Office of the Attorney General • State of Texas
John Cornyn

February 16, 2001

Mr. Leonard W. Peck, Jr.
Assistant General Counsel
Texas Department of Criminal Justice
P.O. Box 13084
Austin, Texas 78711

OR2001-0599

Dear Mr. Peck:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 144292.

The Texas Department of Criminal Justice (the "department") received a request for copies of photographs taken of the requestor's son, a department inmate. You claim that the requested information is excepted from disclosure under sections 552.101, 552.107 and 552.131 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

As an initial matter, we note that the requestor asserts that she originally made the request for the subject photographs over a year ago, and at that time the department denied to her their existence. Although you do not doubt the veracity of the requestor's assertion, you nevertheless inform this office that you do not have a copy of the original request referred to by the requestor, and therefore, you do not know exactly what she may have been seeking. This situation therefore presents a fact issue as to whether the requestor did in fact make an earlier request for the information at issue in this ruling, and if she did, whether the department failed to comply with the requirements of the Public Information Act (the "Act") by not providing the requested information to the requestor, or alternatively, seeking a decision from this office in order to withhold the requested information. See Gov't Code §§ 552.301, 55.302. We cannot resolve disputes of fact in the open records process, and thus, we must rely on the representations of the governmental body requesting our opinion. Open Records Decision Nos. 554 (1990), 552 (1990).

In this case, you assert that because the history of the original request is unclear, the department is treating the instant request as a new one, and that alternatively, if the

department did fail to submit a timely request to this office in response to the original request, that compelling reasons exist for withholding the photographs. With regard to whether the department in fact received an earlier request, you state that "we have dealt with [the requestor] for several years now. Over that time she has shown herself to be persistent, congenial, and absolutely credible." You also inform us that "[w]ith her request she includes an extract from the released material which appears to be authentic and which references the taking of photographs." On this basis, and upon review of the submitted information, it appears that in fact the requestor did submit a request to the department prior to the instant request, and that photographs responsive to her request did exist at that time. Therefore, it appears that the department did not comply with the requirements of the Act in responding to the prior request, in violation of section 552.301 of the Government Code.

Subsections 552.301(a) and (b) of the Government Code provide:

> (a) A governmental body that receives a written request for information that it wishes to withhold from public disclosure and that it considers to be within one of the [act's] exceptions . . . must ask for a decision from the attorney general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions.
>
> (b) The governmental body must ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the 10th business day after the date of receiving the written request.

Assuming that the requestor did make a previous request for the photographs of her son, it is apparent the department neither released the requested photos, nor sought a decision from this office within the ten business day period mandated by section 552.301(a). Because the request for a decision was not timely received, the requested information is presumed to be public information. Gov't Code § 552.302.

In order to overcome the presumption that the requested information is public information, a governmental body must provide compelling reasons why the information should not be disclosed. *Id.*; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.--Austin 1990, no writ); *see* Open Records Decision No. 630 (1994). You argue that the requested information is excepted from disclosure under sections 552.101 and 552.131 of the Government Code. The application of either section 552.101 or 552.131 constitutes a compelling reason to withhold information presumed public.[1]

---

[1]Conversely, section 552.107 of the Government Code, which you also raise, is a permissive exception which is intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive

Section 552.131(a) provides:

> Except as provided by Subsection (b) or by Section 552.029 [of the Government Code], information obtained or maintained by the Texas Department of Criminal Justice is excepted from [required public disclosure] if it is information about an inmate who is confined in a facility operated by or under a contract with the department.

Section 552.029 of the Government Code provides in relevant part:

> Notwithstanding Section 508.313 or 552.131, the following information about an inmate who is confined in a facility operated by or under a contract with [the department] is subject to required disclosure under Section 552.021:
>
> . . . .
>
> (8) basic information regarding the death of an inmate in custody, an incident involving the use of force, or an alleged crime involving the inmate.

Upon review of the submitted information, we conclude that, as it is "information about an inmate who is confined in a facility operated by or under a contract with the department," and as we do not believe the submitted information comes within the ambit of section 552.029, the department must withhold the submitted information from the requestor under section 552.131(a). As we resolve your request under section 552.131, we need not address your argument under section 552.101.

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

---

attorney-client privilege, section 552.107(1)), 473 (1987) (city's failure to meet 10-day deadline waived protections of section 552.103 and 552.111). Permissive exceptions therefore do not constitute compelling reasons to overcome the presumption of openness.

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, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, 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 Department of Public 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 General Services Commission 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/seg

Ref: ID# 144292

Encl. Submitted documents

cc: Ms. K. Denise Thompson
2205 Amhearst Court
Flowermound, Texas 75028
(w/o enclosures)