



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 20, 2008

Lieutenant William Ryan
Records Division
Pharr Police Department
1900 South Cage
Pharr, Texas 78577-6751

OR2008-02336

Dear Lt. Ryan:

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# 301404.

The Pharr Police Department (the "department") received a request for all incoming and outgoing calls, text messages, and e-mails for a named individual from August 1, 2007 to the present. You claim that the submitted information is excepted from disclosure under sections 552.103, 552.107, and 552.108 of the Government Code. You also seek to withhold some of the submitted information under "the same exemption to disclosure as an officer[']s personnel file[;]" we thus understand you to also raise section 552.102 of the Government Code as an exception to disclosure. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we must address the department'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. Section 552.301 provides in pertinent part:

- (a) A governmental body that receives a written request for information that it wishes to withhold from public disclosure and that it considers to be within one of the [Act's] exceptions . . . must ask for a decision from the attorney general about whether the information is within that exception if there has not been a

previous determination about whether the information falls within one of the exceptions.

(b) The governmental body must ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the 10th business day after the date of receiving the written request.

...

(e) A governmental body that requests an attorney general decision under Subsection (a) must within a reasonable time but not later than the 15th business day after the date of receiving the written request:

(1) submit to the attorney general:

(A) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld;

(B) a copy of the written request for information;

(C) a signed statement as to the date on which the request for information was received by the governmental body or evidence sufficient to establish that date; and

(D) a copy of the specific information, or submit representative samples of the information if a voluminous amount of information was requested[.]

(2) label that copy of the specific information, or of the representative samples, to indicate which exceptions apply to which parts of the copy.

Gov't Code § 552.301(a), (b), (e)(1)-(2). If a governmental body fails to comply with section 552.301, 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 department failed to request a ruling or state the applicable exceptions to disclosure within the 10-business-day deadline. The department also failed to submit the

required information to the attorney general within the 15-business-day deadline.¹ Furthermore, instead of a representative sample, the department submitted a disk which contained over 20,000 pages of documents.² See Gov't Code § 552.301(e)(1)(D). None of the submitted information was labeled to indicate which exceptions apply to which parts of the information. See *id.* § 552.301(e)(2). As of the date of this ruling, the department has not responded to a telephonic request from this office that the department provide paper copies of a representative sample of the information at issue, labeled to indicate which exceptions apply to which parts of the information. See *id.* § 552.303(b) (attorney general may determine whether governmental body's submission of information is sufficient to render decision).

Thus, because the department did not comply with the procedural requirements of subsections 552.301(b) and 552.301(e), the submitted information is presumed to be public under section 552.302. This statutory presumption 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). Although the department seeks to withhold the submitted information under sections 552.103 and 552.107 of the Government Code, those sections are discretionary exceptions to disclosure 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 section 552.103); Open Records Decision Nos. 676 at 12 (2002) (harm to governmental body's interests under section 552.107 not compelling reason for non-disclosure), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Also, you have not provided a compelling reason under section 552.108 to overcome the presumption of openness. See Open Records Decision Nos. 586 (1991) (need of another governmental body to withhold requested information may provide compelling reason for nondisclosure under section 552.108), 177 at 3 (1977) (governmental body may waive statutory predecessor to section 552.108). As such, the department's claims under sections 552.103, 552.107, and 552.108 are not compelling reasons for non-disclosure under section 552.302. See Open Records Decision No. 586 at 2-3 (1991). In failing to comply with section 552.301, the department has waived

¹In this instance, the department's deadlines under subsections 552.301(b) and 552.301(e) were November 20 and November 27, 2007. The envelope in which the department submitted its request for this decision is meter-marked November 21, 2007. The DHL envelope in which the responsive information was submitted is dated November 30, 2007.

²Section 552.222(b) of the Government Code provides that "[i]f a large amount of information has been requested, the governmental body may discuss with the requestor how the scope of a request might be narrowed[.]" Gov't Code § 552.222(b). If a requestor makes a vague or broad request, the governmental body should make a good faith effort to advise the requestor of the type of documents available that may be responsive so that the requestor may narrow or clarify the request. See Open Records Decision Nos. 663 at 5 (1999). If the requestor chooses not to narrow a broad request, the governmental body must release all responsive information if not claiming an exception to disclosure applies, or request a ruling under section 552.301 of the Government Code for any information it seeks to withhold.

sections 552.103, 552.107, and 552.108 and may not withhold any of the submitted information under those exceptions. *See* ORD 663 at 5. Although the department also raises section 552.102 of the Government Code, which is a mandatory exception to disclosure, because the department has not submitted a representative sample of the information at issue for our review, we have no basis for finding the information confidential. *See* § 552.303(b). Thus, we have no choice but to order the requested 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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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 challenge 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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/mcf

Ref: ID# 301404

Enc. Submitted documents

c: Mr. Jose M. Soto
2816 Quince
McAllen, Texas 78501
(w/o enclosures)