



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 1, 2008

Ms. Angela M. DeLuca
Assistant City Attorney
City of College Station
P.O. Box 9960
College Station, Texas 77842

OR2008-08887

Dear Ms. DeLuca:

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# 314470.

The College Station Police Department (the "department") received a request for all e-mail communications sent or received from police patrol units during a specified time period. 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.

Initially, we must address the department's obligations under section 552.301 of the Government Code. Section 552.301 provides that a governmental body must ask for the attorney general's decision and state the exceptions that apply within a reasonable time not later than the tenth business day after the date of receiving the written request. Gov't Code § 552.301(b). While you raised section 552.108 within the ten-business-day time period as required by subsection 552.301(b), you did not raise sections 552.101 and 552.103 within the ten-business-day deadline.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ); Open Records Decision No. 319 (1982). A compelling reason exists when third-party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977). Section 552.103 is a discretionary exception that

protects a governmental body's interests and may be waived by a governmental body's failure to comply with the procedural requirements of the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 542 at 4 (1990) (statutory predecessor to section 552.103 subject to waiver). Thus, because you have failed to comply with the procedural requirement of section 552.301(b), the department has waived its claim under section 552.103. Therefore, the department may not withhold any of the submitted information under section 552.103 of the Government Code. Because your claim under section 552.101 can provide a compelling reason for non-disclosure, we will address the applicability of this exception to the submitted information. We will also consider your claim under section 552.108 for this information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101.¹ This section encompasses information protected by other statutes. You argue the submitted information is confidential under article 39.14 of the Code of Criminal Procedure. However, article 39.14 governs the discovery of information and the testimony of witnesses in criminal proceedings. Article 39.14 does not expressly make information confidential for section 552.101 purposes. *See* Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality must be express, and confidentiality requirement will not be implied from statutory structure), 478 at 2 (1987) (statutory confidentiality requires express language making certain information confidential or stating that information shall not be released to public). Consequently, we conclude that the department may not withhold the submitted information pursuant to section 552.101 of the Government Code in conjunction with article 39.14 of the Code of Criminal Procedure.

In addition, we note you raise Rule 612 and Rule 615 of the Texas Rules of Evidence in conjunction with section 552.101. Section 552.101 does not encompass the discovery privileges found in these rules because they are not constitutional law, statutory laws, or judicial decisions. Open Records Decision No. 676 at 1-2 (2002). In *In re City of Georgetown*, the Texas Supreme Court concluded that the Texas Rules of Evidence are "other laws" that makes information confidential for purposes of section 552.022 of the Government Code. *See* 53 S.W.3d 328, 337 (Tex. 2001). We note, however, that section 552.022 of the Government Code is not applicable to the requested information. Therefore, the department may not withhold the requested information under Rule 612 or Rule 615 of the Texas Rules of Evidence.

¹The department asserts section 552.101 but then inexplicably proceeds to discuss the definition of the term, "other law." This term is not found in the wording of section 552.101. Rather, the term is found in section 552.022, which provides that certain categories of information are expressly public unless made confidential by "other law." Gov't Code § 552.022(a).

Section 552.108(a) 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). 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).

You contend the submitted records are related to a pending DWI prosecution. Upon review, we note that most of the records do not relate to the DWI arrest. Therefore, we conclude that the department has not adequately demonstrated how or why release of most of the submitted records would interfere with the detection, investigation, or prosecution of crime. *See* Gov’t Code § 552.108(a)(1); *Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177, 186-87 (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). Accordingly, the department may only withhold the information we have marked that relates to the pending DWI prosecution under section 552.108(a)(1) of the Government Code. The remaining information may not be withheld on that basis.

The department also raises section 552.108(b)(1), which 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 . . . release of the internal record or notation would interfere with law enforcement or prosecution.” Section 552.108(b)(1) 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.). Based on your argument and our review, we determine that you have not sufficiently demonstrated that the release of any of the remaining information would interfere with law enforcement or crime prevention. *See* Gov’t Code § 552.108(b)(1); Open Records Decision No. 508 at 4 (1988) (governmental body must demonstrate how release of particular information at issue would interfere with law enforcement efforts, unless information does so on its face). Therefore, the department may not withhold any of the remaining information under section 552.108(b)(1).

In summary, the department may withhold the information we have marked under section 552.108(a)(1). The remaining records must be released to the requestor.

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). If the governmental body does not file suit over 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 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,



Henisha D. Anderson
Assistant Attorney General
Open Records Division

HDA/mcf

Ref: ID# 314470

Enc. Submitted documents

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(w/o enclosures)