



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 5, 2010

Ms. Sheri Bryce Dye
Assistant District Attorney
County of Bexar
300 Dolorosa, 4th Floor
San Antonio, TX 78205

OR2010-16809

Dear Ms. Dye:

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# 399290.

Bexar County (the "county") received a request for records from January of 2007 through August of 2010 pertaining to state district judges' use of the county parking lot, including the automated log recording entry and exit times.¹ You claim that the requested information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.²

Initially, we note the county does not consider the state district judges' names on the submitted entry and exit log to be responsive to the request. We note, however, the request is for records pertaining to state district judges' use of the county parking lot. Based on our review, we find the judges' names pertain to the judges' use of the county parking lot. Accordingly, this information is responsive to the request.

¹We note that the county sought and received clarification of the information requested. *See* Gov't Code § 552.222 (if request for information is unclear, governmental body may ask requestor to clarify request); *see also* Open Records Decision No. 31 (1974) (when presented with broad requests for information rather than for specific records, governmental body may advise requestor of types of information available so that request may be properly narrowed).

²We assume that the "representative sample" of information submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Next, we must address the county's obligations under the Act. Section 552.301 of the Government Code describes the procedural obligations placed on a governmental body that receives a written request for information it wishes to withhold. Pursuant to section 552.301(e), the governmental body is required to submit to this office within fifteen business days of receiving the request (1) general 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 indicate which exceptions apply to which parts of the documents. *See* Gov't Code § 552.301(e). We note the county did not submit a portion of the requested information until after the fifteen-business-day deadline. Thus, we find the county failed to comply with the requirements of section 552.301 in regards to this information.

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 id.* § 552.302; *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, 381-82 (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); *see also* Open Records Decision No. 630 (1994). Generally, a compelling reason to withhold information 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). Because section 552.101 of the Government Code can provide a compelling reason to withhold information, we will consider your argument under this exception for both the timely and untimely submitted information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses the common-law right to privacy. Information is protected from disclosure by the common-law right to privacy when (1) it is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *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 prongs of this test must be satisfied. *Id.* at 681-82.

You argue the submitted information is confidential pursuant to common-law privacy and "special circumstances." However, the Third Court of Appeals has ruled that the "special circumstances" exception found in past Attorney General Open Records Decisions directly conflicts with Texas Supreme Court precedent regarding common-law privacy. *Tex. Dep't of Pub. Safety v. Cox Tex. Newspapers, L.P. and Hearst Newspapers, L.L.C.*, 287 S.W.3d 390 (Tex. App.—Austin 2009, pet. granted). The court of appeals ruled that the two-part test set out in *Industrial Foundation* is the "sole criteria" for determining whether information can

be withheld under common-law privacy. *Id.*; see also *Indus. Found.*, 540 S.W.2d at 686. Upon review, we find that no portion of the submitted information is highly intimate or embarrassing. As you have failed to meet the first prong of the *Industrial Foundation* test for privacy, we find that the information at issue is not confidential under common-law privacy and the county may not withhold it under section 552.101 of the Government Code.

We note, however, the Eighty-first Legislature enacted section 552.151 of the Government Code, which relates to a public employee or officer's safety.³ This section provides:

Information in the custody of a governmental body that relates to an employee or officer of the governmental body is excepted from the requirements of Section 552.021 if, under the specific circumstances pertaining to the employee or officer, disclosure of the information would subject the employee or officer to a substantial threat of physical harm.

Gov't Code § 552.151. You assert that "by releasing the information about the place and time someone parks his vehicle, the county would inform and confirm, to the public at large, critical information about where someone parks his car and provide patterns of behavior, leaving people vulnerable to physical attack." You have submitted an affidavit from the Deputy Chief of the Bexar County Sheriff's Office. The Deputy Chief attests that certain individuals have made specific threats against district court judges who park in the garage in question. Additionally, he asserts that "[r]eleasing the requested information about the entry and exit times of the judges as it relates to the parking garage would reveal the arrival and departure time of those specified individuals" and would pose a serious risk "by enabling a person to plan an attack on a judge based upon knowledge of their behavior patterns and the location of the garage facility which is open to the public[.]" The Deputy Chief further opines that the "release of the requested information will pose an imminent threat of physical danger and bodily harm to the individuals whose information and records are being requested." The Deputy Chief has also submitted documentation of specific threats against certain judges. Based on the representations of the Deputy Chief and our review of the submitted information, we conclude the county has demonstrated that release of the submitted information would subject the state district judges to a substantial threat of physical harm. Therefore, we conclude the county must withhold the submitted information under section 552.151 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.

³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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,

Handwritten signature of Tamara H. Holland in cursive script.

Tamara H. Holland
Assistant Attorney General
Open Records Division

THH/em

Ref: ID# 399290

Enc. Submitted documents

c: Requestor
(w/o enclosures)