



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 24, 2004

Ms. M. Ann Montgomery  
Assistant County & District Attorney  
Ellis County  
1201 North Highway 77, Suite B  
Waxahachie, Texas 75165-5140

OR2004-5183

Dear Ms. Montgomery:

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# 204923.

The Ellis County Sheriff's Office (the "sheriff's office") received a request for information pertaining to an arrest for sexual assault, as well as any information concerning various procedures of the sheriff's office for undercover or sexual assault investigations and a named police officer's relationships with certain individuals. You state you have released some of the requested information, but claim that the remaining information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that the submitted information includes arrest warrants and arrest warrant affidavits. At the time you submitted your requested for a ruling from this office, Ellis County had a pending lawsuit against the Office of the Attorney General regarding the release of information under article 15.26 of the Code of Criminal Procedure. Judge Cooper recently issued an order in Ellis County's favor (No. GV 304699). Accordingly, you should rely on that decision in determining whether to release the information in these documents. However, we will address the remaining information.

We also note you have not submitted information concerning either the relationships of the named officer or most of the requested procedures for undercover or sexual assault investigation. You have also not indicated that you seek to withhold any such information.

Therefore, if such information exists, we assume you have already released it to the requestor. You must release it to the requestor at this time if you have not done so already. See Gov't Code §§ 552.301(a), 552.302.

In addition, we note that some of the submitted documents are not responsive to the instant request for information, as they were created after the date that the sheriff received the request. Chapter 552 of the Government Code does not require a governmental body to release information that did not exist when it received a request for information. See *Econ. Opps. Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 452 at 3 (1986), 362 at 2 (1983). This ruling does not address the public availability of any information that is not responsive to the request, and the sheriff need not release that information in response to this request. Open Records Decision Nos. 452 at 3 (1986), 362 at 2 (1983).

Next, we must address the obligations of the sheriff's office under section 552.301 of the Government Code. Pursuant to section 552.301(e)(1)(B), a governmental body is required to submit to this office within fifteen business days of receiving an open records request a copy of the written request for information. The sheriff's office, however, failed to do so within the deadlines of section 552.301.

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) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). A compelling reason for nondisclosure exists where some other source of law makes the information confidential. Open Records Decision No. 150 at 2 (1977). Section 552.108 is a discretionary exception to disclosure that may be waived by a governmental body, does not make information confidential, and is therefore not a compelling reason to withhold information for purposes of section 552.302. See Open Records Decision No. 177 (1977) (governmental body may waive statutory predecessor to section 552.108); see also Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, none of the submitted information is excepted from release under section 552.108. However, section 552.101 of the Government Code can provide a compelling reason for nondisclosure. Therefore, we will address whether section 552.101 of the Government Code requires you to withhold the remaining information.

Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses the doctrine of common law privacy, which protects information if it is highly intimate or embarrassing such that its release would be highly objectionable to a reasonable person and the public

has no legitimate interest in it. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). The types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* include 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. *Id.* at 683. Information identifying the victim of a sexual assault is confidential under common law privacy. In particular, a governmental body must withhold an entire report regarding a sexual assault, including basic information, if identifying information in it is inextricably intertwined with other information that can be released or when the requestor knows the identity of the alleged victim. Open Records Decisions Nos. 393 (1983), 339 (1982); see *Morales v. Ellen*, 840 S.W.2d 519 (Tex.App.—El Paso 1992, writ denied); Open Records Decision No. 440 (1986). Here, the requestor includes the name of an alleged victim of a sexual assault in his request for information; thus, withholding only the identifying information from the requestor does not preserve the victim's common law right to privacy. Therefore, the remaining information is confidential under the doctrine of common law privacy, and you must withhold it from disclosure under section 552.101.

To conclude, we do not address the release of information that is subject to the litigation between the county and the Office of the Attorney General, but the remaining information is confidential under common law privacy and must be withheld pursuant to section 552.101 of the Government Code.

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,



James L. Coggeshall  
Assistant Attorney General  
Open Records Division

JLC/seg

Ref: ID# 204923

Enc. Submitted documents

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(w/o enclosures)