



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 28, 2007

Mr. David A. Mendoza
Criminal District Attorney
Hays County Justice Center
110 East Martin Luther King
San Marcos, Texas 78666

OR2007-12691

Dear Mr. Mendoza:

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 #290391.

The Hays County Sheriff's Office (the "sheriff") received a request for (1) copies of all moving traffic citations issued by the sheriff on a specified county road during a specified time period and (2) calibration records pertaining to speed radar equipment used by the sheriff.¹ You claim that the submitted citation is excepted from disclosure under section 552.103 of the Government Code.² We have considered the exception you claim and reviewed the submitted representative sample of information.

¹We note that, although this request was sent to Mr. Mendoza personally, it appears that he was still acting in his role as the sheriff's representative.

²We note that the original request was for a list of all moving citations issued by the sheriff on the specified road during the specified period of time. While we acknowledge that the sheriff does not have to create a list in response to this request, the sheriff does need to make responsive citations available. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990) (holding that a governmental body is not required to create information that did not exist when the request for information was received). The fact that complying with a request for information may be burdensome is irrelevant. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 687 (Tex. 1976) ("It is our opinion that the [predecessor to the] Act does not allow either the custodian of records or a court to consider the cost or method of supplying requested information in determining whether such information should be disclosed.").

Initially, you state that you have already released some information responsive to item 2 of the request to the requestor, and that the request for the calibration records is “duplicative and argumentative.” The requestor’s first request was for the manufacturer name and model number of the speed radar device, as well as the last three years’ calibration records of the user and any technician for a specified radar device. While you released the manufacturer name and model number to the requestor, you respond to the second part of this request by stating that “[o]fficers manually check the calibration several times daily and report any malfunctions to [the sheriff]. There have been no reported malfunctions to that new radar.” In this instance, we find your response to the request for calibration records to be insufficient. Since you did not request a ruling on the responsive calibration records, we conclude that, to the extent information responsive to the request for the calibration records exists, it must be released at this time. *See Gov’t Code §§ 552.301, .302.*

Next, we address the sheriff’s obligations under section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(e), a governmental body must submit to this office within fifteen business days of receiving an open records request a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See Gov’t Code § 552.301(e)(1)(D).* The sheriff received the request for information on July 10, 2007, but it did not send us a representative sample of the requested information until August 1, 2007. Thus, the sheriff failed to comply with the procedural requirements mandated by section 552.301.

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); Open Records Decision No. 319 (1982). A compelling reason exists when third-party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977). The sheriff raises section 552.103 for the requested traffic citations. Section 552.103 is a discretionary exception to disclosure that protects a governmental body’s interests and may be waived. *See 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 section 552.103); Open Records Decision No. 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions). In failing to comply with section 552.301, the sheriff has waived its claim under section 552.103 and may not withhold

the requested citations under this section.³ Because this is the only exception you raise for the requested citations, you must release this information 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).

³You state that the submitted citation is a representative sample of the requested records. Generally, we assume that a representative sample of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). However, we note that your "representative sample" of information consists only of the requestor's citation. In submitting this citation, you are representing that all other citations are like the one submitted. Because the requestor/defendant was given a copy of the citation when it was issued, section 552.103 cannot apply to this information. See Open Records Decision Nos. 349 (1982), 320 (1982) (holding that once information has been obtained by all parties to litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information). In the future, the sheriff should be more cognizant of the samples submitted and the exceptions to disclosure raised.

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,

A handwritten signature in black ink that reads "Reg Hargrove". The signature is written in a cursive, flowing style.

Reg Hargrove
Assistant Attorney General
Open Records Division

RJH/eeg

Ref: ID# 290391

Enc. Submitted documents

c: Mr. Paul Thomas Leigh
8315 La Plata Loop
Austin, Texas 78737
(w/o enclosures)