



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 20, 2007

Mr. Michael B. Gary
Assistant Criminal District Attorney
Smith County
100 North Broadway 4th Floor
Tyler, Texas 75702

OR2007-10723

Dear Mr. Gary:

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# 286940.

The Smith County Sheriff's Office (the "sheriff") received four requests for information pertaining to e-mails sent or received by four named individuals over a specified period of time. You claim that the requested information is excepted from disclosure under sections 552.103 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. *See Gov't Code § 552.304* (providing that interested party may submit comments stating why information should or should not be released).

Initially, we address the sheriff's obligations under section 552.301 of the Government Code. Section 552.301 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(d) provides that a governmental body that requests an attorney general decision must provide to the requestor, not later than the 10th business day after the date of its receipt of the written request for information:

- (1) a written statement that the governmental body wishes to withhold the requested information and has asked for an attorney general decision about whether the information is within an exception to public disclosure; and

(2) a copy of the governmental body's written communication to the attorney general asking for the decision or, if the governmental body's written communication to the attorney general discloses the requested information, a redacted copy of that written communication.

Gov't Code § 552.301(d). If a governmental body fails to comply with section 552.301 in requesting a decision, the requested information is presumed to be subject to required public disclosure and must be released, unless there is a compelling reason to withhold any of the information. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ).

In this instance, the sheriff received the request for information on May 25, 2007. Thus, the sheriff was required to provide the requestor a copy of its request for a ruling no later than the 10th business day after that date. The requestor informed this office that he did not receive a copy of the sheriff's request for this decision, as required by section 552.301(d)(2), until July 2, 2007. Pursuant to section 552.303 of the Government Code, we sent you a letter, asking whether the sheriff provided the requestor with a copy of its letter dated June 11, 2007, in which the sheriff requested this decision. *See id.* § 552.303(c). In correspondence to our office, the sheriff states "to the best of my knowledge, the response to [the requestor's] request was made on July 2, 2007." Thus, we conclude that the sheriff failed to comply with section 552.301(d) of the Government Code in requesting this decision.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with 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). Normally, a compelling reason for non-disclosure exists where some other source of law makes the information confidential or where third-party interests are at stake. Open Records Decision No. 150 at 2 (1977).

Although you claim exceptions to disclosure under sections 552.103 and 552.108 of the Government Code, those sections are discretionary exceptions that protect a governmental body's interests and may be waived. *See Gov't Code* § 552.007; *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 Gov't Code § 552.103), Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 177 at 3 (1977) (statutory predecessor to Gov't Code § 552.108 subject to waiver). *But see* Open Records Decision No. 586 at 2-3 (1991) (law enforcement interests of another governmental body could provide compelling reason for non-disclosure under

statutory predecessor to Gov't Code § 552.108). Therefore, the sheriff has waived sections 552.103 and 552.108 by failing to comply with section 552.301 and may not withhold any of the requested information under these sections.

We note that some of the submitted information is excepted from public disclosure under section 552.117 of the Government Code.¹ Section 552.117 states in pertinent part:

(a) Information is excepted from the requirements of Section 552.021 if it is information that relates to the home address, home telephone number, or social security number of the following person or that reveals whether the person has family members:

(1) a current or former official or employee of a governmental body, except as otherwise provided by Section 552.024;

(2) a peace officer as defined by Article 2.12, Code of Criminal Procedure, or a security officer commissioned under Section 51.212, Education Code, regardless of whether the officer complies with Section 552.024 or 552.1175, as applicable[.]

Gov't Code § 552.117(a)(1)-(2). Section 552.117(a)(2) of the Government Code excepts from public disclosure the home address, home telephone numbers, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with sections 552.024 and 552.1175 of the Government Code.² Thus, the home telephone numbers and family member information of peace officers must be withheld under section 552.117(a)(2). We note that section 552.117 also encompasses a personal cellular telephone number, provided that the service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular mobile phone numbers paid for by governmental body and intended for official use). If the cellular telephone service of the peace officers are not paid for by a governmental body, the cellular telephone numbers in the submitted information must also be withheld under section 552.117(a)(2); otherwise, the cellular telephone numbers must be released.

Next, we address the disclosure of information related to employees who are not peace officers. Section 552.117(a)(1) also excepts the home address, home telephone numbers, and social security numbers of employees of a governmental body, as well as information that reveals whether the employee has family members. However, in order for a piece of

¹The Office of the Attorney General will raise mandatory exceptions to disclosure on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481(1987), 480(1987), 470(1987).

²"Peace officer" is defined by Article 2.12 of the Texas Code of Criminal Procedure.

information to be excepted from disclosure under section 552.117(a)(1), the employee must request that this information be kept confidential prior to the date on which the request for information is received. Thus, whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Accordingly, the sheriff must only withhold the home telephone numbers and family member information of employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. The sheriff may not withhold the home telephone number and family member information of those employees who did not make a timely election to keep this information confidential or for those who elected to allow release of their home telephone number and family member information.

We note that a portion of the submitted information contains a Texas driver's license number. Section 552.130 of the Government Code excepts from disclosure information that relates to a motor vehicle operator's or driver's license or permit issued by an agency of this state. *See* Gov't Code §552.130(a)(1). Accordingly, the sheriff must withhold the Texas driver's license number contained in the submitted information under section 552.130.

Lastly, we note that the submitted information also contains e-mail addresses that are excepted from disclosure under section 552.137 of the Government Code. Section 552.137 requires a governmental body to withhold the e-mail address of a member of the general public, unless the individual to whom the e-mail address belongs has affirmatively consented to its public disclosure. *See id.* § 552.137 (b). You do not inform us that the owners of the email addresses have affirmatively consented to release. Therefore, the sheriff must withhold the e-mail addresses of members of the public in the submitted information under section 552.137, unless the owners have affirmatively consented to release.

In summary, the sheriff must withhold the peace officers' home telephone numbers and family member information under section 552.117(a)(2) of the Government Code. The home phone numbers and family member information of sheriff's employees who are not peace officers must be withheld under section 552.117(a)(1) if these individuals timely elected confidentiality under section 552.024 of the Government Code. The Texas driver's license number must be withheld under section 552.130 of the Government Code. The e-mail addresses of members of the public must be withheld under section 552.137 of the Government Code, unless they have consented to release. The remaining 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, 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); *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 Office of the Attorney General 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. 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,



M. Alan Akin
Assistant Attorney General
Open Records Division

MAA/mcf

Ref: ID# 286940

Enc. Submitted documents

c: Mr. Jason W. Gore
P.O. Box 131052
Tyler, Texas 75713
(w/o enclosures)