



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 9, 2009

Ms. Laura Garza Jimenez  
County Attorney  
Nueces County  
901 Leopard, Room 207  
Corpus Christi, Texas 78401-3680

OR2009-12700

Dear Ms. Jimenez:

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# 353229.

The Nueces County Attorney's Office (the "county attorney") received a request for a copy of the tape "from the dash cam created during the stop and arrest" of the requestor's client on September 15, 2007. You claim that the requested information is excepted from disclosure under sections 552.101, 552.108, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments from the requestor. *See* Gov't Code 552.304 (interested party may submit written comments concerning availability of requested information).

Initially, we address the requestor's contention that she should have received a copy of the tape pursuant to her discovery request prior to the dismissal of her client's criminal case. Section 552.0055 of the Government Code provides that "[a] subpoena duces tecum or a request for discovery that is issued in compliance with a statute or a rule of civil or criminal procedure is not considered to be a request for information under this chapter." Gov't Code § 552.0055. Therefore, the requestor's discovery request is not a request for public information for purposes of the Act and is not relevant to our analysis of whether the tape is excepted from disclosure under the Act.

The requestor also asserts she viewed the tape during the discovery phase of the criminal prosecution of her client and is therefore entitled to a copy of the tape. We note the Act does not permit the selective disclosure of information to the public. *See* Gov't Code §§ 552.007, .021; Open Records Decision No. 463 at 1-2 (1987). If a governmental body voluntarily releases information to a member of the public, such information may not later be withheld unless its disclosure is expressly prohibited by law. *See* Gov't Code § 552.007. However, the 81st Legislature recently enacted article 38.02 of the Code of Criminal Procedure, which provides:

A release of information by an attorney representing the state to defense counsel for a purpose relating to the pending or reasonably anticipated prosecution of a criminal case is not considered a voluntary release of information to the public for purposes of Section 552.007, Government Code, and does not waive the right to assert in the future that the information is excepted from required disclosure under Chapter 552, Government Code.

Act of May 30, 2009, 81st Leg., R.S., ch. 630, § 1, 2009 Tex. Sess. Law Serv. 1410, 1410-11 (Vernon) (to be codified at Crim. Proc. Code art. 38.02). The enactment of article 38.02 codifies this office's long-standing interpretation that the disclosure of potentially exculpatory evidence to the defense as required by *Brady v. Maryland*, 373 U.S. 83 (1963), does not waive the prosecuting governmental body's right to claim exceptions to disclosure under the Act. *See* Open Records Decision No. 454 (1986). Thus, the requestor's viewing of the tape in the context of the criminal prosecution of her client is considered an involuntary release that does not constitute selective disclosure for purposes of section 552.007 or waiver of the county attorney's right to assert the tape is excepted from disclosure under the Act. Accordingly, we will consider the county attorney's arguments against disclosure of the tape under the Act.

Next, we note that 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, a copy of the written request for information. Gov't Code § 552.301(e). The county attorney states it received the present request for information on June 3, 2009. The county attorney did not submit a copy of the written request for information until July 27, 2009. Consequently, the county attorney failed to comply with section 552.301(e) of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption the requested information is public and must be released, unless a compelling reason exists to withhold the information from disclosure. *See City of Dallas v. Abbott*, 279 S.W.3d 806, 811 (Tex. App.—2007, pet. granted); *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ). A compelling reason exists when third-party interests are at stake or when information is confidential under other law. *See* Open Records Decision No. 150

(1977). Section 552.108 of the Government Code, which you claim, is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See* Gov't Code § 552.007; 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 section 552.108 subject to waiver). Accordingly, the county attorney may not withhold the submitted recording under section 552.108. Because your claims under sections 552.101 and 552.130 of the Government Code can provide compelling reasons to withhold information, we will address these exceptions.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses the doctrine of common-law privacy, which protects information if (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both elements of the test must be established. *Id.* at 681-82. A compilation of an individual's criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *Cf. United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (when considering prong regarding individual's privacy interest, court recognized distinction between public records found in courthouse files and local police stations and compiled summary of information and noted that individual has significant privacy interest in compilation of one's criminal history). Although a compilation of a private citizen's criminal history is generally not of legitimate concern to the public, in this instance there is a legitimate public interest in the prior arrest for driving while intoxicated in the context of a second arrest for the same offense. Thus, the submitted recording may not be withheld from disclosure under section 552.101 of the Government Code on the basis of common-law privacy.

You also raise section 552.130 of the Government Code, which 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 [or] a motor vehicle title or registration issued by an agency of this state[.]" Gov't Code § 552.130. Upon review, we find the submitted recording contains Texas motor vehicle record information belonging to someone other than the requestor's client that is confidential under section 552.130. Therefore, the county attorney must withhold this information from disclosure under section 552.130. The remaining portions of the recording must be released to the requestor. However, to the extent the county attorney lacks the technological capability to redact the Texas motor vehicle record information from the recording, the county attorney must withhold the recording in its entirety pursuant to section 552.130 of the Government Code.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



James Coggeshall  
Assistant Attorney General  
Open Records Division

JLC/sdk

Ref: ID# 353229

Enc. Submitted documents

c: Requestor  
(w/o enclosures)