



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 26, 2005

Chief Ken Delacerda
San Augustine Police Department
810 North Highway 96
San Augustine, Texas 75972-1024

OR2005-06690

Dear Chief Delacerda:

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# 228824.

The San Augustine Police Department (the "department") received a request for "all offense reports, investigations, photographs and/or witness statements, in your possession or control pertaining to any and all plea bargains involving" twenty four named individuals. You state that the department does not have some of the requested information.¹ You also inform us that you have released some of the responsive information to the requestor. You ask whether some of the remaining information is excepted from disclosure under section 552.108 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we note that you have only submitted records for one named individual for our review. See Gov't Code § 552.301(e)(1)(D). As you have not submitted the remainder of the requested information, we assume the department has released this information to the extent it existed on the date the department received this request. If not, the department must

¹ We note that the Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request for information. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983). A governmental body must make a good faith effort to relate a request for information to any responsive information that is within its custody or control. See Open Records Decision No. 561 at 8-9 (1990).

do so at this time. *See* Gov't Code §§ 552.006, .301, .302; *see also* Open Records Decision No. 664 (2000) (noting that if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

We must now address your responsibilities under the Act. 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 (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. You did not, however, submit to this office the information at issue within the prescribed time period. Thus, the department failed to comply with section 552.301(e) in regard to this information.

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 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). You state that the submitted information may be excepted from disclosure under section 552.108 of the Government Code. Section 552.108 is a discretionary exception to disclosure that protects a governmental body's interests and may be waived by the governmental body. *See* Open Records Decision No. 177 (1977) (governmental body may waive statutory predecessor to Gov't Code § 552.108); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Thus, your argument under this exception does not constitute a compelling reason to withhold the submitted information. Accordingly, we determine that the submitted information may not be withheld pursuant to section 552.108.

Next, we note that an arrest warrant was included with the submitted documents. Article 15.26 of the Code of Criminal Procedure states that “[t]he arrest warrant, and any affidavit presented to the magistrate in support of the issuance of the warrant, is public information, and beginning immediately when the warrant is executed the magistrate's clerk shall make a copy of the warrant and the affidavit available for public inspection in the clerk's office during normal business hours.” Therefore, this document is made public under article 15.26. Exceptions to disclosure under the Act generally do not apply to information that is made public by other statutes, such as article 15.26 of the Code of Criminal Procedure. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Thus, the submitted arrest warrant must be released to the requestor.

We note, however, that the remaining submitted information is excepted from disclosure based on section 552.101 of the Government Code.² Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses common law privacy. Where an individual's criminal history information has been compiled by a governmental entity, the information takes on a character that implicates the individual's right to privacy. *See United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989). We note that law enforcement records in which an individual is depicted as a complainant, witness, or involved party other than a suspect, arrestee, or criminal defendant do not constitute records of the criminal history of the individual and thus are not protected by common-law privacy as contemplated in *Reporters Committee*. The present request, in part, is for "all offense reports, investigations, photographs and/or witness statements" concerning a named individual. In this case, we believe that this individual's right to privacy has been implicated. The submitted incident report lists the named individual as a suspect/defendant. Therefore, with the exception of the arrest warrant, the department must withhold the submitted information under section 552.101 of the Government Code in conjunction with *Reporters Committee*.

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

²The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

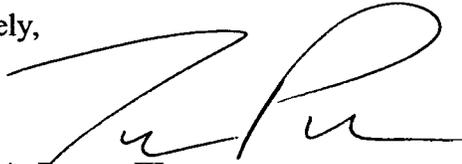
free, at(877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

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 A. Person III
Assistant Attorney General
Open Records Division

JAP/sdk

Ref: ID# 228824

Enc. Submitted documents

c: Mr. F.M. Farrell
The East Texas Sun
P.O. Box 743
Hemphill, Texas 75948
(w/o enclosures)