



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 16, 2004

Mr. David K. Walker  
County Attorney  
Montgomery County  
210 West Davis, Suite 400  
Conroe, Texas 77301

OR2004-9695

Dear Mr. Walker:

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# 212944.

The Montgomery County Sheriff's Department (the "department") received a request for information pertaining to (1) two specified cause numbers, (2) three named individuals, and (3) three certain addresses for specified time periods. You state that some responsive information has been released to the requestor. You claim that some of the requested 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.

As a preliminary matter, we understand you to represent that some of the information that is responsive to the present request is the subject of a prior ruling of this office, issued as Open Records Letter No. 2004-3452 (2004) on April 27, 2004. *See* Open Records Decision No. 673 (2001) (governmental body may rely on prior ruling as previous determination when 1) the records or information at issue are precisely the same records or information that were previously submitted to this office pursuant to section 552.301(e)(1)(D); 2) the governmental body which received the request for the records or information is the same governmental body that previously requested and received a ruling from the attorney general; 3) the prior ruling concluded that the precise records or information are or are not excepted from disclosure under the Act; and 4) the law, facts, and circumstances on which the prior ruling was based have not changed since the issuance of the ruling). You do not

indicate that the pertinent facts and circumstances have changed since the issuance of the prior ruling. Thus, to the extent the present request encompasses records that are identical to the records at issue in Open Records Letter No. 2004-3452, we determine that the prior ruling constitutes a previous determination with respect to such records, and the department may continue to rely on our ruling with respect to any information responsive to the present request that is identical to the information at issue in that ruling.

We next address the department's obligations under section 552.301 of the Government Code. This section prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(b) requires the governmental body to ask for the attorney general's decision and state the exceptions to disclosure that it claims not later than the tenth business day after the date of its receipt of the written request for information. *See Gov't Code* § 552.301(b). You inform us that the department received the request for information on August 20, 2004. You did not request a decision from this office until September 8, 2004. Thus, you have not complied with section 552.301(b) in requesting this decision.

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) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). The presumption that information is public under section 552.302 can generally be overcome when the information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982).

You contend that some of the submitted information is excepted from public disclosure under section 552.108 of the Government Code. Section 552.108 is a discretionary exception and, as such, does not generally provide a compelling reason to withhold information. *See* Open Records Decision No. 177 (1977) (governmental body may waive statutory predecessor to section 552.108); *see also* Open Records Decision No. 522 at 4 (1989) (discretionary exceptions in general); *but see* Open Records Decision No. 586 (1991) (need of governmental body, other than one that failed to comply with requirements for requesting open records ruling, to withhold information under 552.108 may be compelling reason to overcome presumption that information is public). In this instance, you indicate that the release of some of the requested information will affect the law enforcement interests of another governmental body as it pertains to pending cases. You also claim that portions of the requested information are excepted from disclosure under section 552.101 of the Government Code as information made confidential by law. Therefore, we will address your section 552.101 and section 552.108(a)(1) arguments against disclosure for the information

at issue. However, we find you have not presented a compelling reason to overcome the presumption of openness under section 552.108(a)(2). Therefore, none of the information may be withheld under section 552.108(a)(2).

We first address your claim that portions of the requested information are excepted under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," and encompasses the doctrine of common-law privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. 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.

In addition, this office has found that the following types of information are excepted from required public disclosure under common law privacy: an individual's criminal history when compiled by a governmental body, *see* Open Records Decision No. 565 (*citing United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989)); some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps); and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982).

One of the submitted reports relates to an alleged sexual assault. A governmental body must withhold an entire sexual assault report when victim 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). The requestor includes the name of the alleged victim in her 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 entire report is confidential under the doctrine of common law privacy. We have marked the information that must be withheld pursuant to section 552.101 and common law privacy.

Next, you claim that portions of the requested information are excepted from disclosure under section 552.108 of the Government Code. 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.” 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* Gov’t Code §§ 552.108(a)(1), .301(e)(1)(a); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977).

You inform us that offense report numbers 03A047155, 04A004198, 04A004290, and 04A004505 “relate directly to investigations that directly pertain to pending criminal prosecution.” You have also provided an affidavit dated September 7, 2004 from an Assistant District Attorney for Montgomery County (the “district attorney”). In the affidavit, the district attorney states that prosecution related to offense report numbers 03A047155, 04A004198, and 04A004505 is currently pending in district and county court, while offense report number 04A004290 “is being reviewed for charges.” The district attorney further states that “the release of any information compiled to date would hamper the prosecution of the alleged offenses.” Based on these representations and our review of the information at issue, we find that the district attorney has established that release of this information “would interfere with the detection, investigation, or prosecution of crime.” Gov’t Code § 552.108(a)(1); *Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14<sup>th</sup> 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); Open Records Decision No. 216 at 3 (1978); *cf.* Open Records Decision No. 586 at 3 (1991).

The remaining submitted information that you seek to withhold under section 552.108, however, pertains to cases that concluded. Thus, as this information is not under active investigation or prosecution, we find that neither you nor the district attorney has established that its release would interfere with the detection, investigation, or prosecution of crime. Therefore, report numbers 99A016053 and 02A013544 may not be withheld under section 552.108(a)(1).

Further, we note that section 552.108 is inapplicable to basic information about an arrested person, an arrest, or a crime. Gov’t Code § 552.108(c). We believe such basic information refers to the information held to be public in *Houston Chronicle*. *See id.* at 186-87. Because the prosecution interest at issue here belongs to the district attorney, the department must consult with the district attorney and release the types of information that are considered to be front page information, including a detailed description of the offense, even if this information is not actually located on the front page. *See* Open Records Decision No. 127 (1976) (summarizing types of information made public by *Houston Chronicle*). Pursuant to section 552.108(a)(1), the department may withhold the remaining information that we have marked under section 552.108(a)(1) of the Government Code.

In summary, the department may continue to rely on Open Records Letter No. 2004-3452 with respect to information responsive to the present request that is identical to the information at issue in that ruling. We have marked the information that must be withheld pursuant to section 552.101 and common-law privacy. With the exception of basic

information, the department may withhold the information that we have marked under section 552.108(a)(1) of the Government Code. The remaining submitted information 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 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,



Cindy Nettles  
Assistant Attorney General  
Open Records Division

CN/jh

Ref: ID# 212944  
Enc. Submitted documents

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(w/o enclosures)