ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 23, 2011

Mr. Samuel B. Katz
Chief Appellate Prosecutor
Comal County Criminal District Attorney's Office
150 North Seguin, Suite 307
New Braunfels, Texas 78130

OR2011-08967

Dear Mr. Katz:

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# 422129 (File No. 11-OR-031).

The Comal County Sheriff's Office (the "sheriff") received a request for the incident report pertaining to the specified arrest of a named individual. You claim the submitted information is excepted from disclosure under sections 552.103, 552.108, 552.130, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.[1]

Initially, we must address the sheriff's obligations under the Act. Pursuant to section 552.301(e) of the Government Code, 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

[1]We assume the "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). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

which exceptions apply to which parts of the documents. *See* Gov't Code § 552.301(e). You inform us the sheriff received the request on April 25, 2011. Thus, the fifteen-business-day deadline under section 552.301(e) was May 16, 2011. Although you submitted a representative sample of the requested information that was accompanied by written comments dated May 13, 2011, the envelope in which they were submitted bears a postmark date of May 17, 2011. *See id.* § 552.308 (prescribing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Consequently, we find the sheriff has failed to comply with the requirements of section 552.301(e)(4).

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 the information is public and must be released. Information presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *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 (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. Open Records Decision No. 150 (1977). Although you raise sections 552.103 and 552.108 of the Government Code as exceptions to disclosure of the requested information, these exceptions are discretionary in nature. They serve only to protect a governmental body's interests and may be waived; as such, they generally do not constitute compelling reasons to withhold information for purposes of section 552.302. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decisions Nos. 665 at n.5 (2000) (discretionary exceptions in general), 177 (1977) (statutory predecessor to section 552.108 subject to waiver). *But see* Open Records Decision No. 586 at 2-3 (1991) (claim of another governmental body under statutory predecessor to section 552.108 can provide compelling reason for non-disclosure in appropriate circumstances). By failing to comply with the requirements of section 552.301, you have waived sections 552.103 and 552.108.[2] However, because sections 552.101 and 552.130 of

[2]We note you raise sections 552.103 and 552.108 both on behalf of the sheriff and on behalf of your own office, the Comal County Criminal District Attorney's Office (the "district attorney"), in its capacity as prosecutor. As agent for both the sheriff and the district attorney, your office is required to comply with the requirements of section 552.301 on behalf of both entities it represents. Accordingly, the district attorney's failure to comply with section 552.301(e) cannot be excused by the fact that the district attorney is the agent of two entities. We therefore conclude the district attorney's litigation and law enforcement interests in the submitted information are not compelling reasons to withhold it under these discretionary exceptions in this instance.

the Government Code can provide compelling reasons to withhold information, we will consider these exceptions.[3]

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 information made confidential by other statutes, such as section 261.201(a) of the Family Code, which provides, in relevant part:

> (a) [T]he following information is confidential, is not subject to public release under [the Act], and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:
>
> > (1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and
> >
> > (2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a). We note the submitted information was used or developed in an investigation of alleged child abuse. *See id.* § 261.001(1)(E) (definition of child abuse includes sexual assault or aggravated sexual assault under Penal Code sections 22.011 and 22.021); *see also* Penal Code § 22.011(c)(1) (defining "child" for purposes of Penal Code sections 22.011 and 22.021 as a person younger than 17 years of age). Upon review, we find the submitted information falls within the scope of section 261.201 of the Family Code. You have not indicated the sheriff has adopted a rule that governs the release of this type of information; therefore, we assume no such regulation exists. Given that assumption, we conclude the sheriff must withhold the requested information in its entirety under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. *See* Open Records Decision No. 440 at 2 (1986) (addressing predecessor statute). As our ruling is dispositive, we need not address the remaining arguments against disclosure.

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.

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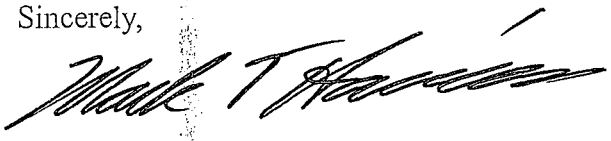
[3]The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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,



Mack T. Harrison
Assistant Attorney General
Open Records Division

MTH/em

Ref: ID# 422129

Enc. Submitted documents

c: Requestor
(w/o enclosures)