



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 12, 2004

Ms. Maleshia Brown Farmer
Assistant City Attorney
City of Fort Worth
1000 Throckmorton Street
Fort Worth, Texas 76102

OR2004-1066

Dear Ms. Farmer:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 196174.

The Fort Worth Police Department (the "department") received a request for information pertaining to the department's "crime lab" for a specified period of time. You state that you have provided the requestor with the majority of the requested information. You claim, however, that the remaining requested information is excepted from disclosure pursuant to sections 552.101, 552.107, 552.108, and 552.111 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information.

Initially, we must address the procedural requirements of section 552.301 of the Government Code. Pursuant to section 552.301(e), a governmental body that requests an attorney general decision under section 552.301(a) must, within a reasonable time, but not later than the fifteenth business day after the date of receiving the written request, submit to the attorney general: (1) written comments stating the reasons why the stated exceptions to disclosure apply that would allow the requested information to be withheld; (2) a copy of the written request for information; (3) a signed statement of or evidence sufficient to establish the date that the governmental body received the written request; and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions to disclosure apply to which parts of the documents. *See id.* § 552.301(e). You state that the department received the request for information on November 14, 2003. Therefore, the department had until December 9, 2003 to submit to us the items required by section 552.301(e) of the Government Code. However, we note that the department did not fully comply with section 552.301(e) until December 10, 2003. Accordingly, we conclude that the department failed to comply with section 552.301 of the Government Code in requesting this decision from us.

Because the department failed to comply with the procedural requirements of section 552.301 with regard to the information at issue, this information is now presumed public. *See* Gov't Code § 552.302; *see also* *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.- Austin 1990, no writ); *City of Houston v. Houston Chronicle Publ'g Co.*, 673 S.W.2d 316, 323 (Tex. App.- Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). The department must demonstrate a compelling interest in order to overcome the presumption that the information at issue is now public. *See* Gov't Code § 552.302. Normally, a compelling interest is demonstrated when some other source of law makes the requested information confidential or third party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977) (construing predecessor statute). Although the department claims that portions of the submitted information are excepted from disclosure pursuant to sections 552.107 and 552.111 of the Government Code, we note that these exceptions to disclosure are discretionary exceptions to disclosure under the Public Information Act (the "Act") that do not constitute compelling interests that are sufficient to overcome the presumption that the information at issue is now public.¹ Further, we note that, although the department claims that portions of the submitted information are excepted from disclosure pursuant to section 552.108 of the Government Code, the department in this instance has not demonstrated a compelling interest under this exception to disclosure that would allow any portion of the submitted information to be withheld from disclosure. *See* Open Records Decision No. 586 (1991) (need of another governmental body to withhold requested information may provide compelling reason for nondisclosure under predecessor to section 552.108 in certain circumstances). Accordingly, we conclude that the department may not withhold any portion of the submitted information under sections 552.107, 552.108, or 552.111 of the Government Code. However, since you also claim that the submitted information, or portions thereof, is excepted from disclosure pursuant to section 552.101 of the Government Code, we will address this claim.

You claim that the submitted information is excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy.² Information is protected from disclosure under the common-law right to privacy

¹ Discretionary exceptions are 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 attorney-client privilege, section 552.107(1)), 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), 473 (1987) (governmental body may waive predecessor to section 552.111), 522 at 4 (1989) (discretionary exceptions in general); *see also* *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). Discretionary exceptions, therefore, do not constitute "other law" that makes information confidential.

² Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. *See* Gov't Code § 552.101. Section 552.101 encompasses information that is protected from disclosure by the common-law right to privacy.

when (1) it is highly intimate and embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *See id.* at 683. After carefully reviewing the submitted information, we find that no portion of the information is protected from disclosure under the common-law right to privacy. Accordingly, we conclude that the department may not withhold any portion of the submitted information under section 552.101 of the Government Code in conjunction with the common-law right to privacy. Consequently, the department must release the submitted information to the requestor in its entirety.

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, 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 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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/lmt

Ref: ID# 196174

Enc. Submitted documents

c: Ms. Laurie Fox, Reporter
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(w/o enclosures)