



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 14, 2005

Mr. Don Schnebly  
District Attorney  
Parker County  
117 Fort Worth Highway  
Weatherford, Texas 760863

OR2005-03213

Dear Mr. Schnebly:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 222202.

The Parker County District Attorney's Office (the "district attorney's office") and the Weatherford Police Department (the "department") received a request for copies of specific audio tape recordings. Both the district attorney's office and the department claim that the requested information is excepted from disclosure under section 552.101 of the Government Code. The department also asserts that the information is excepted under section 552.108 of the Government Code. We have considered the claimed exceptions and reviewed the submitted arguments.

As a threshold issue, we will address your arguments under section 552.101 of the Government Code and section 16.02 of the Penal Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes, including section 16.02 of the Penal Code. You claim that section 16.02 of the Penal Code deems that the requested audiotapes are confidential. Section 16.02 provides in relevant part:

(b) A person commits an offense if he:

(1) intentionally intercepts, endeavors to intercept, or procures another person to intercept or endeavor to intercept a wire, oral, or electronic communication;

(2) intentionally discloses or endeavors to disclose to another person the contents of a wire, oral, or electronic communication if the person knows or has reason to know the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection[.]

Penal Code § 16.02(b). You state that the requested audiotapes consist of “surreptitiously recorded conversations” made by the department. You inform us that the district attorney’s office conducted an investigation to determine whether a violation of section 16.02 of the Penal Code had been committed by making the surreptitious recordings. According to your statements, the Parker County Grand Jury “no billed” the cases involving these audiotapes and “no investigation or prosecution of any kind pertaining to this matter is presently being conducted by the [district attorney’s office] or the [department].” You do not inform us, nor do you otherwise establish, that section 16.02 has been violated. Without a clear violation of section 16.02(b)(1), we cannot find that section 16.02(b)(2) is applicable in this instance. Accordingly, neither the district attorney’s office nor the department may withhold the requested tapes on this basis.

We next address your obligations under section 552.301 of the Government Code. Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request, among other things, a copy of the specific information requested or a representative sample thereof. You did not, however, submit to this office a copy of the specific information requested. Pursuant to section 552.302 of the Government Code, a governmental body’s failure to submit to this office the information required in section 552.301(e) results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See 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). Because section 552.108 of the Government Code is a discretionary exception to disclosure that protects a governmental body’s interests, we find the department has waived section 552.108 in this instance. *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). You raise both constitutional and common law privacy under section 552.101 of the Government Code. Generally, section 552.101 constitutes a compelling reason to overcome the presumption of openness. However, because you have not submitted the information, we have no basis for finding it confidential. Thus, we have no choice but

to order the information released per section 552.302. If you believe the information is confidential and may not lawfully be released, you must challenge the ruling in court as outlined below.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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); *Tex. 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,

A handwritten signature in cursive script that reads "Amanda Crawford". The signature is written in black ink and is positioned above the typed name and title.

Amanda Crawford  
Assistant Attorney General  
Open Records Division

AEC/sdk

Ref: ID# 222202

c: Mr. David Broiles  
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