecessor to Gov’t Code § 552.108 not applicable to internal investigation that did not result in criminal investigation or prosecution).

In this instance, you inform us, and provide a letter from the district attorney confirming, that a criminal proceeding is pending, and claim that the submitted information should be withheld pursuant to section 552.108(a)(1). Based on these representations and our review of the information at issue, we conclude that the city has demonstrated that section 552.108(a)(1) applies to the submitted offense and incident reports that pertain directly to the criminal proceeding. 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); 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); see also Open Records Decision No. 586 (1991). We have marked this information.

However, section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. Gov’t Code § 552.108(c). Basic information refers to the information held to be public in *Houston Chronicle*. Thus, with the exception of the basic front page offense and arrest information, you may withhold the offense and incident reports from disclosure based on section 552.108(a)(1). We note that you have the discretion to release all or part of the remaining information in the offense reports that is not otherwise confidential by law. Gov’t Code § 552.007.

¹The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

As for remaining information in the internal affairs file, including the submitted audio recordings, we find that neither the city nor the district attorney has reasonably explained how and why the release of this information would interfere with the pending criminal proceeding. Therefore, these records may not be withheld pursuant to section 552.108(a)(1). *See Gov't Code §§ 552.108(a)(1), .301(e)(1)(A); see also Ex parte Pruitt, 551 S.W.2d 706 (Tex. 1977).* However, we will address the applicability of other exceptions to this information.

Some of the remaining records at issue are medical records, access to which is governed by the MPA, chapter 159 of the Occupations Code. Section 159.002 of the MPA provides:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

The medical records of the requestor must be released upon her signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). We have marked the medical records subject to the MPA.

Section 552.117(a)(2) excepts from disclosure the current and former home addresses and telephone numbers, social security number, and family member information of a peace officer regardless of whether the officer elected under section 552.024 or section 552.1175 of the Government Code to keep such information confidential. *See Gov't Code § 552.117(a)(2).* Section 552.117(a)(2) also encompasses the personal cellular telephone number and pager number of a peace officer. *See Open Records Decision No. 670 (2001).* We have marked the personal information of a police officer that must be withheld under section 552.117(a)(2). We also note that the city must also withhold the personal cellular telephone number of a police officer contained within the submitted audio recordings.²

²The cellular phone number at issue is contained in the recording of the interview with officer Billy Barrow, Jr.

We next note that the submitted information contains Texas driver's license numbers. Section 552.130 of the Government Code provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]

(2) a motor vehicle title or registration issued by an agency of this state[.]

Gov't Code § 552.130(a). The driver's license numbers we have marked must be withheld under section 552.130.

In addition, section 552.136 of the Government Code states that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136. The city must therefore withhold the account number we have marked under section 552.136.

Finally, we note that you submitted a portion of the responsive information in an envelope marked "Confidential – Garrity Protected." We therefore understand you to argue that this information is excepted from disclosure under section 552.101 of the Government Code³ in conjunction with the case of *Garrity v. New Jersey*, 385 U.S. 493 (1967). In *Garrity*, certain officers made incriminating statements during an investigation by the Attorney General of New Jersey under the threat of a forfeiture-of-office statute. *Garrity*, 385 U.S. at 494-95. During subsequent criminal proceedings, the lower court admitted some of these statements into evidence, holding that the officers gave the statements voluntarily. *Id.* at 495 n.2. Ultimately, the United States Supreme Court held that self-incriminating statements obtained under a threat of job forfeiture and subsequently used in criminal proceedings violated the officers' Fifth Amendment privilege against self-incrimination. *Id.* at 500. *Garrity* is inapplicable here because the statements are released in response to a request under the Act and not used as evidence in a criminal prosecution. *See id.* at 495. Therefore, we find that *Garrity* provides no basis for withholding the statements at issue. Accordingly, we conclude the city may not withhold any portion of the submitted information under section 552.101 in conjunction with *Garrity*.

In summary, with the exception of basic information, the submitted offense and incident reports we have marked may be withheld under section 552.108(a)(1). The marked medical

³Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

records may only be released in accordance with the MPA. The marked personal information of a police officer must be withheld under section 552.117(a)(2). The Texas driver's license information must be withheld under section 552.130. The account number we have marked must be withheld under section 552.136. The remaining information must be released to the requestor.⁴

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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 challenge that decision by suing the governmental

⁴We note that the submitted information contains social security numbers. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act. Section 552.147 is based on privacy concerns. Accordingly, pursuant to section 552.023, the requestor has a right of access to her own social security number. *See* Gov't Code § 552.023(a). In addition, we note that the information being released contains other confidential information to which the requestor has a right of access. *See id.*; Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual asks governmental body to provide him with information concerning himself). Therefore, if the city receives another request for this particular information from a different requestor, then the city should again seek a decision from this office.

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,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/jb

Ref: ID# 303796

Enc. Submitted documents

c: Ms. Natalie Amanda Luna
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(w/o enclosures)