



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 24, 2010

Mr. Josh McCown
District Attorney
Wharton County District Attorney's Office
329th Judicial District
100 South Fulton, Suite 100
Wharton, Texas 77488

OR2010-02771

Dear Mr. McCown:

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# 371069.

The 329th Judicial District Attorney's Office (the "district attorney") received three requests for three arrest warrant affidavits.¹ We understand you to claim that the requested 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 must address the district attorney'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. Under 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) 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

¹As the district attorney has not submitted copies of the requests, we take our description of the requests from the district attorney's brief.

indicate which exceptions apply to which parts of the documents. Gov't Code § 552.301(e). In this instance, the district attorney did not submit a copy of the original requests it received from the requestors. Consequently, we find the district attorney failed to comply with the procedural requirements of 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 id.* § 552.302; *City of Dallas v. Abbott*, 279 S.W.3d 806, 811 (Tex. App.—Amarillo 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); *see also* Open Records Decision No. 630 (1994). A compelling reason exists when third-party interests are at stake or when information is confidential under other law. *See* ORD 630 at 3. Section 552.108 of the Government Code 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. 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions), 177 (1977) (statutory predecessor to section 552.108 subject to waiver). In failing to comply with section 552.301, the district attorney has waived its claim under section 552.108. Therefore, the district attorney may not withhold any portion of the submitted information under section 552.108 of the Government Code.

However, we note that the submitted information contains information subject to section 552.136(b) of the Government Code.² Section 552.136(b) states that “[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.”³ Gov't Code. § 552.136(b); *see id.* § 552.136(a) (defining “access device”). However, the purpose of section 552.136 is to protect the privacy interests of individuals. The right of privacy lapses at death; thus information that pertains solely to a deceased individual may not be withheld under section 552.136. *See Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 491 (Tex. App.—Texarkana 1979, writ *ref'd n.r.e.*); Open Records Decision No. 272 at 1 (1981). Thus, to the extent a living person has an ownership interest in the credit card number in the submitted information, the district attorney must withhold the credit card number we have marked. Conversely, if no living

²The Office of the Attorney General will raise a mandatory exception, such as section 552.136, on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

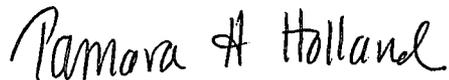
³We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including credit card numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

person owns an interest in this credit card number, the district attorney must release the marked credit card number. The remaining information must be released to the requestors.

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, 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,



Tamara H. Holland
Assistant Attorney General
Open Records Division

THH/jb

Ref: ID# 371069

Enc. Submitted documents

c: Requestor
(w/o enclosures)