



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 3, 2012

Ms. Mary Kay Fischer
City Attorney
City of Angleton
121 South Velasco
Angleton, Texas 77515

OR2012-01779

Dear Ms. Fischer:

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# 444234.

The Angleton Police Department (the “department”) received a request for the personnel file of a specified police officer. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.108, 552.114, 552.115, 552.117, 552.1175, 552.119, 552.122, 552.136, and 552.140 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, we must address the department’s procedural obligations under the Act. Section 552.301 describes the procedural obligations placed on a governmental body that receives a written request for information it wishes to withhold. Pursuant to section 552.301(e) of the Government Code, a governmental body is required to submit to this office within fifteen business days of receiving an open records request: (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. Gov’t Code § 552.301(e)(1)(A)-(D). In this instance, you state the department received the request for

¹We assume the “representative 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 those records contain substantially different types of information than those submitted to this office.

information on November 14, 2011. You inform us the department was closed for business on November 24, 2011 and November 25, 2011. Accordingly, the department's fifteen-business-day deadline was December 7, 2011. A copy of the envelope in which the department originally submitted a copy of the requested information bears a postmark of December 1, 2011. The submitted information reflects, however, that the original submission was returned to the department for insufficient postage and the department again mailed the requested information to this office in an envelope bearing a postmark of December 8, 2011. Section 552.308 of the Government Code provides when a submission within a specified time period is required under the Act, the time requirement is met if the submission is sent by first class mail "with postage . . . prepaid" and the postmark date is within the required time period. *See id.* § 552.308. Because the department did not submit all the information required by section 552.301(e) within the required time period, we find the department failed to comply with the requirements of section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption the requested information is public and must be released unless a compelling reason exists to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *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 section 552.302); *see also* Open Records Decision No. 630 (1994). Generally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). Sections 552.103, 552.108, and 552.122 of the Government Code are discretionary exceptions to disclosure that protects a governmental body's interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 177 at 3 (1977) (statutory predecessor to section 552.108 subject to waiver). Because the department failed to comply with section 552.301, it has waived these discretionary claims. However, the interests under sections 552.103 and 552.108 of a governmental body other than the one that failed to comply with section 552.301 can provide compelling reasons for non-disclosure under section 552.302. *See* Open Records Decision No. 586 at 2-3 (1991). The Brazoria County Criminal District Attorney's Office (the "district attorney's office") asserts an interest in the information at issue. Therefore, we will determine whether the department may withhold the submitted information on behalf of the district attorney's office under section 552.103 or section 552.108. Further, because sections 552.101, 552.114, 552.115, 552.117, 552.1175, 552.119, 552.122, 552.136, and 552.140 can provide compelling reasons to withhold information, we will also consider the applicability of these exceptions to the submitted information.

We note the submitted information contains a completed evaluation subject to section 552.022(a)(1) of the Government Code. Section 552.022(a)(1) provides for required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or

by a governmental body[.]” unless the information is made confidential under chapter 552 or “other law” or is excepted from disclosure under section 552.108 of the Government Code. Although the district attorney’s office asserts the submitted information is excepted from disclosure under section 552.103, this section is discretionary and does not make information confidential under the Act. *See* Act of May 30, 2011, 82nd Leg., R.S., S.B. 602, §§ 3-21, 23-26, 28-37 (providing for “confidentiality” of information under specified exceptions); *see also Dallas Area Rapid Transit*, 4 S.W.3d at 475-76; Open Records Decision No. 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body’s position in litigation and does not itself make information confidential); *see also* ORD 665 at 2 n.5 (discretionary exceptions generally). Therefore, the department may not withhold the completed evaluation under section 552.103 of the Government Code. However, because information subject to section 552.022(a)(1) may be withheld under section 552.108 of the Government Code, we will consider the applicability of this exception to the completed evaluation, as well as the remaining 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] 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 id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You inform us the submitted personnel records pertain to an officer who is the arresting officer and witness in a pending criminal prosecution. You have also provided our office with correspondence from the district attorney’s office wherein the district attorney’s office indicates it objects to the release of the submitted information because of the officer’s involvement in the pending prosecution. Based on the district attorney’s objections and our review, we find the release of the submitted information 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) (court delineates law enforcement interests that are present in active cases), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976); *see also* Open Records Decision No. 474 at 4-5 (1987) (section 552.108 may be invoked by any proper custodian of information relating to pending investigation or prosecution of criminal conduct). Therefore, the department may withhold the submitted information under section 552.108(a)(1) of the Government Code on behalf of the district attorney’s office.²

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

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and

²As our ruling is dispositive, we need not address your remaining arguments against disclosure or the district attorney’s office’s remaining argument under section 552.103 of the Government Code.

responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,

A handwritten signature in cursive script, appearing to read "Michelle R. Garza".

Michelle R. Garza
Assistant Attorney General
Open Records Division

MRG/em

Ref: ID# 444234

Enc. Submitted documents

c: Requestor
(w/o enclosures)